Council File
10-0173

MARCH 8, 2010

TO: PLANNING & LAND USE Committee (PLUM)
LOS ANGELES CITY COUNCIL

Date: 3-8-10
Submitted in PLUM Committee
Council File No: 10-0173
Item No: 9
By: P. Lattimore

FROM: GRASSROOTS COALITION / ETINA
Patricia McPherson
patriciamcpherson@att.net

RE: PLAYA VISTA PHASE 2, THE VILLAGE
CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Phase 2 of Playa Vista, should not be approved.

REQUEST- Grassroots Coalition and ETINA request that the City of LA enforce its Public Methane Task Force as approved in 2004. This Task Force has not been enforced by the City Council despite citizen requests for its enforcement. Enforcement of this Public Methane Task Force would provide a potential for full disclosure of the viability of methane mitigation systems and provide a start for the enforcement of implementation and monitoring of methane safety systems in Los Angeles, including Playa Vista. Grassroots Coalition and ETINA made the initial request for this Task Force in 2004 and request to be made part of such an independent Task Force for oversight of the methane mitigation systems.

THE SENSITIVE WETLAND SETTING HAS NOT BEEN ADEQUATELY ADDRESSED UNDER CEQA

The possibility of harm to the natural environment and the scope of such possible harm are issues in the Phase 2 EIR that have either not been addressed or have been inadequately addressed under CEQA. It is a basic tenet of CEQA that the location of a project matters, since something that would cause significant environmental damage in one area might cause only negligible damage in a different area. (Guidelines, 15064, subd. (b).) Here we have a development project, unlike most urban development in Los Angeles because the Playa Vista project's setting is the sensitive and endangered wetland habitat of Ballona Wetlands. California has lost over 95% of its wetlands already. The Playa Vista development has already destroyed wetland acreage to pursue this massive development project that, in part, was agreed to by the City contingent upon a restoration of wetland acreage – the riparian corridor and a freshwater marsh along the southern length of the Playa Vista project.

- The Phase 2 EIR does not address:
- The stress upon the sensitive wetland ecosystem is not addressed in the Phase 2 EIR.
- The Phase 2 EIR does not provide an accurate description of the existing physical environment conditions in the vicinity of the project, so that the project's environmental effects can be measured against this baseline. (Guidelines 15124, 15125, subd. (a))
- Deficiencies in the EIR include failure to address expert information regarding the gases migrating into Playa Vista –Phase 1 and 2. EG. The Phase 2 EIR does not provide a meaningful response to the California Public Utilities Commission Safety Branch Report (Nov. 2004) that warns the gases migrating upwards into

Playa Vista have a greater than 50% chance of being SOCALGAS's migrating gases. (See attached document at CPUC Safety Branch Study)

- Furthermore, the Phase 2 EIR fails to address the air quality, greenhouse gases and global warming impacts of the project. In particular, the EIR fails to provide a cumulative assessment of the BTEX, H2S and methane gases migrating up through the vent stacks of Playa Vista.
- The Phase 2 EIR fails to address feasible gas mitigation measures- charcoal gas scrubbers- that would reduce, if not eliminate greenhouse gases emanating from their venting devices. Scrubbers are used in numerous situations of gas venting for instance, the Hoag Hospital in Newport Beach. A small section of the hospital is built over a gassy area and utilizes vent systems. The emerging gases are sent through a system of charcoal scrubbers to remove any toxic gases.
- The Phase 2 EIR fails to address feasible gas mitigation measures such as flaring – in order to remove methane from emanating from their vent stacks. Methane is a major greenhouse gas of concern.
- The Phase 2 EIR fails to address the Playa Vista marsh oversight. In particular, the EIR fails to reveal, let alone discuss, the new situation of millions of cubic feet (Endres PhD 2007) of oilfield gases- including BTEX and H2S (CDM marsh gas study revealing oilfield gases) that are broiling upwards through approximately 8 feet of water in the freshwater marsh.

This new leakage area (post 2001) is within the immediate vicinity of the Playa Capital LLC abandoned well- University City Syndicate. No attempt has been made by Playa Capital LLC to investigate the source of the gas leakage along the well bore. University City Syndicate is an oil well, long known for its problematical blow outs and leakage issues. Since the well was reabandoned by Playa Capital and paid for via Mello Roos funds, there has been no investigation of the new leakage. There has been no baseline analysis or cumulative analysis of the greenhouse gases Playa Vista emits that includes the venting and the new leakage area(s) in the freshwater marsh.

We live within the most polluted air basin in the State- the South Coast Air Basin. The Basin is home to over 16 million people, nearly half of California's population and it is the second most populated urban area in the United States. (http://www.aqmd.gov/aqmd/index.html)

Failure to address Playa Vista's large- scale impacts of greenhouse gases violates CEQA.

- DEWATERING- The Phase 1 and 2 EIR do not adequately describe the baseline environmental conditions for the watersheds impacted by the project. There has been no reasonably conscientious attempt to collect the watershed/aquifer and underground stream flow data or to make further inquiry under CEQA of environmental or regulatory agencies having expertise in the matter. (Berkeley Keep Jets Over the Bay v Board of Commissioners (2001) 91 Cal. App. 4th 1344. 1370) An analysis of underground stream/ aquifer flow and volume/ quality is critical to understanding the environmental impacts of a project that proposes to extract and discharge into the sewer system waters of the State within a sensitive wetland area.

THE PHASE 2 EIR DOES NOT PROVIDE AN ACCURATE CUMULATIVE ASSESSMENT

The Phase 2 EIR relies heavily upon the incomplete and inaccurate Phase 1 1993/5 EIR, that is devoid of any of the newly discovered (1999) site conditions and is devoid of any analysis under CEQA pertaining to the new and experimental 2001 City Council approved mitigation measures for the oilfield/ thermogenic gas hazards. In short the Phase 2 EIR wrongfully compares itself to an inaccurate project description of Phase 1 that is contained in an outdated and inaccurate 1993/5 EIR. In addition, an inaccurate project description necessarily results in inaccurate environmental analyses. Here, the Phase 2 EIR is plainly inadequate under CEQA when it fails to consider the cumulative impacts of groundwater dewatering effects upon the sensitive wetland environment. While the Phase 2 EIR does contain some of the Phase 1 City Council approved CLA Reports of 2001 and 2007, these reports were not performed under a CEQA process thus rendering any use of the reports as – either – out of context, or as piecemealed, NON-substantial evidence. Both the 2001 and the 2007 CLA Reports' legal legitimacy are part of the ongoing litigation for Phase 1, in ETINA v City of LA, Playa Capital LLC. This is especially important within the CEQA context of cumulativity. There is a current failure to address cumulative dewatering effects upon the environment in Phase 1, thus any cumulative dewatering analysis performed in the Phase 2 EIR that relies upon Phase 1 information is consequently impossible. Thus the cumulative assessments for dewatering provided in the Phase 2 EIR are flawed and inaccurate.

THE OPENING BRIEF HAS BEEN FILED IN THE PHASE 1 LEGAL CHALLENGE. THE ACCURACY OF THE PHASE 2 EIR IS DEPENDENT UPON FULL SITE ANALYSIS OF BOTH PHASE 1 AND 2.

The approval of the Phase 2 EIR poses important issues regarding CEQA compliance, with implications for air quality, groundwater/wastewater and environmental / public health and safety matters relevant to the entire Playa Vista development site- Phase 1 & 2. The issues cited above have not been adequately evaluated or addressed under CEQA and the City has failed to comply and implement CEQA mitigation measures that are part of the Phase 1 EIR/ Addendum-MND 1993/5 and has failed to provide accountability for Phase 1 as we shall explain-

1. The City and Playa Capital LLC are currently engaged in CEQA litigation for Phase 1 of Playa Vista at the Appellate Court. See ETINA et al v City of LA, Playa Capital LLC

a.. Issues that are part of this litigation include but are not limited to:

- The City of LA has failed to comply with the 1995 Appeal Court Ruling
- The City of LA has abused its discretion and has failed to implement and comply with CEQA. The City lacked substantial evidence for its implied finding that no further environmental documentation was necessary in response to the 1995 Appeal Court ruling.
- The City of LA has failed to implement approved mitigation measures from the 1993/5 EIR.
- The City of LA has abused its discretion by failing to gather or present data necessary for determining whether dewatering activities are cumulatively significant and has excluded evidence from the record demonstrating a specific intent to suppress evidence.

- The City of LA's 2007 CLA Report process does not comply with the procedures set forth in CEQA guidelines.
- Phase 1 gas mitigation and monitoring measures were ONLY approved via the 2001 CLA Report & Directives - City Council approval. Numerous safety systems were still in a "progressive design" stage. But for one such system, the experimental 50' vent wells safe performance for venting and monitoring the aquifer gases, the site was considered too dangerous to develop.
  The 2001 gas mitigation approval provided NO specific criteria or standards of performance and consequently there is no mitigation and monitoring program enforced by the Planning Dept. as approved by City Council in 2001 for the gas safety systems of Phase 1.
  Under CEQA, a lead agency cannot defer development of the specifics of a mitigation measure to the future. (San Joaquin Raptor Rescue Center v. County of Merced (2007) 149 Cal. App. 4th 645, 670)

  "A mitigation plan is acceptable mitigation where the EIR includes a performance objective for the plan and the plan is sufficiently formulated that the lead agency and the public can have a level of assurance that the objective of the plan- real mitigation- will be achieved. (See, e.g., Sacramento Old City Assn. V. City Council (1991) 229 Cal. App 3d 1011, 1020-22." Pg. 8 Attorney General Opinion 6/16/08 Re: Solano County General Plan Draft EIR)

  The City violates the mitigation and monitoring tenets of CEQA at Playa Vista, the gas mitigation measures are not included in any Phase 1 EIR and no adherence to CEQA implementation and enforcement has occurred. (2007 City Controller Audit- Phase 1 Playa Vista)

  The City has not fulfilled its obligations under CEQA at Phase 1 and therefore cannot be relied upon to fulfill obligations of CEQA at Phase 2.

See Opening Brief- ETINA et al v City of Los Angeles, Playa Capital LLC

The following letter relies upon documentation as cited. The cited documentation has either 1) already been provided to the Los Angeles City Council and documented by City Council receipt stamps at hearings or; 2) is already in the possession of the City eg. the LA City Controller's Playa Vista audit of 2007. Upon request Grassroots Coalition may re-provide requested materials to city persons.

The following is provided as an example of how the City has failed to implement or abide by CEQA on Phase 1. Without accountability there is no means to ensure anything from the City of Los Angeles on Phase 2.

WE BELIEVE THAT-
The Los Angeles City Council disregarded a 2005 Court of Appeal opinion directing it to conduct a review of the Playa Vista Project Phase 1 pursuant to the California Environmental Quality Act. Both the City and Real Parties in Interest have disregarded the mandate of the Court of Appeal and CEQA and, may also be violating the California Water Code through unaccounted for extractions and discharges of Waters of the State that are part of the non-adjudicated Santa Monica Basin, Venice Sub-basin. Due to the exceptional circumstances that are explained in this letter, ETINA and Grassroots Coalition et al., request legal and investigative assistance from the Attorney General's Office. The City must be compelled to be in compliance with the law in order to avoid what we believe will be an inevitable and regrettable but still preventable post-mortem inquiry into who is to blame for approving the Playa Vista project in Los Angeles, California.

PRESS RELEASES RE:

2007-LOS ANGELES CITY CONTROLLER'S AUDIT
SUBJECT: CITY'S OVERSIGHT OF PLAYA VISTA PHASE 1 DEVELOPMENT

KNBC-TV Report on the LA City Controller's (Laura Chick) Audit of the City's oversight of methane mitigation measures of Playa Vista. The project sits atop explosive, toxic oilfield gases and is required by City Council directives to have multiple and experimental safety systems in place to monitor and manage the surfacing gases.

In the KNBC –TV news broadcasts BURNING QUESTION & POWER POLITICS; the Controller-Laura Chick cites that she cannot vouch for the safety of the Playa Vista site and that it had been hard to get sound, solid facts. She described the inspection records found as "mush".
(See full transcripts and interviews online KNBC and in DVDs provided with this request. This Peabody award winning series of news broadcasts spans several years of time and explores the investigative research of Grassroots Coalition.)

"Introduction: You'll hear a top City official accuse a major player in the development industry of trying to shut her up." KNBC-TV4 ONLINE-POWER POLITICS
Controller Chick describes the intimidation and bullying tactics used by Steve Soboroff-president of the massive Playa Vista project- as done to shut down her recent investigation of Playa Vista.
"The intimidation didn't work," says Chick in the broadcast. The Report accused City departments of poor record keeping, inconsistencies, lack of coordination and follow through and numerous other significant problems.

"Laura Chick: It causes the highest suspicion in my mind that somebody wants to cover things up." (KNBC-TV online transcript)

An auditor described interview with, "the only trained inspector on methane mitigation systems for the LAFD" cites that the LAFD Inspector warned that many detection

systems are so badly designed that they, "would impose a safety hazard for the LAFD" in an emergency. (LAFD-Los Angeles Fire Department)

The 2007 Audit, was conducted during the timeframe of the City's response to the Appellate Court Ruling in ETINA v City of LA however, the City gave itself the Return of the Writ on 2/27/07, shortly before the Audit was released for public review and thus the Audit itself is outside of the CEQA record for the ongoing Appeal. (See Audit section)

Numerous Public Record Act requests made by Grassroots Coalition (GC) regarding dewatering and discharge were made to the LA Department of Sanitation, prior to the City's decision on 2/27/07 however; the City failed to timely respond and only provided its first responses two months after 2/27/07. Thus these suppressed records are also outside of the Appeal Record but are provided, in part herein and upon request.

REQUEST FOR AMICUS CURIAE AND INVESTIGATION

TABLE OF CONTENTS

Gas Mitigation Monitor (2001 LA City Council Discretionary Approval)

B. History

1. Bonds- Environmental Clearance Disclosure Statements Rely Upon New & Experimental Gas Mitigation Implementation & Monitoring & Reporting Requirements - That Have Not Been Fulfilled Onsite.

2. Mitigation & Monitoring Modifications & Deletions Made Without Adherence To CEQA Procedure

   a. Gas Mitigation & Monitoring Systems Were Deleted and/or Modified After City Council Approval In Chief Legislative Analyst's (CLA) Report 2001

   b. Recent Case Law Re: Modification/Deletion Of Approved Mitigation Measures Requires CEQA Review
      - Napa Citizens for Honest Government v Napa County Board of Supervisors (2001)

      - Lincoln Place Tenants Association v City of LA (2005)

   c. 2004- Citywide Methane Code & Inclusion Of Playa Vista Methane Prevention Detection & Monitoring Program (PVMPDMP 2001) And;
      2004 City Council Approved Public Methane Task Force & Failure To Implement (LA City File 01-0135)

III. FAILURE TO DISCLOSE & SUPPRESSION OF EVIDENCE

A. Pilot Safety System Failure (Experimental 50' Aquifer Gas Vent Wells (City's Consultant- Exploration Technologies Inc. (ETI) Report- Still Workin' On It)

B. LADBS & City Attorney Suppress Evidence of Gas Safety System Failure (Declaration Of Attorney From State Lands Commission Re: Still Workin'..)

C. Vent Wells Must Be Kept Free Of Water- Dewatering Is An Intrinsic Function For Effective Gas Intake Pipes

- Comparison To Division of Oil & Gas' Dewatering Pump Requirement For Deep Vent Well Located in Fairfax After A Near Repeat Explosion (LA City Fairfax Task Force Report 1989)

- Declaration From Gas Migration Expert-Bernard Endres PhD Re: Fairfax 1985-9 and 50' Aquifer Vent Well Dewatering Necessity

IV. LADBS' METHANE CODE EXPERT

A. Insider's Declaration Re: LADBS' Failure To Comply With Codes & Concerns Regarding Dangerous Ineffectiveness Of The Playa Vista Safety Systems

V. 2007 LA CITY SAFETY AUDIT OF PLAYA VISTA

A. 2007 City Controller Audit Titled Subject: City's Oversight of Playa Vista Phase1 Development

B. Public Disclosures By The Los Angeles City Controller

C. City Deletes Approved Mitigation Measures

-City Deletes Capri Court Homes Gas Detection Devices

D. Examination and Review Of The 2007 Playa Vista Audit By KNBC and Grassroots Coalition

VI. CONCLUSION

Accronyms

BTEX- Benzene, Toluene, Ethylbenzene, Xylene
H2S- Hydrogen Sulfide
CEQA- California Environmental Quality Act
CDLAC- California Debt Limit Allocation Committee
CPUC- California Public Utilities Commission
ETI- Exploration Technologies Inc.
ETINA- Environmentalism Through Inspiration and Nonviolent Action
GC- Grassroots Coalition
KNBC- Los Angeles branch of the television network NBC
LADBS or DBS- Los Angeles Department of Building & Safety
LAFD- Los Angeles Fire Department
LARWQCB- Los Angeles Regional Water Quality Control Board
NPDES- National Pollutant Discharge Elimination Systems
OPR- Office Planning & Research
PV- Playa Vista

PC- Playa Capital LLC (LLC- Limited Liability Corporation)
SOCALGAS- Southern California Gas Company

REQUEST
IN THE PUBLIC'S INTEREST FOR ASSISTANCE OF THE STATE OF CALIFORNIA'S ATTORNEY GENERAL
Requesting- Amicus Curiae RE: Adherence to CEQA Standards of Review in the Playa Vista Project's Environmental Impact Report process and; an Evaluation of the deficiencies in the City's environmental review process pertaining to the Playa Vista Project as per the Attorney General's broad common law powers related to the protection of the public interest: including but not limited to Government Codes 12600-12612-Environmental Action & the enforcement of CEQA including AB 3180 and; take appropriate action.

PART I.
ALLEGATIONS- The Failure of the City of Los Angeles and Playa Capital LLC to act in a lawful manner and abide by CEQA.

A. Please evaluate the attached 2010 Opening Brief of Petitioner's- ETINA et al. v City of Los Angeles, Playa Capital LLC & Opening Brief of John Davis v City of Los Angeles, Playa Capital LLC. (2010 Petitioner's Appeal B213967; 2005 Appeal Ruling; 2004 Petitioner's Appeal B174856 (ETINA 1); 2006 LASC BS073182)

We allege that the Playa Vista Phase 1 project developers (Playa Capital LLC) have been circumventing the California Environmental Quality Act (CEQA) and are out of compliance with Los Angeles' Building & Safety Department and Department of Sanitation Codes & Procedures and that the City of Los Angeles has been complicit in that evasion of CEQA and noncompliance with its own Codes & Procedures.
In addition, bonds that have been approved for the site, including California Debt Limit Allocation Committee (CDLAC bonds used for building Fountain Park Apartments) and MELLO ROOS bonds, utilized for Playa Vista, have disclosure statements regarding implementation and monitoring of gas safety systems for site safety- that do not exist. Additionally, MELLO ROOS bonds have been utilized by Playa Capital LLC at Playa Vista for the re-abandonment of an oil well known as University City Syndicate and that since the well's reabandonment, the immediate vicinity of the well has been producing millions of cubic feet of methane (carrying BTEX and H2S) upwards through Waters of the State daily without further inspection of the well, which has a long history of blow-outs and leakage, that is a potential source of the gas migration. These tremendous volumes of greenhouse gases continue to not be addressed in any CEQA process of review of Playa Vista.

B. The City of Los Angeles Fails To Comply With CEQA Guidelines 15162, 21166
We are seeking enforcement of a 2005 Appeal Court Ruling requiring a Subsequent or Supplemental EIR for the Playa Vista development project on Ballona Wetlands, in Los Angeles, under CEQA Guidelines 15162, 21166, and AB 3180 and; compliance with the policies of CEQA including but not limited to:

- **Providing** a CEQA review to a legally deficient 1993/5 EIR for the Playa Vista development project. Revisions and recertification are required to make whole, the 1993/5 Playa Vista EIR. Revisions and recertification would include the discretionary approvals made by the LA City Council in 2001 pertaining to the changed circumstances and new information that was not known and could not have been known at the time of the 1993/5 EIR. The new information includes new oilfield gas mitigation and monitoring/ reporting programs approved by the City Council in 2001 and; enforcement of a 2005 Appeal Court Ruling requiring a CEQA analysis of methane mitigation measures in conjunction with dewatering needs of Playa Vista. (See 2010 ETINA v City of LA Appeal Brief) Thus far, the Playa Vista project has **only** a 1993 EIR/ '95 MND/Addendum containing information that was provided prior to approval in 1993/5 and does NOT contain any of the new methane mitigation (degassing and dewatering) and monitoring requirements that constituted a discretionary approval by the Los Angeles City Council in 2001 adopting the Playa Vista Methane Prevention Detection and Monitoring Program & Directives (PVMPDMP). In 2004, the PVMPDMP was also added as the Playa Vista section of LA's Citywide Methane Code.
  Thus, the 1993/5 EIR violates the most basic CEQA tenet; it fails to accurately describe the actual Playa Vista project that was proposed and that has been agreed to by contract.

- **Enforcement** of approved mitigation measures
- **Enforcement** of all feasible mitigation measures that would reduce potentially negative environmental impacts to a less than significant level
- **Adherence** to the CEQA process for the deletion and/or modification of approved mitigation measures that has occurred at Playa Vista (Lincoln Place v City of Los Angeles- requiring the performance of a Supplemental EIR for deletion of approved mitigation measures)
- **Implementation** and enforcement of approved mitigation monitoring and reporting programs. Numerous approved mitigation & monitoring measures have not been implemented and/or monitored as required.
- **Enforcement** of a City of Los Angeles Ordinance 175790

Playa Vista Methane Prevention Detection and Monitoring Program (PVMPDMP and LA City Building & Safety Codes (see 2007 Playa Vista Safety Audit section for detail

C. Failure To Protect Ballona Wetlands and Waters Of The State (Classified As Potential Drinking Water)

Citizens of the State of California have a special interest by virtue of ownership of a new State Park- the Ballona Wetlands (2003). Roughly one hundred and forty million dollars of public funds were used to acquire some of the remaining portions of Ballona, in order to help preserve the fewer than 5% of wetlands left in California. The Ballona Wetlands are also part of a global area that is an endangered world habitat hotspot - having species found nowhere else in the world- known as the California Floristic Province.

It is our contention that the 2005 Appeal Court ruling that required a California Environmental Quality Act (CEQA) analysis to study the potential environmental harm to Playa Vista's ground and surface waters in association with its methane mitigation

measures; has not been performed as required. A CEQA analysis is necessary due to newly discovered oilfield (thermogenic) gases surfacing at Playa Vista (1999) and the new (experimental) design of mitigation measures to:

1. safely degas and monitor gas levels in the aquifer and land under Playa Vista and,
2. dewater the high water table in order to keep critical gas intake pipes from failing due to clogging with water and silt etc. and,
3. to ensure the feasibility, implementation and monitoring of the gas safety system's performance.

The feasibility and adequate performance of Playa Vista's unique and experimental gas mitigation measures are crucial to the health and safety for both:

1. the public's habitation of the residential and commercial development
2. the environment of Playa Vista which lies within the watershed that is the Ballona Wetlands

Playa Vista overlies Waters of the State - three aquifers within the Venice Sub-basin of the Santa Monica Basin- a non-adjudicated basin whose waters are classified as potential drinking water sources. The waters are both fundamental to the health of Ballona Wetlands and also provide-as classified- a potential source of drinking water. **A cumulative analysis of extraction and discharge of these waters is critical** to ensuring that Article X, Section 2 of the California Constitution is enforced and which requires that:

..waters of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.

Beneficial uses include- preservation and enhancement of fish, wildlife and aquatic resources (13050 CEQA Guidelines).

Without proper CEQA analysis and enforcement of 1993/5 EIR mitigation measures such as having an approved plan for the beneficial use and/or discharge of Ballona's waters, we believe that an adverse environmental impact may occur upon Ballona Wetlands- including the groundwater and surface waters of Playa Vista. **Thus far, 1) there has been no adherence to the 1993/5 mitigation measure of having an approved plan for the beneficial use and/or discharge of groundwater and; 2) there has been no evaluation done to describe the baseline environmental conditions of this impacted watershed.**

Currently, the vast majority of the methane groundwater dewatering at Playa Vista is being arbitrarily sent into the sanitary sewer. This practice has been ongoing for years of ongoing development without permits from the Department of Sanitation that would necessarily include water quality testing; water volume accountability and scientific studies to validate that there is no feasible alternative to dumping these waters into the sanitary sewer.

(See Attachment X. Public Record Act request responses from the Department of Sanitation and NPDES –new information and data)

D. BACKGROUND - ETINA v City of LA

Grassroots Coalition (GC) fully believes that based upon the evidence that it has gathered over numerous years of investigation, evidence which is also corroborated by the 'working pages' of a 2007- Playa Vista Safety Audit performed by the Los Angeles City Controller, that the **Playa Vista development is a public and environmental disaster in the making**. In KNBC television interviews entitled "Burning Questions" and "Power Politics", the Controller is on record as announcing to the public that she cannot vouch for the safety of Playa Vista Phase 1 and that the records for the site are mush.

This request for assistance in review of the evidence is GC's outreach for honest and diligent scrutiny of the facts surrounding the Playa Vista development project and; provides a red flag warning from Petitioners to all served with this information.

The current Appeal, ETINA v City of Los Angeles, Playa Capital LLC (B213967 (2010)) serves the public's interest in its challenge to ensure that the health and safety of the public and the environment is protected in the fullest possible manner via the California Environmental Quality Act (CEQA) including but not limited to the enforcement of AB 3180 (Public Resource Code (PRC) 21081.6 which became effective in 1989 in order to ensure that mitigation measures identified in CEQA documents are implemented after a Project is approved. (PRC Section 21000 et ceq.)

Public Resources Code section 21081.6 provides, "the reporting or monitoring program shall be designed to ensure compliance during project implementation."

In the case at hand (B174856 (2004)) and its, ETINA v City of Los Angeles & Playa Capital LLC et al Appeal Court Decision (B174856 (2005)), the Appellate Court made determinations and rulings regarding mitigation measures and their attendant mitigation and monitoring and reporting programs. The mitigations and reporting programs hold critical importance for human and environmental health and safety and that but for the mitigation's successful, effective and perpetual performance, the Playa Vista Project (Project) was considered too dangerous to build.
(1/31/01 ETI & LADBS letters 30 SAR 7835, 30 SAR 7837)
Of special concern is the experimental nature and feasibility of the mitigation systems due to the unique geotechnical setting of this Project. And, especially because there is nowhere else in the United States that serves as a model to show that aquifers underlying homes can be safely degassed. At Playa Vista, there is no mitigation monitoring data for numerous systems as required and Playa Vista does not have the inspection data required to show proper implementation and follow through to prove the systems provide adequate safety performance. (2007 Audit-City's Oversight Of Playa Vista Phase 1 Development)

In part, it is the contention of the ongoing Appeal that the City of Los Angeles and Playa Capital LLC not only did not adhere to the direct orders of the Court of Appeal but also have not implemented certain mitigation measures and have not adhered to the required mitigation monitoring and reporting necessities that would ensure and provide disclosure of safety mitigation effectiveness that was acknowledged by the Appeal Court and originally approved by a Los Angeles City Council Discretionary Approval in 2001 of the Chief Legislative Analyst's Report (CLA) & Directives and in 2004, the City Council approval of a Phase One Playa Vista & Citywide Methane Code) thus violating CEQA as we shall explain.

E. HISTORY

1. The Project- 1999 Discovery Of Toxic & Explosive Oilfield Gas

Phase One of Playa Vista consists of 280 acres located on the Ballona Wetlands ecosystem, L.A.'s only remaining coastal wetland ecosystem, a 1, 087 acre area bounded by Culver City, the Pacific Ocean, Marina del Rey, and the Westchester Bluffs. The ecosystem is divided into four uneven quadrants by Lincoln Boulevard as the north-south axis and by the Ballona Creek Channel as the east-west axis, and designated as Areas A, B, C, and D.

Phase 1 of Playa Vista consists of 280 acres located east of Lincoln Blvd., in Area D that is divided into 3 sections. Phase 1 is located on both the western and eastern portions of Area D. Phase 2-Playa Vista is located in the middle.

" Playa Vista is the largest residential and commercial development ever proposed in the history of the City of Los Angeles. (16 AR 4271)" p.2, 2004-Petitioner Appeal Brief.

The original litigation concerning Phase One of the Project (EIR certification 1993-5) had its origin in Petitioner's alert to the City regarding the 1999 discovery of highly dangerous thermogenic/oilfield gases seeping to the surface in the Project area planned for highly dense residences, schools, and commercial development.
(See B. Discovery of Thermogenic Gas pgs. 4-7 2004 Petitioner's Appeal Brief, 2001CLA Report- Study" to resolve the policy issues relative to the safety of the site. " (2005 Appeal Ruling p. 18)

In court, respondents argued that the migrating oilfield gas was not a new issue in the 1993-5 EIR. However, outside of court, the City acknowledged the oilfield gas discovery and lack of adequate methane mitigation in 2004, via its new 2004 CITYWIDE METHANE CODE/ Playa Vista Phase One Methane Code- ORDINANCE NO. 175790:

"WHEREAS, in 1999, large pockets of methane gas in subsurface geological formations were discovered at the Playa Vista project area of West Los Angeles;

WHEREAS, in 2001 new methane mitigating systems were developed and used in the Playa Vista Project; ..."

2. Unique and Potentially Hazardous Site Conditions

The Playa Vista development site is unique, unlike any other sites with thermogenic gas seepage issues. (23 AR 6346; 9 JA 2444). According to one of Playa Capital's own consultants, who expressed grave concern that it (Playa Vista) will be plagued with environmental troubles, Fleet Rust stated;

"No matter which membrane barrier is used beneath the homes and businesses at Playa Vista," Rust says, "it's just a piece of land that was not meant to have a lot of buildings, especially residential. You have the seismic liquefaction problems, the high ground water problems, the extreme methane problems, and the earthquake fault, all coming together in a very complex way that we don't fully understand."
(3 AR 820; Appeal Brief Nov. 2004, p.1)

The highly pressurized oilfield gases are surfacing upwards of 20 pounds per square inch (psi) through a high water table; by way of comparison, the gases surfacing in the Fairfax

La Brea area are 4-7 psi and are without the influence of a constant high water table.
(Aug. 22, 2006 Petitioner Brief attachment-ETI –Still Workin On It p. 5 of 32; LA City, Fairfax Task Force Report p. 2)

Playa Vista is also the only densely planned development located adjacent to a high-pressure underground-oilfield gas storage formation- Southern California Gas Company/SEMPRA Energy operations. The City's consultant Exploration Technologies Inc. (ETI) stated:

"The safest approach would be to avoid building in this area; however, it is possible to build ***if it can be demonstrated*** *that the methane is properly mitigated."*
(28 AR 7478 Emphasis added.)

ETI recommended and the City has observed that no buildings are to be constructed over the gas storage operations located in Areas A and B (ETI Still Workin On It-p.28, Recommendation 4.). The owners of Playa Vista, Playa Capital LLC have since sold these parcels to the State of California as State Park areas.

According to the City's peer reviewer and consultant, Exploration Technologies Inc. (ETI-Victor Jones)-
Depending on where the thermogenic gas originates, "*They have enough pressure to literally throw 5 million cubic feet a day into the area if they're opened up.*"
(22 AR 5979)

ETI's testimony given at the June 7, 2000, Budget & Finance Committee hearing, *"We think that, since there's 75% to 89% gas in some of these shallow sands (underneath Playa Vista site), it's possible to get nearly 100% gas into the gravel pack. If you had a leak into an elevator shaft or a pump room or something in the basement of the building with a small volume and you actually had 100% methane underneath, I would be very concerned that an earthquake or even just stress in the earth could use (sic) buildings to shift, foundations to crack. Don't even need an earthquake to do that, and what would happen is you'd have a dangerous situation.* (22 AR 5975-2004 Appeal Brief-Petitioner)

2. a. A November 2004, California Public Utilities Commission, Safety Branch Report contradicts the City's 2001 CLA Report Findings Regarding SOCALGAS Leakage Into Playa Vista

A NEW California Public Utilities Commission, Safety Branch Study (Nov. '04) states-
*"The isotopic analysis report indicates the gas sample was collected from Playa Vista Area-D. .. The significance of this isotopic analysis report is the presence of Storage Reservoir gas or Native PDR gas signature and the location where the gas sample was collected (Area- D of Playa Vista Project). My opinion is that the probability of Storage Reservoir gas sample from PDR area containing Ethane and 22 PPM Helium is greater than 50percent (>50%). Furthermore, the location where the sample was collected should be of major concern."*p.6 Complaint Case Facts and Findings (Playa del Rey Storage Field) by Consumer Protection and Safety Division, November 2004.

This CPUC November 2004 Report contradicts the City's 2001 CLA Report wherein the City states,

"According to the report, the 'combined geochemical and geophysical information proves beyond a reasonable doubt that the methane gas seepage observed on the Playa

Vista site does not come from the Southern California Gas Storage Field. The Department of Building and Safety accepts this conclusion." (Jan. 31, 2001 letter contained within the 2001 CLA Report)

This newer finding not only contradicts the City's findings that there is no evidence of SOCALGAS reservoir leakage but also; the City's current failure to address this CPUC Safety Branch Report reveals a reckless disregard for the City's own findings that:
The PLAYA VISTA RISK ANALYSIS TASK FORCE found that:
"Building & Safety stated that the source of the contamination is important because, if it is the reservoir, the gas is under much more pressure, and the design of the mitigation measures must take that into account."

Because the City determined in 2001 that the gases surfacing at Playa Vista did not come from the SOCALGAS reservoir, the City's methane mitigation measures are not adjusted for that scenario.
The City remains silent regarding the CPUC Report despite numerous attempts of ETINA/GC to illicit response.

3. BONDS- California Debt Limit Allocation Committee (Housing Bonds) and Mello Roos
Predicated upon environmental clearance, bonds, both state and local were issued after the 2001 CLA Report -City Council approval. It is significant to note the lack of proven gas mitigation systems at the Project site. The bond disclosure statements recite the 2001 CLA Report/Directives and purport that the new and experimental mitigation systems will provide for the safety of site build-out. These statements have remained unchanged. However, even when the 2001 CLA Report (City's Report regarding the gas and geotechnical issues of Playa Vista) was approved, critical, experimental gas mitigation systems were still in a research and design stage.
(30 AR 7837; 4 AR 1075)

The California State Controller, expressed concerns about the 2001 CLA Report's integrity, ultimately voting against further CDLAC bond issuance, and provided response to the 2001 CLA Report stating that:

"...the majority of the consultants...were developer's consultants" and, "...all of the systems to mitigate the gas are currently in the research and development phase and have been untested." (23 AR 6310-6311 p.31, 2004 Appeal Brief-Petitioner)

RISK FACTORS-
"The City has also concluded that a system for monitoring and mitigating methane in a gravel acquifer located approximately 35 to 50 feet below the surface of a portion of the District can be devised and implemented."
(Appraisal information contained in City Resolution Authorizing Issuance of $135 million CDLAC BONDS p. 19 (PV/AR –004790))
According to the 2007 City Controller's Audit of the Playa Vista Safety System the inspection records for implementation are scanty and inconsistent and, records for performance monitoring are absent required data. Further, there is nothing in City records to account for the early warning system - the monitoring of gases in the aquifer.

See also the GC Public Record Act responses that reveal – no oversight or performance data.

The City's requirement for an approved (licensed) methane engineer of record to attribute Playa Vista's new "methane system" was fulfilled by the City utilizing J. Sepich of Methane Specialists. However while searching through archived Playa Vista records, GC discovered letters to the City from Mr. Sepich that reveal he specifically told the City to NOT attribute the 2001 methane systems to him. This is but one of many controversies surrounding the legal accountability of the City's oversight of the Playa Vista methane systems. (ETINA 1 Record)

4, 1993 EIR- Failure To Recertify As Required Under Guidelines 15162

The 1993 certified EIR for the Project had not addressed the later discovery of migrating oilfield gases or analyzed the 2001 proposed - new and experimental gas mitigation measures with their attendant dewatering needs. Neither the 2001 CLA Report nor the 2007 CLA Report analyzed the new information in comparison with the 1993 EIR as required under CEQA. The deficient EIR remains incomplete and no attempt has been made by the City to attach the information in order for recertification under CEQA. The issues of permanent dewatering necessary to both 1) keep gas intake pipes free of water and 2) lower the water table and maintain the water level at least 1' below the gas intake pipes to prevent failure of the safety systems- had never been analyzed or addressed under CEQA for feasibility and new or substantially more severe significant environmental impacts. (Ordinance 175790; 2005 Appeal)
The 1993/5 EIR/MND -Addendum had provided analysis of known dewatering activities and cautioned against any long term or permanent dewatering due to the potential for causing negative environmental impacts.

5. 2005 Appellate Court Ruling
The 2005 Appellate Court ruling reversed the Superior Court decision and directed the Superior Court:

"to grant the petition and issue a peremptory writ of mandate ordering the city to vacate its approval of the methane mitigation measures, for the purpose of determining whether a subsequent EIR or a supplemental EIR is required with respect to groundwater dewatering, and proceed accordingly as required by CEQA."

6. City Action Subsequent To Appeal Decision
The City, however, continued to approve methane mitigation permits and allowed building to continue unabated. Instead of going through one of the processes described under CEQA, the City ordered the City's Chief Legislative Analyst to prepare a peer review report analyzing a narrowly scoped hydrological report created by the developer. During the peer review process, the City failed to 1) inform or consult with other responsible or trustee agencies in determining whether the dewatering was directly, indirectly or cumulatively considerable; 2) failed to consider or include groundwater dewatering activities that were ongoing from other permanent methane dewatering building sites such as: a) the Department of Sanitation groundwater dewatering activities (albeit without permits) and; b) Los Angeles Regional Water Quality Control Board

(NPDES) permanent methane groundwater dewatering activities and; c) other cumulative groundwater dewatering activities such as those occurring on both Phase 1 and Phase 2 of Playa Vista and; d) the City never analyzed the dewatering directly relating to the performance and effectiveness of the methane mitigation measures and; e) refused to include any information of the feasibility of the new Methane Code's requirement of maintaining the groundwater at least 1 foot away from the gas intake pipes. The City had already acknowledged invasion of water into the gas intakes would cause the systems to clog and fail. So, after preparing a short CLA Report, which narrowly looked at "certain" developer purported dewatering activities the City unsurprisingly found that it did not have to do any further CEQA analysis.

City Councilman Rosendahl:

"Over the past year, I have made every effort to work constructively with the CLA, the City Attorney, department staff, my constituents and other interested parties to make the peer review process more open, transparent and thorough. Unfortunately, the structure of the peer review process was inherently flawed; its scope of review was too narrow, too technical, and too legalistic.
The City of Los Angeles and Playa Vista residents need absolute assurance that all questions of public health and safety have been adequately resolved. These are the concerns that I understood to underlie the Court's decision against our City. After reviewing the CLA report and ETINA's reply letter to Council, I feel the peer review process failed to do that.
Therefore, I reiterate my support for conducting a Subsequent EIR or Supplemental EIR under CEQA. This is the best way to determine with finality the impact of dewatering on the methane mitigation system at Playa Vista, and to comply with CEQA as ordered by the Court."
(Letter to the Planning and Land Use Committee, 2/22/07 from Councilman Bill Rosendahl, in whose district Playa Vista is located.)

PART II.
FAILURE TO IMPLEMENT MITIGATION MEASURES AND MITIGATION MONITORING AND REPORTING AS REQUIRED UNDER CEQA (AB 3180)

A. New And Experimental Oilfield Gas Mitigation Measures & A New Role Of Gas Mitigation Monitor- Monitoring/ Reporting Requirements For Playa Vista

The 2005 Appeal Ruling acknowledged the City Council's June 12, 2001 approval of recommendations of City Planning's role of oversight:

"direct (ing) city departments to coordinate with the planning department regarding implementation of the methane mitigation system." (2005 Appeal Ruling p. 6)
And, City Planning's oversight of creating the new role of a CEQA Gas Mitigation Monitor (21 AR 5711; 26 AR 7069; 20 JA 5563)

"Methane Monitoring and Venting
We have examined the files in the Department of Planning regarding methane gas monitoring and venting at the PV site. ...Although a venting program was required

under the Environmental Impact Report, there is very little evidence that such a plan exists." 4/2/07 letter from M. Brown-((LA)Westside Planning Commissioner) representing Ven-Mar Neighborhood Association to Gail Goldberg, Director of City Planning. (See further quotes in Audit section)

Grassroots Coalition has Public Record Act requested and received any and all Planning Files that contain mitigation and monitoring information as required for the methane safety systems. The file contains contracts for several companies tasked with filing annual reports, detailing limited monitoring information from only one safety vent type. The reports from the companies are absent. There is no "mitigation monitor" (ing) entity(s) that has been assigned, as required by the 2001 City Council-CLA Report & Directives approval, to provide oversight of the methane safety systems. Thus, **the oversight responsibility of Planning to monitor Playa Vista's compliance or non-compliance with respect to methane gas protections for residents and the surrounding community has not been fulfilled.**

History

After the June 12, 2001 CLA Report & Directives were approved by the City Council, the City determined that the Playa Vista site could be safely built out, providing there was strict adherence to the approved mitigation and monitoring measures and therefore, the City had the necessary "environmental clearance" to – for example- issue bond money-

1. **BONDS- <u>Environmental Clearance Disclosure</u> Statements' Reliance Upon New and Experimental Mitigation Implementation and Mitigation Monitoring/Reporting Requirements**

California Debt Limit Allocation Committee (CDLAC) HOUSING BONDS ($33.6 million) proceeds were distributed after the approval of the CLA Report and, Mello Roos Bond ($135 million) issuance was approved by the City Council on June 26, 2001 (with a determination that the decision was categorically exempt under CEQA). **The following disclosure statement <u>falsely alludes to the effective implementation of gas safety systems</u>, that were approved by the City Council on June 12, 2001 as part of the CLA 2001 Report, <u>that do not exist onsite</u>- including but not limited to:**

<u>Mello Roos Official Statement</u> - pgs. 55-59 Re: Gas Hazards-
*"a. Although there is a methane hazard in Tract 49104-03, the methane source in the shallow sediments appears to be indirectly sourced from <u>the 50-foot gravel aquifer</u>. This aquifer, because of the distance from the potential sub-surface sources to the buildings, <u>can serve as a partial methane monitoring</u> and mitigation system for the shallow gas. The **distribution of gas in the aquifer and in the building remediation systems can easily be continuously monitored so that building can be permitted on Tract 49104-03.**"* P. 56, Emphasis added.

2. **Mitigation and Monitoring**

a. Modifications & Deletions Without Using The Required CEQA Process
After the June 12, 2001 CLA Report was approved for implementation: 1) certain critical mitigation measures were dropped with no explanation or substantial evidence ever provided for their deletion- such as the so-called "early warning

system" of the critical gas level monitoring within the 50' aquifer and, gas detection devices at Playa Vista locations such as Capri Court Homes (see Audit section) and; 2) no Gas Mitigation Monitor was ever appointed; 3) virtually all of the methane mitigation systems have no monitoring or reporting programs and; 4) the Planning Department has not provided oversight or coordination to implement the CEQA mitigation measures. (Exhibit A, #8- 8/22/06 LASC BS073182; 2007 City Controller Audit and Ven Mar Neighborhood Council letter written by Westside City Planner to LA City Planning 4/2/07.)

On 1/25/07 Grassroots Coalition filed an Appeal, regarding the deleted mitigation measure from Capri Homes, to the Building & Safety Commission, costing $210.00 for filing fees. Building & Safety took the money and has never complied with scheduling a hearing for this matter. Once again the public is provided with a total lack of accountability. (See attached LADBS Appeal of Dept. Action form)

b. Recent Case Law Re: Modifications and/or Deletions of Adopted Mitigations
A project applicant or a lead agency that chooses, during project implementation, to modify or delete mitigation measures previously approved/adopted as part of the CEQA process for project approval is limited under recent case law as to how to go about such a change or deletion as described below-

Napa Citizens for Honest Government v. Napa County Bd. Of Supervisors (2001) 91 Cal. App 4th 342 (110 Cal. Rptr. 2d 579) ("Napa")

...The Napa court held that when an earlier adopted mitigation measure is deleted, the governing body must state a legitimate reason for deleting the measure, and the reason must be supported by substantial evidence. (Id. At 3580 The Napa court also held that if a valid reason is stated and the evidence supports the governing body's finding that the stated reason exists, the land use plan and the supporting EIR should be subjected to the same scrutiny as would be given any land use plan and EIR. (Id. At 359)... (Times Change; CEQA Mitigation Measures Don't (Or Can't) 11/17/08 Article by C. Hall)

Lincoln Place Tenants Assoc. v City of Los Angeles (2005) 130 Cal. App. 4th 1491 (31 Cal.Rptr.3d 353) "("Lincoln Place")
...In addressing the seemingly collusive action of the developer and the lead agency of ignoring the previously adopted mitigation measures, the Lincoln Place court stated that, while a city cannot ignore the mitigation measures it imposes on a project, it can modify or delete them. (Id. At 1508.) Quoting for the decision in Napa, the Lincoln Place court noted that a governing body must state a legitimate reason for deleting an earlier adopted mitigation measure and must support the statement with substantial evidence. (Id. At 1509.) Expanding upon the holding in Napa, the Lincoln court then went on to hold that a previously adopted mitigation measure can only be deleted if it is found infeasible. Also, since the determination that a mitigation measure is infeasible must be made in an EIR, ***any determination that a previously adopted mitigation measure has become infeasible must be made by supplemental EIR****. (Id)...* (Times Change:.Article by C..Hill, Emphasis added.)

At Playa Vista, mitigation measures have been modified and deleted without any public notification, legitimate reason and no substantial evidence provided and no Supplemental EIR.

c. 2004 Citywide Methane Code Hearing

During the **2004 Methane Code Hearing**, in response to queries regarding the efficacy of the 50' aquifer vent/monitoring well for Playa Vista, **LADBS' Chief Engineer responded stating that the 50' vent wells don't work in a high water table environment and that they clog and fill with silt**. Presumably, he was reciting what he had learned regarding the new and experimental 50' vent wells attempted use in the high water table of Playa Vista Phase 1. However, despite such open public acknowledgements of the 50' vent well failure, the City's mantra, without any evidence, has since been that the 50' vent wells simply work at Playa Vista Phase 1. Meanwhile and thus far, no mitigation monitoring reports of system efficacy exist for most systems and none for the 50' aquifer vent/monitoring wells that- but for their successful implementation and efficacy- the Phase 1 site was considered to be too dangerous to build. And, with many buildings already constructed and occupied on Phase 1, the agility of the City and Playa Capital LLC to dodge accountability and scrutiny of system performance has become the leading challenge to public inquiry. (3/28/07 Petitioner's Brief Attachment 2- 2/19/07 GC letter (p.13) to City Council with DVD-Methane Hearing)

d. Public Methane Task Force & Failure To Implement (City Council File 01-1305)

In 2004, in response to Petitioners' frustrated requests for promised accountability of the methane mitigation systems, the City Council approved a Public Methane Task Force as part of the new Citywide Methane Code which also included the 2001 City Council approved and specialized Playa Vista Methane Code for Phase One- known as the Playa Vista Methane Prevention Detection and Monitoring Program (PVMPDMP).
The Public Methane Task Force (LA City File 01-1305), working with the Los Angeles Building and Safety Department (LADBS) was to include but not be limited to Neighborhood Councils, individuals involved with development, and experts, as needed. The Task Force was empowered by the City Council through LADBS to report back annually relative to what is being learned, what is being submitted as analysis occurs, and the levels of improvement needed... **This Public Task Force for accountability for the methane mitigation measures does not exist.**
Councilman Rosendahl's response letter to LADBS regarding the failure to adhere to the City Council directive (6/22/06) -

"Your reply states the Task Force has been formed, has met twice, and has made recommendations.

While this group may have a name similar the one mentioned in the council file, it is clearly not the panel intended and directed by the council motion. For instance:

- *Councilwoman Miscowski's motion clearly stated that neighborhood councils would be represented on the task force. There is no neighborhood council representation on the panel you mention.*

- *The council motion was in direct response to concerns by residents and activists that the City of Los Angeles' review of methane issues was closed to the public. There is no public process for and no public participation in the task force you reference.*

Your letter also mentions that your task force has met twice, most recently on March 17, 2006. Why were interested council offices not notified? Why was the public not invited? Where are the minutes of the meeting and have they been made public?

To be clear, the task force you mention is substantially different one than the one envisioned by the council motion. This is either an egregious mistake or a flagrant disregard for a directive from the City Council. I strongly suggest you immediately take steps to constitute a Methane Task Force that complies with the letter and spirit of Council File #01-1305."

..."*Given my concerns about how the task force you have composed fails to meet the mandate or mission of the council directive, its use as a foundation for the annual report makes the entire document suspect.*" (LASC Brief 8/22/06 Declaration Patricia McPherson-exhibit B)"

After this confrontation with LADBS, one Public Methane Task Force meeting was held in which Petitioner's took part and provided numerous queries that have gone unanswered to this day. At the meeting, GC provided numerous documents that contained information contrary to statements made by LADBS. The controversy remains unresolved. The numerous neighborhood participants that were present at the meeting are still left with no answers and no further meetings taking place.

Grassroots Coalition also attempted to utilize the Building & Safety's Commission's- Err & Abuse procedures to compel LADBS compliance and was thwarted by LADBS' refusal to sign and submit the forms to the DBS Commission. (LASC Brief 8/22/06 McPherson Declaration, Exhibit B - 2/10/06 GC letter to LADBS re: Failure To Comply With City Council Motion 01-1305 (Ordinance 175790 & 2001 CLA Directives)

PART III.
FAILURE TO DISCLOSE AND SUPPRESSION OF EVIDENCE

A. PILOT SAFETY SYSTEM FAILURE (Experimental 50' Aquifer Vent Well Failures Cited In ETI's Report- Still Workin On It)

"The CLA also reported that the City's Department of Building and Safety and its 'peer reviewer' ETI, concluded that the proposed methane mitigation system 'would adequately protect public safety.' The CLA concluded that the mitigation measures 'are adequate'. (Appeal Ruling p.22)

Both LADBS and ETI provide extensive caveats to their conclusions including ETI's

"...'METHANE SYSTEM REQUIREMENTS,' and find that the proposed systems meet our recommendations, provided that the systems meet, or exceed all detail specifications as required by Department of Building and Safety."
And, references to the 50-foot gravel aquifer mitigation as being, *"currently in the research and design stages " for the Level III areas. ..."Building in Level III is contingent upon a functional subsurface venting system to the satisfaction of the Department of Building and Safety in consultation with the peer review team."*
(1/31/2001 ETI letter to LADBS.
Emphasis added.)

The 1/31/01 LADBS letter response to ETI agrees with and cites the ETI caveats including,

"Building in Level III is contingent upon a functional subsurface venting system..." and acknowledges that the *"subsurface venting system is currently in the progressive research and design stages being conducted by Playa Capital consultants in consultation with ETI."*

"The CLA reported that Camp Dresser & McGee Inc., an environmental consultant hired by Playa Capital, implemented ***a pilot program by installing more than 70 temporary vent wells designed for Level III*** *methane remediation, and that* ***the program was successful."*** (Appeal Ruling 2004 p. 21-2, Emphasis added.)
The City and Playa Capital LLC had led the Courts to believe that the pilot experimental gas safety systems were successful. This assertion contradicted evidence contained in the City's ETI report, entitled Still Workin On It which described the pilot program and experimental gas systems- a failure.

ETI wrote, *"Many unsuccessful attempts were made by CDM to solve the mechanical production problems..."*(5 RR 917).

ETI explains in both his April 17, 2000 Report and the Still Workin On It (Report) the necessity of dewatering to keep the deep wells free of water in order to produce gas freely from the aquifer and that the water was then to be treated and sent back down into the aquifer in order to prevent subsidence.
ETI-
"If the pump and treat or equivalent methane mitigation system is not effective or if Playa Capital does not install an appropriate mitigation system in the 50-foot grave, ETI believes that development of the area should not proceed. Without the proper mitigation of the methane present, a dangerous situation exists at the site. No further development should be allowed on this site until these mitigation issues are resolved." (28 AR 7479)

"An extensive program of drilling and testing of vent wells and monitor wells was carried out within the upper 50 feet of sedimentary cover underlying these gas-charged areas in an effort to characterize the nature and source of these thermogenic gases.
In an attempt to measure flow rates and deplete these shallow gas accumulations, ***over 120 vent wells were installed*** *(mostly in Tract 01) on the largest soil gas anomaly. This* ***effort was essentially a failure*** *because of the weakness and fluidity of these former Los Angeles River sediments, which were too easily disturbed by the drilling operations and the flow of gas, water and sediments towards the well screens, plugging the well screens*

and preventing the installation of effective vent wells, even when free gas was encountered." P. 5 of 32

"Most of these attempts to install gas vent wells failed because the shallow silts at the top of the 50-foot gravels were too unconsolidated to remain open. ***The wells were clogged by unconsolidated clastic sediment and were invaded by water, which shut off the gas flow.***" P. 14 of 32
(Emphasis added. ETI-Still Workin On It- 7/10/ 2001 & last updated 8/10/2001, p.5 of 32 (8/22/06 Pet. Brief Exhibit 8/22/06 GC letter to CLA)

B. LADBS & CITY ATTORNEY SUPPRESSION OF EVIDENCE OF SAFETY SYSTEM FAILURES

The ETI Report, titled Still Workin' On It (contained on a CD-disk) describes numerous problems with the gas safety systems and the need for extensive field testing and monitoring that had not been done and was still necessary to do. Otherwise, ETI warned that a dangerous condition could exist.

Grassroots Coalition had been alerted to the Report's whereabouts by ETI as being lodged with both the City and the State Lands Commission. The City responded to Grassroots Coalition's Public Record Act request for the Report, stating that no such report existed. (PRA response)
Upon requesting the Report from the State Lands Commission (SLC), GC was told that SLC would have to contact the city due to confidentiality concerns. Provided herein is the Declaration of an SLC attorney that reveals the **city's attempt to prevent the release of the ETI Report to Grassroots Coalition.**

Declaration by Assistant Chief Counsel of the California State Lands Commission (11/30/06)

4. *"In early May 2002 I spoke by telephone with* ***a representative*** *of the City of Los Angeles* ***Department of Building and Safety*** *who, upon learning of the Coalition's request,* ***objected to the release of the information contained on the disk.*** *I then emailed Dr. Victor Jones, President of ETI, and asked him if in his opinion the information on the disk was the property of his company or of the City. He replied that in his opinion the information contained on the disk was the property of the City. Shortly thereafter I spoke by phone with* ***a Deputy City Attorney*** *whose name I cannot remember.* ***She asked me not to release the Playa Vista information to the Coalition*** *and then followed up with a letter explaining the reasons for the City's objections. (Emphasis added)*
5. *In September of 2002, the Commission, pursuant to the Coalition's Public Records Act request, sent a copy of the Playa Vista disk prepared by ETI to, the Coalition.*

Because of the time delays caused by the City's suppression of the ETI Report-Still Workin On It, GC was time barred from its inclusion in the CEQA record. Had the ETI Report been available for the court's review, GC believes that the court would not have been led to conclusions that include, for example- the pilot vent well system was

successful. And, the City and Playa Capital LLC would not be able to hide behind their interpretation of the court's order and continue in their dodging of these extremely dangerous issues.

C. VENT WELLS MUST BE KEPT FREE OF WATER-- DEWATERING IS AN INTRINSIC FUNCTION FOR EFFECTIVE GAS INTAKE PIPES

ETI's Report discusses the need to keep water and silt out of the 50' gas vent/ monitoring wells. Likewise, the City of Los Angeles had already discovered this need during the 1989 near repeat explosion incident that occurred in the Fairfax area in the 1985 Ross-Dress-For-Less oilfield gas explosion and fires. The Declaration of Bernard Endres PhD. below, discusses the Playa Vista 50' vent well's need for dewatering and the 1989 Fairfax incident in which a similar deep gas vent well- the Anthony Vent Well- in Fairfax had to be dewatered and have a pump installed under the orders of the State of California-Division of Oil & Gas to intercept high storm waters from invading the deep gas well and causing malfunction and a near repeat of the 1985 incident. Further, Dr. Endres provides expert opinion regarding the absolute need to keep the deep 50' vent/monitoring wells at Playa Vista free of water and silt in order for effective performance. This Declaration is included in a 3/28/07 Petitioner's Brief and further Fairfax Task Force documents are included in Petitioner's Brief of 8 /22/06.

The 2005Appeal Court Decision acknowledges that the dewatering needs of the deep gas wells have not been determined. (footnote 11 P. 26)

The City's 2007 CLA Report, deliberately excludes any discussion or provision of the required CEQA mitigation monitoring information for the 50' wells efficacy. Contrary to CEQA needs for substantial evidence, the City simply offers a conclusory statement that the 50' wells are passive and do not need to be kept free of water. In fact, the City simply claims that the 50' wells are pipes filled with rocks that sit in the aquifer and work. The conclusory statement made by the City is waged against the reality that there is no model upon which to rely for the perpetual outgassing of an aquifer underneath homes. It has simply never been done before. Even the Fairfax area normally has a low water table.

Bernard Endres PhD. was the lead investigator on behalf of plaintiffs that were injured victims in the 1985 Fairfax incident and also had first hand knowledge of the later 1989 Anthony Vent Well incident. He addresses the issues in his Declaration-

DECLARATION OF BERNARD ENDRES PHD. 3/28/07

Gas Migration Expert

Portions of the Endres Declaration are as follows:

"14...In 1989 there was a near repeat of the gas hazard conditions that had caused the 1985 explosion and gas fires. The City of Los Angeles discovered that the Anthony Vent Well had become clogged by the infiltration of water and scale build-up in the perforations used at the base of the vent well located at a depth of approximately 50 feet. These problems led to the formation of a second Task Force by the City of Los Angeles. The study results identified the extreme criticality of not allowing the water table to rise above the vent pipe perforations located at an approximate depth of 50 feet. Also, it was found critical not to allow scale build-up to occur within the perforations at this depth, largely caused by microbial activity occurring within the water and gas bubble interface at this depth.

15...For the foregoing reasons, and because extensive research has been performed on these detailed gas migration hazards and topics, since the 1985 explosion, today the problems have been well documented in the scientific literature. ..

*16...**The above findings and research confirm that degassing of the high-pressure gas pockets existing in the '50' Foot Gravel' at Playa Vista <u>cannot</u> be accomplished by way of drilling passive vent wells into these areas. In particular, the perforations used at the base of the vent wells will become clogged with water intrusion and scale build-up in the same manner that the Anthony Vent Well clogged in the 1989 time period, and nearly caused a repeat explosion of the 1985 Ross Department Store explosion.***"(Highlight added.)

*17....**It is necessary to perform extensive dewatering, as determined by Dr. Victor Jones of ETI, to perform adequate degassing of the 50-Foot Gravel. This dewatering must be evaluated in the context that the subject area at Playa Del Rey, including Playa Vista, has been categorized by the United States Geological Survey as a highly subsidence-prone area.***" (highlight added, 3//28/07 Petitioner's Brief)

IV.
LADBS' METHANE CODE EXPERT INSIDER'S DECLARATION RE: LADBS NONCOMPLIANCE WITH CODES CONTENTIONS & CONCERNS ABOUT INFEASIBILITY & INEFFECTIVENESS OF SAFETY SYSTEMS AT PLAYA VISTA

Declaration (4/6/07) Of Alfred O. Babayans- P.E. State of California. Mr. Baybayans holds a Masters degree in Mechanical Engineering/Chemical Engineering from CSU Northridge. As written in the first several statements of his Declaration, Mr. Babayans has an extensive background (19 year LADBS history) in oversight and development of the Los Angeles methane mitigation procedures and mechanical implementation. During the early years of construction of Phase 1, he was an **LADBS official having 1st hand knowledge and responsibility regarding Building Code compliance with Playa Vista's Methane Code.**

Portions of the A.O.Babayans Declaration:

"6. I frequently voiced strenuous objections to my superiors within the LADBS regarding the permitting and approval process that was being employed by the City regarding the Playa Vista building site. These review procedures were substantially relaxed, and made much less demanding upon the Playa Vista building site, versus the permitting procedures employed in the Fairfax area. It was expressly stated by my superiors within the LADBS that special accommodations had to be made for the building at Playa Vista in order to favor the building contractors, and limit the cost implications of the methane mitigation systems. I was appalled by these procedures.

7. I personally became aware that gas mitigation systems were allowed to be installed at Playa Vista, by the City, without first going through a blueprint review and design

verification with the methane ordinance requirements. This violated the practices employed by the City that required that the blueprints be first approved by the permitting department of LADBS, before construction could proceed.

8. I was the Metro, Chief of Mechanical Plan Check during the time period that the Playa Vista methane mitigation system approval process was taking place. I have personal knowledge that the blueprint approval phase was often violated, as described above.

9. The methane mitigation systems that were allowed to be installed by the City at Playa Vista failed to comply with appropriate design requirements to assure safe operation over the range of anticipated operating conditions. The most dangerous features that were allowed to be installed by the City at Playa Vista, largely as cost cutting measures are described in the following paragraphs.

10. A so-called Dual System was used in which subsurface perforated gas collection pipes were simultaneously used to also collect water—that was seeping into these gas collection pipes—and drained to a sump area. This design practice is extremely dangerous because of the high probability that the perforated gas collection pipes will fill with water especially during heavy rains, and completely defeat the passively designed gas mitigation system.

11. The above-described defective design features employed at the Playa Vista site also prevent—on an ongoing basis—the ability to detect and determine if the methane mitigation system is actually venting gas to the atmosphere, as required to protect the building structures from explosion and fires. ...
(4/6/07 Petitioner's Brief)

The City of LA and Playa Capital LLC have remained silent since presented this Declaration during the 2007 Hearing on the Playa Vista Safety System Audit.

V.
2007 AUDIT OF THE SAFETY SYSTEMS AT PLAYA VISTA

Had the Playa Vista development been subjected to an SEIR, as required, the deep flaws, inconsistencies, lack of coordination and vagueness cited below by the City Controller regarding the City's approach to oversight of the Playa Vista methane mitigation safety systems, would likely have been avoided and the public would be provided with full disclosure for informed decision-making and, in the alternative, with all the information obtained via an SEIR process a no-build decision or an alternative design of the project may have also ensued.

A. 2007 City Controller Audit titled Subject: City's Oversight of Playa Vista Phase 1 Development

Grassroots Coalition Public Record Act Requested the 2007 Audit papers including the "600 Working Papers" of the 2007 Playa Vista Safety Audit Performed Via The City Controller.

1. The objective and scope of the 2007 Audit are stated within the Audit as:

- "Objective- To answer the overarching question – Have development activities at Playa Vista appropriately complied with established City regulations made specifically to ensure public safety in regards to methane mitigation." (Audit papers A-5)

- "Scope of Audit: The audit will include all City related oversight activities related to development activities at Playa Vista Phase I during the period January 2001 through fieldwork completion." (Audit papers A-8-1,2)

B. Public Disclosures By The Los Angeles City Controller

During KNBC TV interviews with the City Controller, Laura Chick, regarding the Playa Vista safety audit, the Controller expressed her opinions to the public stating that **she could not vouch for the safety of the site and that the records were mush.** (KNBCTV –Burning Questions, Power Politics)

"My report found significant problems including inadequate quidelines, lack of co-ordination, unclear responsibilities and shoddy record keeping." ...

"It is unfortunate that a sentence in the report, "...nothing came to our attention to indicate that required inspections relating to methane mitigation, or the project as a whole, were not performed," has been used to negate the deep flaws that we found in the City's oversight of the project.

Again, I repeat, I regret that sentence, and if I could go backwards, I would not include it in the report. It was a negative assurance which was ***not a finding of fact.****"...*
(Emphasis added. 7/25/07 LA City Controller letter to KNBC regarding "REVIEW OF PLAYA VISTA", This comment by the Controller was also later provided to the full City Council during 2007Audit Hearings)

In fact, the roughly 600 working pages of the audit reveal dangerous contradictions to many of the summary findings. The glaring lack of inspection data, especially for the most critical of safety systems- the 50' aquifer vent wells, the subslab portal monitoring and field testing of systems-- is alarming. Furthermore, through interviews of department personnel it is revealed the lack of knowledgeable and licensed personnel performing work and lack of coordination or follow-through of oversight.

C. Approved Mitigation Measures Deleted

City Deletes Capri Court Homes Gas Detection Devices

On page 3 of the 6/5/07 Summary Report, the 2001 City Council approved gas detection systems that are required for ALL buildings is revealed to have been arbitrarily deleted on the Capri Court I homes.

"- The quidelines also state that all buildings will be equipped with methane detection systems and that the detectors will be approved by DBS and LAFD. Another footnote (#6) states that when methane is detected, audio and visual alarms and automatic notification of LAFD shall be triggered. The interpretation made by DBS to eliminate methane detectors under footnote #5 appears to contradict the requirements stated in footnote #6, since without methane detectors, alarms could never be activated, nor could LAFD be notified." City Controller Summary 6/5/07, SUBJECT: CITY'S OVERSIGHT OF PLAYA VISTA PHASE I DEVELOPMENT

1. Mitigation Monitor

The new role of gas mitigation monitor has in effect been deleted as it has never come to fruition as ordered via the City Council 2001 CLA Directive approval.

In the 6/5/07 City Controller letter to the Mayor, City Attorney and City Council it states on pg. 4 of 7,

"Participating department representatives, led by Planning, developed a comprehensive document known as the 'matrix' to specify each department's oversight responsibility and to ensure that all activities had received appropriate authorization. However, the document has never been finalized and remains in draft format. DBS and Planning also have varying interpretations of the primary purpose of the matrix, and of the importance it plays in ensuring compliance with the CLA guidelines."

While the so-called "matrix" continued to be an unimplemented "draft" after the Audit, what the City Controller leaves out is how many years since 2001 that the "matrix" did not even exist. GC's PRAs on the matter reveal that Planning was virtually not engaged whatsoever in any oversight of the methane mitigation implementation and compliance. For instance, in 2004 City Planning responded to GC's request for the methane mitigation and monitoring information by stating they had no idea of what GC was even referring to. (Response to a March 3, 2004 GC PRA)

As of late 2004- three years after development of Playa Vista- Planning's response to GC was,

"The Custodian of Records for the Los Angeles Department of Building and Safety (LADBS), Teresa Abrams, will be able to assist you with your request. The Department of Building and Safety receives and reviews methane reports submitted by the Playa Vista applicants."

Clearly, the Planning Department did not have any "matrix" to provide to GC and did not have the required documents necessary to comply with its oversight role. The 2007 Safety Audit of Playa Vista speaks to the lack of required documentation at DBS.

A 4/2/07 letter comment from an LA Westside Planner (in a letter representing Ven-Mar Neighborhood Association) regarding methane monitoring and venting-

"We note that the actual reports of PV monitoring and venting are not kept at Planning but instead are kept at the Fire Department and at the Department of Building and Safety—in two different locations in the City. This makes it very cumbersome for community residents, and we suspect for you in Planning, to monitor Playa Vista's compliance or non-compliance with respect to methane gas protections for residents and the surrounding community. This is very disturbing. We recommend that even the Department of Planning, keep copies of all records regarding PV compliance with EIR-mandates and other such requirements."

Accountability and enforcement of compliance to the 2001 City Council approved CLA Report and Directives is not met.

2. No Licenses

Companies that were not licensed by the City for such studies performed gas testing, in the main. Public Record Act (PRA) requests of GC have revealed that the City licensed only one company. (See new city protocol for methane testing licenses- subsequent to the audit)

D. EXAMINATION AND REVIEW OF THE 2007 PLAYA VISTA AUDIT BY KNBC AND GRASSROOTS COALITION

Grassroots Coalition concurs with the findings made in the KNBC review and also provides further comments to issues not addressed in the KNBC review. (See GC 7/18/07 Review of the Audit and working papers to the City of LA Government and Audit Committee and Controller Chick. (See GC Audit comments attached and attached Audit letters.) Grassroots Coalition comments-in part:

"Deputy Inspector Protocol-
The Audit on page 5, bullet 1 states, 'DBS inspectors must ensure that systems have been installed according to the stated building plans; however, we noted that DBS relied on non-City engineers, consultants and Deputy Inspectors to assure that the systems were operational. We also noted that the City has no certification program for Deputy Methane Inspectors; instead, DBS required the manufacturers of the methane systems to certify the deputy methane inspectors.'

...DBS acted contrary to City Codes when it allowed Deputy Inspectors to not be in compliance with long standing Deputy Inspector protocol. While the auditors state that there is no certification program for Deputy Methane Inspectors, what the Controller's Office omits is that the City does have City Code requirements for Special Inspections (1701.1) and, 1701.2 Registered Deputy Inspector wherein, "A committee appointed by the superintendent of building shall examine each applicant as to his or her experience and training for performing the duties of an inspector of the type for which application has been made. ..." And, 1701.3 Duties and Responsibilities of the Registered Deputy Inspector. Certificate of 'Registration' protocol (1701.17.1) for Controlled Activity Inspection Authority (1701.17) and 'Duties' 1701.17.2 which are set forth also under Deputy Inspectors (1701.2 Registration & 1701.3 Duties) under the California Building Code and the City of Los Angeles Building Code.

'1701.17.3 Fees. The procedures for the examination, registration and renewal of authority as a controlled activity inspector shall be the same as specified for deputy inspectors under Section 1701.3 of this code.'

Clearly, state and city codes provide for registration, examination and other requirements set forth for structural welding inspectors, concrete inspectors, reinforced masonry inspectors and soils/grading inspectors. LADBS' failure to extend these long standing code principles and requirements of knowledge regarding the type of work to be

inspected- to methane inspectors, makes no sense and may be in violation of- at least- the spirit and intention of City and State Building Codes."

The City has provided no response to these comments.

A KNBC review of the 2007 Playa Vista Audit examines the more than 600 pages of "work papers" used in preparing the City Controller's Report of June 5, 2007 titled, "Subject: City's Oversight of Playa Vista Phase I Development." The papers, were released to KNBC in response to their Public Record Act requests. (Attached are the KNBC Review and Audit papers, in part. The full 600+ pages are available upon request.)

KNBC comments, in part-

"Noteworthy omission from Controller's Report—Alfred Babayans (p. 20)

Prior to the issuance of the Controller's Report, Councilman Rosendahl sent her a copy of a sworn declaration by former DBS engineer, Alfred Babayans, who helped design the mitigation systems at Playa Vista.

Among other things Babayans stated under oath: DBS review procedures for permitting and approval of the methane mitigation systems at Playa Vista were 'substantially relaxed...to favor the building contractors and limit the cost implications..."

He goes on: 'I personally became aware that gas mitigation systems were allowed to be installed at Playa Vista by the City without first going through a blueprint review and design verification with the methane ordinance requirements...

...(Other quotes of Babayans Declaration) ...

Given Babayans' expertise, the specificity of his allegations, and their obvious bearing on the utility of methane inspections and City oversight at Playa Vista, one might have reasonably expected him to be among those interviewed by the Controller's staff, especially since the Babayans declaration was presented to her by Councilman Rosendahl whose legislative responsibilities include the safety of Playa Vista.

But nowhere is Babayans referenced in the auditor's work papers of the Controller's Report.".....

"Propriety of DBS Altering CLA Methane Mitigation Requirements (p.22)

..."*Code experts say that Ops Cal Atty Gen 01-306 appears to void DBS' unilateral deviation from the Code standards at PV, especially in the absence of 'specific evidence; of equivalency. They also say that the Appeals Court ruling in the Etina v City of Los Angeles has the same effect.*

Thus, there appear to be two legal authorities that would warrant challenging the propriety of DBS' decisions (with Fire Department concurrence) to obviate Fire

Department methane inspection duties at single-family homes at PV and to eliminate methane detectors at the Capri 1 single-family-homes complex."

Nor response was forthcoming from the City addressing KNBC's comments and queries.

The Babayans Declaration was presented by Mr. Babayans at the City Council Audit Hearing. There continues to be no response to his declaration from the City.

Post Audit: The City Controller does not have enforcement authority and provides only recommendations. Playa Vista Phase 1 has not materially changed in response to the problems noted in the Audit. Thus, the construction defects that may exist, still exist. Only certain licensing procedures have altered for instance, there is a provision for inspectors of the methane membrane to be trained/ licensed by the City however, the membrane is but one component of all of the gas safety systems.

VI...CONCLUSION

Grassroots Coalition requests that the City not approve the Phase 2 EIR at this time and come into compliance with CEQA for the entire Playa Vista project site. Grassroots and ETINA also request the City Attorney review the matters stated herein and provide for an independent investigation of the allegations cited above and take appropriate action.

Thank you for your prompt attention to these serious matters,
Patricia McPherson- Grassroots Coalition & ETINA
310 397 5779
patriciamcpherson@att.net

Council File
10-0173

Case No. B213967

COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ENVIRONMENTALISM THROUGH INSPIRATION AND NON-VIOLENT ACTION ("ETINA"), ET AL.

Appellants and Petitioners

v.

CITY OF LOS ANGELES, ET AL.

Respondents

PLAYA CAPITAL COMPANY LLC, ET AL.,

Real Parties-in-Interest and Respondents

Los Angeles Superior Court, Case No. BS 073182
Honorable Ann I. Jones

PETITIONERS ETINA, GRASSROOTS COALITION AND DANIEL COHEN'S JOINT OPENING BRIEF

Todd T. Cardiff, Esq. (SBN 221851)
LAW OFFICE OF TODD T. CARDIFF
121 Broadway, Suite 358
San Diego, CA 92101
TEL: (619) 546-5123
FAX: (619) 546-5133

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE	Court of Appeal Case Number: B213967
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Todd T. Cardiff, Esq. (SBN 221851) Law Office of Todd T. Cardiff 121 Broadway, Ste. 358 San Diego, CA 92101 TELEPHONE NO.: (619) 546-5123 FAX NO. (Optional): (619) 546-5123 E-MAIL ADDRESS (Optional): todd@tcardifflaw.com ATTORNEY FOR (Name): ETINA, Grassroots Coalition and Daniel Cohen	Superior Court Case Number: BS073182 FOR COURT USE ONLY
APPELLANT/PETITIONER: ETINA Et. Al. RESPONDENT/REAL PARTY IN INTEREST: City of Los Angeles Et. Al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): ETINA, Grassroots Coalition and Daniel Cohen

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: February 22, 2010

Todd T. Cardiff
(TYPE OR PRINT NAME)

▶ Todd T. Cardiff
(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courtinfo.ca.gov

American LegalNet, Inc.
www.FormsWorkflow.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

CEQA Guidelines

I. STATEMENT OF APPEALABILITY

The judgment disposes of all issues between the parties to this appeal and is appealable as a final judgment. (Code Civ. Proc. § 904.1(a)(1).) On November 24, 2008, judgment was entered discharging the writ issued on February 23, 2006. (19 CT 4501.) On December 8, 2008, Real Parties-in-Interest served Notice of Entry of Judgment. (19 CT 4498-4499.) Petitioners timely filed their Notices of Appeal on February 5, and 6, 2009. (19 CT 4504-05.)

II. INTRODUCTION

In 2005, the Court of Appeal ordered the City of Los Angeles ("City") to vacate its methane mitigation measures developed for the Playa Vista development project and determine whether a Subsequent or Supplemental EIR was required with respect to groundwater dewatering. (*Environmentalism Through Inspiration and Nonviolent Action (ETINA) v. City of Los Angeles,* 2005 Cal. App. Unpub. LEXIS 9697 (Oct. 26, 2005); 1 CT 62.)[1] Instead of going through one of the processes described under CEQA, the City ordered the Chief Legislative Analyst (CLA) to hire peer reviewers to analyze the hydrological reports prepared for Real Party-in-Interest Playa Capital (RPI). Throughout the process, the City failed to consider or include information about all Phase I dewatering and other groundwater dewatering, such as dewatering occurring in conjunction with Phase II of the project; refused to provide information requested by Petitioners; failed to notify, as requested, the Department of Fish and Game, and; refused to stop building multi-family and mixed use buildings on the largest methane gas leak in the western United States. After

[1] [Volume] Clerk's Transcript [Page]. For consistency and convenience of all parties, Petitioner will cite to the copy of the Court's Opinion located in the Clerk's Transcript at 1 CT 28 to 62.

preparing a short 18-page Chief Legislative Analyst Report ("CLA Report" or "Report") reiterating the conclusory findings of the City's peer review of Playa Capital's consultant's reports purportedly analyzing "groundwater dewatering in conjunction with methane mitigation measures," the City unsurprisingly found it did not have to conduct any further CEQA review. The City created the evidence it was looking for, while suppressing any evidence that dewatering may have a significant impact either directly or cumulatively.

Petitioners and Appellants Environmentalism Through Inspiration and Non-Violent Action ("ETINA") Grassroots Coalition and Daniel Cohen (collectively "Petitioners") object to the Return to Writ, and challenge the City's CLA Report as inconsistent and inadequate under CEQA. The CLA Report, prepared through a process uniquely created by the City of Los Angeles, is not a Subsequent EIR, Supplemental EIR, or Addendum to an EIR. The City's analysis was intentionally constrained to minimize evidence of cumulative impacts and failed to properly inform the public or the City Council of the impact of dewatering. The City, once again, failed to proceed in a manner required by law, and abused its discretion. The Court must overturn the trial court's ruling discharging the writ of mandamus. In addition, Petitioners request the Court to revisit its prior ruling in ETINA v. Los Angeles, and order the City to conduct proper CEQA review on the project in light of the discovery methane at Playa Visa.

III. STATEMENT OF FACTS

A. The Project

The project is described in the 1993 EIR as the first phase of a multiphase mixed use residential development. (4 RR 822 at 25.)[2] The entire Playa Vista project includes 13,085 dwelling units, 5,025,000 sq. ft. of office space, 595,000 sq. ft of retail space, 1,050 hotel rooms, a new marina and a variety of civic and community serving uses. (4 RR 822 at 266.) The first phase of the Playa Vista Project (Phase I) consists of 3,246 residential units, 1.25 million square feet of office space, 35,000 square feet of retail space and 300 hotel rooms on 280.5 acres of land. (4 RR 822 at 25, 29; 1 CT 30.) Phase II was approved as 108,050 square feet of office and light industrial, but was later expanded to include 2,600 residential units, 175,000 square feet of office space, 150,000 square feet of retail space, and 40,000 square feet of community-serving uses. (*City of Santa Monica v. City of L.A.* (Sept. 13, 2007), 2007 Cal. App. Unpub. LEXIS 7409 at *4.)[3]

In 1995, the City prepared a combination addendum/mitigated negative declaration to reconfigure certain portions of the project and approve additional development at former Hughes Aircraft Plant site. (1 CT 30; 4 RR 822 at 23873 and 23878.) The extensive addendum included a detailed comparison to the 1993 EIR. (4 RR 822 at 23852-24071.) In

---

[2] The "Return Record" for the City's Return to Writ will be referred to by [Vol] RR [Page] to distinguish it from the Administrative Record (AR) filed in the underlying *ETINA I* decision. Significant portions of the Return Recod were submitted to the trial court as photocopies of CD disks. See 2 RR 299-301, 4 RR 820-822. The specific pages on the CD;s will be identified with an "at". Thus, for example, the FEIR for the first phase is located at (4 RR 822 at 25), means the page stamped as "25" on the CD disk photocopied at volume 4, page 822 of the Return Record.

[3] The Phase II EIR was found to be legally inadequate by the Court of Appeal. (*City of Santa Monica v. City of L.A.* at *163-164.)

addition, because the 1993 EIR did not discuss the development of the former aircraft plant site, the City also combined the addendum with a mitigated negative declaration (MND) for the additional development. (See, 4 RR 23890 (describing the different levels of environmental review between the addendum and the MND).) Despite the somewhat confusing nature of a combination Addendum /MND, it was clear the Addendum relied upon and amended the 1993 EIR.

B. The Discovery of Methane at Playa Vista

In 1999, large pockets of methane gas were discovered at Playa Vista. (5 RR 1024.) In response to this new information, the City directed the City's Chief Legislative Analyst ("CLA") to prepare a report and hold public hearings on safely developing the Playa Vista site. (22 AR 6135-36; 28 AR 7337.) The CLA was to report back to the City Council's Planning and Land Use Management committee. (1 CT 31.)

Methane is highly flammable and can be explosive in concentration levels as low as 5%. (30 AR 7817; 22 AR 5977.) It is a known carrier for other toxic gases, including BTEX and hydrogen sulfide all of which are surfacing at Playa Vista. (5 AR 1009, 1016; 27 AR 7261; 29 AR 7582; 30 AR 7815.) Methane leaking into buildings is a potentially deadly problem. In 1985, a methane explosion in the Los Angeles suburb of Fairfax injured 23 people at a Ross Dress-for-Less store. (5 RR 886; See also 4 AR 861, 5 RR 1075 (other methane explosions).) Thus, the presence of high concentrations of methane at the Playa Vista is a serious cause for concern.

The City's own consultant acknowledged the tremendous safety concern, stating, "The safest approach would be to avoid building in this area; however, it is possible to build if it can be demonstrated that the methane is properly mitigated." (28 AR 7478.) The City nevertheless permitted construction to move forward, finding, "methane mitigation

systems adequate to protect public safety have been developed for the site." (4 AR 1084, 1 CT 35.) The City authorized methane mitigation measures below the slabs of each building, including dewatering. (1 CT 33, 52.) Playa Capital's own expert noted the importance of dewatering: "permanent groundwater dewatering measures are also critical to insuring the proper operation of the methane mitigation measures." (1 CT 52.)

The methane mitigation system approved by the City included measures to mitigate various concentrations of methane. (4 AR 1071, 1077.) All buildings were required to install a 12-inch gravel blanket, gas collection vent pipe and impermeable membrane below the buildings slabs. In addition, methane detections systems were required. Buildings located in areas of higher methane concentrations required the installation of data collecting sensors both below the impermeable membrane and between the membrane and the basement slab. Buildings in the areas of the highest methane concentrations required continuous methane sampling and data collection accessible by the homeowners' association, Department of Building and Safety, and Fire Department. (4 AR 1077.) In the areas of the highest methane concentrations, a subsurface venting system consisting of vent pipes drilled into the 50-foot aquifer were required. (4 AR 1071.)

The 50-foot deep vent wells were considered critical to safely mitigate the highest methane areas. (28 AR 7479.) So much methane is trapped in the 50-foot aquifer that one of the monitoring wells blew water 40 feet into the air, and continued to vent for 69 hours. (1 AR 20, 24.) The concern was that an earthquake or other rupture could result in an uncontrolled release of large quantities of methane causing a catastrophic explosion. (5 RR 897 & 899; 1 AR 28.)

Venting the 50-foot aquifer proved difficult. The pilot test wells failed to continuously vent without dewatering. (5 RR 908.) The City's consultant observed, "most of these attempts to install gas vent wells failed

because the shallow silts at the top of the 50-foot gravels were too unconsolidated to remain open. The wells were clogged by unconsolidated clastic sediment and were invaded by water, which shut off the gas flow." (5 RR 917.) The consultant noted, "Many unsuccessful attempts were made by CDM to solve the mechanical production problems..." (5 RR 917.) The City's Consultant specifically noted:

> If the pump and treat or equivalent methane mitigation system is not effective or if Playa Capital does not install an appropriate mitigation system in the 50-foot gravel, ETI believes that development of the area should not proceed. Without the proper mitigation of the methane present, a dangerous situation exists at the site. No further development should be allowed on this site until these mitigation issues are resolved.

(28 AR 7479; *See also* 5 RR 899-900, describing the dewatering mitigation measures in the 50-foot aquifer.)

Despite such reports, the 2001 CLA report claimed, "The only public safety risk identified that requires mitigation is methane gas emissions...methane mitigation systems adequate to protect public safety have been developed for the site." (4 AR 1050.)

On June 12, 2001, the City Council adopted the CLA Reports' recommendations and directives as mitigation measures for the Playa Vista Development. (1 CT 33.) Petitioners timely filed a petition for writ of mandate.

C. The Appellate Decision in *ETINA v. Los Angeles* (*ETINA I.*)

The Appellate Court overturned the City's adoption of the methane mitigation measures. The Court noted that the 1993 EIR cautioned against dewatering in connection with a proposed sewer and long term dewatering in connection with subterranean structures. (1 CT 52.) Because the

methane mitigation measures included permanent groundwater dewatering it was "a *potentially* substantial project change because it could result in those new or substantially more severe significant effects." (1 CT 52-53.) The Court held, because the City failed to determine whether a subsequent or supplemental EIR was required, the "appropriate remedy…is to order the city to make that determination and to vacate its approval of the methane mitigation measures until it makes the determination under CEQA and complies with CEQA." (1 CT 55.) The Court also noted the dispute as to whether the 50-foot vent wells required dewatering, but declined to resolve the issue. (1 CT 53, n.11.)

In contrast, despite assuming the discovery of methane was new information of substantial importance, the Court held that a subsequent EIR was not required for the methane mitigation measures themselves. (1 CT 48.) The Court reasoned, "a new or more severe significant environmental impact does not require the preparation of a subsequent or supplement to an EIR if adopted mitigation measures will reduce the impacts to a level of insignificance." (1 CT 48 citing *River Valley Pres. Project v. Metro. Transit Dev. Bd.* (1995) 37 Cal. App. 4th 154, 168.) Thus, the Court held that the City impliedly found the mitigation measures reduced the impact of methane to a level of insignificance, and substantial evidence supported the City's finding that a subsequent or supplemental EIR was not required. (1 CT 49.)

D. City Action Subsequent to the Appellate Decision.

On February 23, 2006, the trial court issued a peremptory writ of mandate which states:

> YOU ARE HEREBY COMMANDED immediately upon receipt of this Writ to vacate your approval of the methane mitigation measures for the Playa Vista First Phase Project, for the purpose of determining whether a subsequent EIR or

> supplemental EIR is required with respect to groundwater dewatering, and proceed accordingly as required by CEQA.

(1 CT 103.)

On March 31st, 2006, the City passed an oral resolution vacating its prior approval of the methane mitigation measures substantially parroted the Writ. (1 CT 102.) However, the motion failed to include the language, "and proceed in accordance with CEQA" as required by the writ. (Id.)

Despite the City's oral motion vacating the methane mitigation measures, construction of Phase I continued unabated. (See e.g., 4 CT 822 to 5 CT 1155.) City inspectors continued to sign off on building permits for methane mitigation systems, dewatering systems and the installation of 50-foot vent wells. (See e.g., 4 CT 794 (deep vent well), 822 (methane dewatering pipe), 824 (methane barrier), 869 (methane dewatering pipe), 5 CT 985 (methane dewatering pipe), 1052 (methane dewatering pipe).) The City continued to grant temporary certificates of occupancy allowing people to move into buildings. (See e.g., 2 CT 381-383.) There was no indication the methane mitigation measures were actually vacated.

Attempts to bring the failure to comply with the writ to the Court's attention and stop the construction were unsuccessful. (See 2 RT B-6:lines 4 – 22; 2 RT C-20:23-26 ; 2 RT D-7:4-11; .) The trial court took a very narrow view of the writ, holding that the order to "vacate" the methane mitigation measures solely applied to groundwater dewatering systems in connection with the methane mitigation measures. (2 RT D-11:19-28 & D-13:1-15.) The trial court believed the Writ was only intended to vacate the methane mitigation measures for a limited purpose. Petitioners' counsel argued:

> But whatever the purposes may be, the methane - - the approval is vacated. [The writ] didn't say partially vacate. It didn't say a little bit vacated. It said "vacated."

(2 RT D-13:23-26.)

The trial court denied the Motion for Contempt and/or Motion under Code of Civil Procedure section 1097. No findings pursuant to Public Resources Code § 21168.9(c) severing a portion of the project were made by the court. The trial court simply disagreed with petitioner's interpretation, and refused to stop the ongoing construction. (2 RT D-15:22-27.)

E. The Chief Legislative Analyst Report Process

The CLA Report process had a very narrow scope. (8 RR 1638.) It expressly limited the scope of review to "the potential for subsidence" and "exacerbation of existing groundwater contamination" caused by groundwater dewatering in connection with methane mitigation systems in Phase I of Playa Vista. (3 RR 472.) It proposed to investigate such impacts by conducting a "peer review" of two reports prepared for RPI entitled:

1. Evaluation of Settlement Due to Lowering of Groundwater, Phase I Development Area, Playa Vista, Los Angeles, CA for Playa Capital LLC. (November 23, 2005)

2. Evaluation of the Potential of Dewatering Associated with Methane Mitigation Systems at Playa Vista Phase I Development, Playa Vista Site, Los Angeles, CA for Playa Capital Company, LLC. (November 23, 2005)

In addition, the CLA intended to hold two meetings "to obtain comments on the groundwater dewatering systems associated with the methane mitigation systems in Phase I of the Playa Vista Development." (8 RR 1638.)

The peer review process limited its consideration to the validity of RPI's consultant's reports on subsidence and groundwater contamination

caused by groundwater dewatering in conjunction with methane systems of certain buildings in the west end of Playa Vista I. RPI's reports estimated approximately 16,000 gallons per day (gpd) were dewatered from four buildings. (3 RR 530.) The model distinguished between "groundwater dewatering" as opposed to what they termed "nuisance dewatering" reducing the estimates of groundwater extraction by 40%. (2 RR 230.) In addition, the peer reviewers initially reviewed dewatering models based solely on historical average groundwater levels, not historic high groundwater levels. (3 RR 529.) While RPI's consultants eventually ran a model for an alleged worse-case scenario, the dewatering estimates from such model were never disclosed. (4 RR 779-783.)

The CLA Report process failed to disclose or analyze significant information that was readily available. For example, the CLA Report failed to disclose the amount of water being pumped from the 21 buildings identified by RPI as possessing a "groundwater dewatering system." (2 RR 226-230; See also 4 RR 692 (identifying 21 dewatering systems).) Further, the City failed to analyze or disclose the amount of dewatering occurring in Phase II of the Playa Vista development or the eastern end of Phase I. (See 2 RR 230.) The CLA Report did not consider water extraction for the "pump and treat" of the contaminated plume, construction dewatering or other dewatering occurring at Playa Vista. The City refused to disclose Industrial Waste Discharge Permits despite the clear relevance of the information and requests for such information by Petitioners. (5 RR 985.) In addition, the City failed to request from the applicant NPDES permits issued by the Regional Water Quality Control Board (RWQCB). (Id.) Importantly, there is nothing in the CLA Report or in the Return Record which identifies the total amount of dewatering occurring at Playa Vista.

In addition, the peer reviewers refused to consider whether the 50-foot vent wells were effective without dewatering. (4 RR 833.) Despite the

fact that prior expert reports prepared for the City emphasized the necessity of dewatering for the 50-foot vent wells, the peer reviewers stated "The referenced ETI Report...[is] unrelated to the dewatering associated with the methane mitigation systems installed at the Phase I Development Site." (4 RR 841.) The City claimed, without evidence, that dewatering the 50-foot vent wells was an "initial concept abandoned by ETI, and the City..." (4 RR 833.)

On February 7, 2007, the City issued another CLA Report consisting of 18 pages ("CLA Report" or "Report"). (3 RR 468.) The Report devoted to itself to criticism of the litigation and conclusory statements from RPI's consultants, from the City's peer reviewers and from the City's Bureau of Engineers (BOE). (3 RR 470-78.) The CLA Report failed to set forth the underlying data relied upon by RPI's consultants. Absent a thorough review of the appendices, City Council was left with either rejecting or accepting the peer reviewers' conclusions, without the benefit of facts presented in an easily available format.

On February 27, 2008, prior to receiving approval from the court, the City rescinded its prior "vacation" of the methane mitigation measures. (1 RR 1.) The City found no substantial evidence in the record to require a subsequent EIR. (1 RR 4.)

F. Procedural History

On March 5, 2007, the City filed its Supplemental Return to Peremptory Writ of Mandamus and [proposed] Order Discharging Writ of Mandate. (10 CT 2291.) Petitioners objected on a number of grounds including that the City had not prepared a subsequent or supplemental EIR as required by the writ. (10 CT 2339.) In Reply, the City claimed, for the first time, the 2007 CLA Report was an addendum. (12 CT 2791.)

Shortly after the reply, but before a hearing on the Return to Writ, Judge Wu was elevated to the Federal Court. The parties then went through seven different judges, (13 CT 2897 (Lee), 2903 (Shook), 2948 (Aragon), 2950 (Sanchez-Gordon), 3017 (Cherness), 3022 (Dau), 3051 (Jones).)

On April 1, 2008, the City moved to discharge the writ and prevent the filing of further objections. (13 CT 3053, 3060.) Petitioners objected arguing that the City could not choose to prepare no further documentation (13 CT 3254-56); the CLA Report was legally inadequate as an addendum (3257); the City failed to consider the 1993 EIR (3258); and failed to notify the Department of Fish and Game (3259-3260.) In addition, Petitioners argued the City failed to actually vacate the methane mitigation measures, and RPI's failed to use actual data for its groundwater models. (13 CT 3264.)

In response, the City claimed that the addendum argument was new, but the CLA Report, nevertheless, met the criteria for an addendum. (15 CT 3474.) In addition, the City claimed it did compare the CLA Report to the EIR. (15 CT 3481.) The City also claimed that consultation with the Department of Fish and Game was not required. (15 CT 3482.) Finally, the City asserted that, because the writ did not specifically require "the suspension of the activity," it was not required to stop building. (15 CT 3484.)

On May 9, 2008, the court ordered the parties to meet and confer regarding the administrative record and file motions to augment for any documents parties could not agree belonged in the record. In compliance with such order, Petitioners sought to augment the record with four sets of documents: 1. documents which were served on the City Attorney (ie. The motion for contempt); 2. documents that were in the City's Department of

Sanitation files for Playa Vista; 3. Documents from the RWQCB, and; 4. documents showing the City's bad faith. (15 CT 3549-50.)[4]

The City opposed the motion to augment claiming that Petitioners had an affirmative duty to obtain even documents contained in City files and submit them to the City. (15 CT 3586-87.) In response, Petitioners noted that City's argument shifted the burden of environmental investigation to the public, and created a duty to obtain documents from the City's files just to resubmit such documents to the City. (16 CT 3622-23.) The Court denied the Motion to Augment holding that Petitioners failed to show that the documents, in the exercise of due diligence, could not have been presented prior to the City decision. (16 CT 3655.) The court ordered the contents of photocopies of the disks to be printed out, which consisted of 41 volumes.

On September 12, 2008, Petitioner's filed "Additional Objection to Return to Writ (Set No. 2)." (17 CT 3866.) Among other things, Petitioners argued that the 41 volumes allegedly contained on the paper copies of the disks, were submitted to the City 6 days prior to the hearing, and therefore could not have been considered. (17 CT 3870.) Additionally, Petitioners noted that the 2001 CLA Report mitigation measures required a hydrological report [to] ensure that groundwater withdrawal will be less than the recharge rate of the aquifer," but, the total amount of water being dewatered is not identified. (17 CT 3872-73.)

Petitioners also filed a second Motion to Augment seeking the Court's consideration of Petitioner's Public Records Act requests for Industrial Waste Discharge Permits from the City dated prior to the City's

---

[4] Petitioner's [Proposed] Volume 9 and 10, were not included in the Clerk's Transcript (15 CT 3560.) However, the documents in Volume 9 and 10 relevant to this appeal are in the record as exhibits. (16 CT 3693-3703.) Petitioners shall lodge such volumes upon the Court's request.

decision and the City's response after the February 27, 2007 hearing. (17 CT 3874-3907.) Real Parties-in-Interest moved to strike the evidence filed with the Additional Objections and Petitioner's second Motion to Augment. (17 CT 4004.) The motion to strike such items was granted. (19 CT 4497C.)

On November 10, 2008, the Court granted the City's Motion Overruling Objections to Return to Writ of Mandate and for an Order Discharging the Writ and Entering Judgment (19 CT 4497.) Petitioners appealed. (19 CT 4504.)

IV. STANDARD OF REVIEW AND BACKGROUND LAW

A. The Court Adjusts the Standard of Review Based on Whether the Alleged Error is Procedural or Evidentiary.

The appellate court reviews the administrative record, not the trial court's decision, and determines, de novo, whether the agency abused its discretion. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 427.) "An abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Pub. Res. Code § 21168.5.)

"[The Court] can and must scrupulously enforce all legislatively mandated CEQA requirements." (*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal. 3d 553, 564 ("Goleta II").) The lead agency is not entitled to any deference on questions of interpretation or procedures under CEQA. CEQA must "be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.) "Only by requiring the [lead agency] to fully comply with the letter of the law can a subversion of the important public

purposes of CEQA be avoided." (*Citizens of Goleta Valley v. Bd. of Supervisors* (1988) 197 Cal. App. 3d 1167, 1176 ("Goleta I") (citation omitted.)

Factual determinations, however, are reviewed under a substantial evidence standard. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 393("*Laurel Heights I*").) Substantial evidence is defined as, "facts, reasonable assumption predicated on facts, and expert opinion supported by facts." (Guideline § 15384.) "The court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document." (*Laurel Heights I, supra,* at 392. (quotation omitted).) "[Courts] may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable." (*Goleta II, supra,* 52 Cal. 3d at 564.) The Court reviews the "record as a whole contains substantial evidence to support a determination that the changes in the project were not so 'substantial' as to require 'major' modifications to the EIR." (*Bowman v. City of Petaluma* (1986) 185 Cal. App. 3d 1065, 1075.)

The Court must distinguish between factual questions and procedural questions. "[A] reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts. For example, where an agency failed to require an applicant to provide certain information mandated by CEQA and to include that information in its environmental analysis, we held the agency 'failed to proceed in the manner prescribed by CEQA.'" (*Vineyard Area, supra,* 40 Cal. 4th at 435.) Thus, the Court will independently review the record to determine whether the agency failed to include relevant information that precluded informed decisionmaking. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 946.)

B. CEQA Requires the Agency to Consider Environmental Impacts Prior to Approving a Project.

"CEQA is a comprehensive scheme designed to provide long-term protection to the environment." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal. 4th 105, 112.) The Legislature mandated that government "Take all action necessary to provide the people of this state with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise." (Pub. Res. Code § 21001.) The purpose of CEQA is "to compel government at all levels to make decisions with environmental consequences in mind." (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal. 3d 263, 283; Pub. Res. Code § 21000(g).)

CEQA is primarily implemented through the preparation of environmental impact reports ("EIRs"), which are described as "the heart of CEQA," an environmental "alarm bell" designed to alert decisionmakers and the public of the environmental consequences prior to approving the project. (*Laurel Heights I, supra,* 47 Cal. 3d at 392.)

> The CEQA process is intended to be a careful examination, fully open to the public, of the environmental consequences of a given project, covering the entire project, from start to finish. This examination is intended to provide the fullest information reasonably available upon which the decision makers and the public they serve can rely in determining whether or not to start the project at all, not merely to decide whether to finish it.

(*NRDC, Inc. v. City of L.A.* (2002) 103 Cal. App. 4th 268, 271(quoting Attorney General Brief).)

"[P]ublic agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects..." (Pub. Res. Code § 21002.) A significant effect is defined as "a substantial or

potentially substantial adverse change in the environment." (Pub. Res. Code § 21068.) For each significant effect, the EIR must identify alternatives to avoid the impacts, propose mitigation measures reducing the impact to a level of insignificance, identify significant irreversible or unavoidable impacts, and identify impacts that are not considered significant. (Pub. Res. Code § 21100.)

The EIR and the findings serve "to demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its action." (*No Oil, Inc. v. Los Angeles* (1974) 13 Cal. 3d 68, 86 (superseded on other grounds by Pub. Res. Code § 21082.2(b)).) If done correctly, the public is able to determine the environmental and economic values of their elected officials, thus allowing for appropriate action come election day. (*People v. County of Kern*, 39 Cal. App. 3d 830, 842.)

Numerous cases have described the dangers of proceeding with a project before completing an adequate EIR:

> It is all too likely that if such activities proceed pending preparation of an adequate EIR, momentum will build and the project will be approved, no matter how severe the environmental consequences identified in the new EIR. Consideration of alternative sites or density or additional mitigation measures...for the development project will have proceeded well beyond the planning stages and change will be both more difficult to effect and less likely to occur.

(*San Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 741.)

Consistent with this requirement, when changes to the project, changes to the circumstances or new information arises which requires revisions to the EIR, no further discretionary decisions may be made until the lead agency, or responsible agency, prepares subsequent environmental documents rendering the EIR "adequate." (Guidelines § 15162.)

C. CEQA Requires a Public Agency to Consider the Legal Adequacy of an EIR at Every Subsequent Discretionary Approval and Update the EIR if Necessary.

Once the time for challenging an EIR has passed, the EIR is presumed valid. (Pub. Res. Code § 21167.2.) At that point, the finality of the public agency's decision is favored over public review. (*Bowman v. City of Petaluma* (1986) 185 Cal. App. 3d 1065, 1074.) Even new information of substantial importance does not mandate the reopening of the certification of the EIR unless there is another discretionary decision. (*Fort Mojave Indian Tribe v. Department of Health Services* (1995) 38 Cal. App. 4th 1574, 1597.) In addition, Public Resources Code section 21166 states that a subsequent or supplemental EIR may not be required absent one of the following conditions:

> **(a)** Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
>
> **(b)** Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.
>
> **(c)** New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

(Pub. Res. Code § 21166.)

However, CEQA requires government at all levels to consider the environmental consequences of its decisions. (Pub. Res. Code § 21001.) Thus, at the next discretionary approval for the project, a public agency must consider the EIR and proceed accordingly.

The CEQA guidelines explain the circumstances requiring the preparation of a Subsequent EIR, Supplemental EIR or addendum. A

subsequent EIR is usually reserved for circumstances where the EIR requires major revisions to be legally adequate. (City of San Jose v. Great Oaks Water Co. (1987) 192 Cal. App. 3d 1005, 1016.) Thus, if "substantial changes" to the project or circumstances requires "major revisions" to the EIR a subsequent is required. (Guidelines § 15162.) In addition, a subsequent EIR is required when "new information of substantial importance" demonstrates ***any*** of the following:

> (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
>
> (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
>
> (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
>
> (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.

(Guidelines § 15162 (emphasis added).)

A supplemental EIR may be prepared if, "Only minor additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation." (Guidelines § 16163(a)(2).) The supplemental EIR need only contain the additional information to make the EIR adequate for the project, as revised. (Guidelines § 15163(b).) The supplemental EIR must be considered in conjunction with the previous EIR, prior to approving the project. (Guidelines § 15163(e).)

An addendum may be prepared when "some changes or additions" are required to the EIR, but none of the circumstances requiring the preparation of a subsequent or supplemental EIR have occurred. (Guidelines § 15164(a).) In other words, if changes to the EIR are required, then, at a minimum, an addendum must be prepared. The addendum need not be circulated for public review, but can be included or attached to the final EIR. (Guidlelines § 15164(c).) Importantly, the lead agency must consider the addendum in conjunction with the Final EIR prior to approving the project. (Guidelines § 15164(d).)

The final option mentioned in the Guidelines is "no further documentation." (Guideline § 15162(b).) In the hierarchy of options, the circumstances permitting the agency to avoid any further CEQA review must be less than the "some changes or additions" required to trigger the need for an addendum. Thus, the logical conclusion is that the agency may avoid all CEQA processes only when there are no changes to the project, no changes in the circumstances, and no new information, and therefore the EIR adequately describes and mitigates the project.

D. The Agency Must Focus its Review on the Adequacy of the EIR, not the Mitigation Measures, to Determine the Appropriate Level of Environmental Review.

"The first step in determining whether supplemental environmental review is required under section 21166 is to identify the changes in the project that were not considered in the original environmental review document." (*American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal. App. 4th 1062, 1073-1074.) The focus must be whether the prior EIR remains legally adequate to describe the project, and the significant impacts, mitigation measures, and significant unavoidable impacts related to the project. (*Mira Monte Homeowners Ass'n v. County of Ventura* (1985) 165 Cal. App. 3d 357, 365-

66; *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal. App. 4th 1385, 1397; see also Guidelines § 15163 (emphasizing minor changes "to make the previous EIR adequate".) This is an incredibly important point. If changes to the project, changes in the circumstances or significant new information are discovered, the agency must consider whether the EIR continues to properly serve its informational function.

This focus on the steps necessary to make the prior EIR legally adequate is abundantly evident in the case law. For example, the discovery that a road alignment would go through wetlands was significant new information making the prior EIR legally inadequate. "The failure to prepare a subsequent or supplemental EIR deprived the public, who relied on the EIR's representations, of meaningful participation regarding the issue of wetland degradation." (*Mira Monte Homeowners, supra,* 165 Cal. App. 3d at 365.)

Similarly, the Supreme Court found the failure to prepare a subsequent EIR constituted an abuse of discretion when a project expanded from six to ten acres, increased seating capacity by 200%, and moved a stage to face residences. The Court found the failure to prepare a subsequent or supplemental EIR deprived the public of the ability to comment on the actual project, as opposed to the project described in the EIR. (*Concerned Citizens of Costa Mesa v. 32nd Dist. Agric. Ass'n* (1986) 42 Cal. 3d 929, 937.)

In contrast, a pipeline realignment was not considered a significant change warranting a subsequent or supplemental EIR because the negative declaration considered substantially the same route. (*Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal. App. 4th 689, 704.) The Court noted:

> The location of the Silver Creek alignment is not significantly different from the Via del Oro alignment that was fully

> evaluated and subject to public review and comment in connection with the phase 2 initial study and negative declaration...Petitioners do not explain, nor does the record shed any light upon how, if at all, the Silver Creek route poses a different or greater threat to the aquifer than that posed by the Via del Oro route.

(*Id.*)

Here, because the 1993 EIR neither analyzed nor contemplated the existence of large pockets of methane at Playa Vista, this was significant new information requiring, at a minimum, a supplemental EIR. The mere requirement to adopt methane mitigation measures is predicated on the fact that methane is a significant effect on the environment. (See Guidelines §15126.2(a).) Furthermore, the fact that permanent dewatering activities were considered significant impacts in the EIR, but not significant impacts in the CLA Report, again demonstrates that changes to the EIR are necessary and a subsequent or supplemental EIR is required. (See, CEQA Guidelines §§ 15151 (summarize disagreement among experts); 15064(g) (disagreement among experts).) The previous 1993 EIR is legally inadequate without major revisions.

IV. ARGUMENT

A. The 2007 CLA Report Process Did Not Comply With The Procedures Set Forth In The Guidelines.

i. The City Failed to Proceed in a Manner Required by Law by Failing to Identify and Compare the Changes to the Project with the Original Project Described in the 1993 EIR.

"The first step in determining whether supplemental environmental review is required under section 21166 is to identify the changes in the project that were not considered in the original environmental review document." (*American Canyon Community United for Responsible Growth*

v. City of American Canyon (2006) 145 Cal. App. 4th 1062, 1073-1074.) Without describing the project as originally proposed, and identifying the changes or additions to the EIR, neither the decisionmaker nor the public can make an informed decision on whether the changes, if any, require subsequent environmental review.

In this case, the CLA Report fails to mention, let alone analyze the information in the 1993 EIR. (3 RR 468 to 479.) The City must disclose what was analyzed in the EIR, what changes to the EIR are required, and what new analysis must be added. There is nothing in the record or in the transcripts that demonstrates that the EIR was considered by the City Council, except to mention that the project was approved with an EIR around 1994. (2 RR 311, 394, 445.)

The City will likely argue that a CD Rom of the 1993 EIR was part of the record and was listed as one of the documents reviewed by the peer reviewers (3 RR 481.) "[T]he fact that the EIR was transmitted to the council members [does not] ... compel the inference that the document was reviewed and considered by them any more than does the fact that a horse was led to water compel the inference that it drank from it." (*Kleist v. City of Glendale* (1976) 56 Cal. App. 3d 770, 777.) Listing the 1993 EIR as one of the documents reviewed by the peer reviewers is not equivalent to a good faith analysis of the necessary changes to the 1993 EIR. (3 RR 481-82; see also 3 RR 488.)[5]

Furthermore, the analysis comparing the information in the 1993 EIR to the new information should be included in the CLA Report. "[I]nformation scattered here and there in EIR appendices, or a report buried in an appendix, is not a substitute for a good faith reasoned analysis ... " (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of*

---

[5] The trial court and Petitioners had a paper photo-copy of the disk allegedly containing the 1993 EIR. (4 RR 822.)

Rancho Cordova (2007) 40 Cal. 4th 412, 442 (internal quotations omitted).) However, even if the City Council and the public attempted to ferret out the information, they would find the record lacking. The most detailed statement contained in any of the peer review reports about the EIR states, "Playa Vista draft and final Environmental Impact Reports did not contain data specifically relevant to the issue of dewatering at Playa Vista." (3 RR 488.) This indicates that substantial changes and analysis must be added to the 1993 EIR to serve its informational purpose.

Additionally, the important task of considering whether the 1993 EIR required substantial changes cannot be delegated to non-elected officials or third party reviewers. (*Kleist , supra,* 56 Cal. App. 3d at 779; See also, *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal. App. 3d 872, 885.) Whether the peer reviewers believed that substantial changes were required to make the 1993 EIR legally adequate is irrelevant. There must be an indication in the record that the City Council reviewed the EIR and made such determination.

The first step in determining whether additional environmental review is necessary is to identify the changes or additions to the project or circumstances, and determine whether the EIR adequately covered such impact. The City failed to proceed in a manner required by law by failing to conduct such analysis.

ii. The City Lacked Substantial Evidence for its Implied Finding That No Further Environmental Documentation was Necessary.

A lead or responsible agency may prepare one of three documents when faced with project changes, changed circumstances or new information of substantial importance. (Guidelines § 15162(c).) A subsequent EIR is required when major changes to the EIR are necessary. A supplemental EIR is required for minor changes to the EIR. An

addendum may be used when "some changes" to the EIR are necessary, but the conditions triggering a subsequent EIR are not present. A determination that no further action is required is only appropriate when no changes are necessary to render the prior EIR legally adequate to analyze the project. In this case, the City impliedly determined that no further environmental documentation is necessary to render the 1993 EIR legally adequate. The City lacked substantial evidence to support such decision.

This issue was addressed in by the Court in the underlying lawsuit. The Court noted:

> The 1993 EIR and the conditions imposed by the city council upon approval of a tentative tract map in 1993 cautioned against dewatering in connection with a proposed sewer along Jefferson Boulevard and "long-term pumping" in connection with subterranean structures, noting the potential for subsidence and exacerbation of existing groundwater contamination. We conclude that the permanent groundwater dewatering contemplated in connection with the methane mitigation measures adopted by the city is a *potentially* substantial project change because it could result in those new or substantially severe significant impacts.

(*ETINA v. L.A.*, 1 CT 52-53.)

A significant effect is defined as "a substantial, or potentially substantial adverse change in the environment." (Pub. Res. Code § 21068.) Thus, this Court's decision that the dewatering "could result in those new or substantially severe significant impacts," means that the Court has already found that dewatering may result in a significant impact, and therefore an SEIR would be required. (Pub. Res. Code § 21166; CEQA Guidelines §§ 15162, 15163.)

In addition, the 1993 EIR warned, "Past overpumping of the local ground water lowered the groundwater levels and degraded the ground water quality as a result of sea water intrusion." (4 RR 822 at 39.) Thus, to the extent that the EIR contemplated long-term dewatering, a series of

mitigation measures were required, including the identification of well locations and expected dewatering volumes in the pre-design phase, and plans for beneficial use and discharge of the pumped water. (4 RR 822 at 40.) The City does not have the option of not complying with mitigation measures identified in the EIR. (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2005) 130 Cal. App. 4th 1491, 1508.)

Petitioners and others repeatedly requested information concerning all dewatering activities at Playa Vista, including well locations and the amount of dewatering. (2 RR 428-429, 5 RR 859, 7 RR 1357, 8 RR 1469, 1476.) As noted by Grassroots Coalition, "The NPDES data and Sanitation Department dewatering data which relates to all ongoing dewatering needs within Phase I and as such must be included to both validate the data being utilized by Playa Capital...and to include in the dewatering evaluation." (8 RR 1469.) Well locations and amounts were never provided to the public or the decisionmaker. If the City determined that it no longer needed to identify well locations and expected volume at the predesign stage, it had to provide an explanation of why this mitigation was deleted. (*Lincoln Place, supra,* 130 Cal. App. 4th at 1509.) Otherwise, this information should have been provided. (Pub. Res. Code § 21081.6.)

Furthermore, if the City found that the long-term dewatering at Playa Vista was no longer a significant impact, this is a substantial change to the 1993 EIR requiring a subsequent or supplemental EIR as well. (Guidelines § 15151 (EIR should summarize disagreement between experts); see also 15064(g) (disagreement among experts considered significant impact).) Instead, the City determined that no changes were required to the EIR, and chose to prepare no further documentation. The City failed to proceed in a manner required by law.

iii. Even if the 2007 CLA Report was Considered an Addendum, the City Abused Its Discretion by Not Considering it With the 1993 EIR.

Respondents claim that the CLA report is an addendum. (17 CT 4026.) However, there is no indication that the City considered the Report an addendum to the 1993 EIR. Nothing in the CLA Report identifies it as an addendum. The City Attorney did not identify the Report as an addendum at the hearings. (2 RR 403.) The Notice of Determination does not state that an addendum to the 1993 EIR was prepared. (1 CT 1.) However, even if the CLA Report was an addendum, the City still failed to proceed in a manner required by law.

An addendum must be included in, attached to, and considered with the previously prepared EIR prior to approving the project. (Guidelines § 15164(c)&(d).) Importantly, a finding that the City considered the EIR in conjunction with the addendum, prior to approving the project is necessary. (*Save San Francisco Bay Ass'n v. San Francisco Bay Conservation Etc. Com.* (1992) 10 Cal. App. 4th 908, 935; but see, *Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal. App. 4th 91, 114-15.) The City failed to make such finding either expressly or impliedly, and there is no evidence the City Council considered the CLA Report in conjunction with the 1993 EIR prior to approving the project.

In the *Save San Francisco Bay* case, the Court held that the failure to include a finding that the agency considered the EIR when approving an addendum was an error. (*Save San Francisco Bay, supra,* at 935.) But, the Court held that such error was akin to a clerical oversight, "de minimis in the extreme", because the Port Commission clearly considered the EIR in its lengthy review. (*Id.*) There is no such de minimis error in this case. The City simply failed or refused to consider the 1993 EIR in conjunction with the CLA Report.

The 1995 combined addendum/ mitigated negative declaration prepared by the City is instructive. (4 RR 822 at 23852 et. seq.) The document specifically states, "The decision-making body shall consider the addendum with the Final EIR prior to making a decision on the proposed tract modification and amendments [to the project]" (4 RR 822 at 23888.) The addendum also goes issue-by-issue through the 1993 EIR identifying changes and explaining why the EIR did not need to be recirculated. (See e.g. 4 RR 822 at 23906 (air quality), 23954 (light glare), 23962 (land use), 23991 (traffic), 24025 (water supply); see also 4 RR 822 at 23888-89 (discussing document structure).) In addition, the City not only considered the addendum in conjunction with the 1993 EIR, but prior to approving the project, the addendum required the City to recertify the EIR. (4 RR 822 at 23888.) This demonstrates the proper focus of subsequent environmental review as a determination of what actions, if any, are necessary to render the previous EIR legally adequate. (See also, 4 RR 822 at 24156 et. seq..(traffic addendum).)

In contrast, there is nothing in the City's CLA Report that identifies itself as an addendum to the 1993 EIR. The only mention of the 1993 Final EIR, is a listing at the back of 2007 CLA report, for "Additional documents Reviewed under the Initial Peer Review Reports." (3 RR 481.)

Both Respondents and the trial court claim that "virtually any post-EIR public agency analytical document is considered an "addendum" if it adds new information that does not also disclose "significant new effects". (15 CT 3474; 19 CT 4497E)[6] The trial court noted that "a mere letter by a traffic engineer qualifies as an addendum." (19 CT 4497E-F (citing *A Local and Regional Monitor v. City of Los Angeles* (1993) 12 Cal. App.

---

[6] The trial court's November 10, 2008 decision is attached as exhibit 1 to the "Order Correcting Clerk's Transcript" filed December 18, 2009. (Appellate Court Order dated December 29, 2009.)

4th 1173, 1802-03 ("*ALARM*").) In *ALARM* a traffic engineer drafted a letter re-analyzing the traffic data contained in an EIR. (*Id.* at 1787.) The only change in comparison to the EIR was a change in traffic percentage for a freeway. (*Id.*) The letter's conclusion was identical to the conclusions contained in the EIR, namely the project would have significant unmitigable impacts.

Importantly, in *ALARM* the City did consider the EIR in conjunction with the traffic letter addendum. "The Planning Commission then made the finding of 'Overiding Considerations' with respect to the Project's unavoidable significant impacts on traffic:...as required by CEQA." (*Id.* at 1787-88.) The letter addendum was considered by each "responsible agency" prior to approving the project in conjunction with a review of the entire EIR. (*Id.*; Guidelines § 15062.)

Regardless of whether a document is labeled "addendum," to be considered an addendum the document must identify the changes to the EIR, and demonstrate why such changes do not require the preparation of a subsequent or supplemental EIR. The agency must consider the addendum with the EIR prior to approving the project. The City failed to make such findings, and failed to consider the 1993 EIR as required by CEQA.

B. The City Failed To Conduct A Full And Open Process Designed To Determine Whether Dewatering Caused A Significant Impact.

Instead of complying with CEQA and reviewing all dewatering at Playa Vista and all potential effects of dewatering, the City conducted a peer review of a model of five buildings (actually four) in Phase I that allegedly had dewatering systems below average historical groundwater levels. (3 RR 530.) Actual dewatering data of groundwater extractions within Playa Vista or the surrounding area was not disclosed. Even the four buildings that were included in the groundwater model reviewed by the

City were based on estimates, not actual pumping volumes. (Id.) Such narrow review precluded informed decisionmaking and public review.

The City cannot avoid the mandates of CEQA by narrowly construing the writ. Courts have previously admonished the City for engaging in this exact behavior: "The perimeters of this lawsuit do not necessarily mark the boundaries of the city's CEQA-imposed obligations." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal. App. 3d 185, 204.) The City must comply with both the writ and CEQA. Consistent with such requirement, the writ issued by the court specifically included the phrase, "and proceed accordingly as required by CEQA." (1 CT 103.)

To comply with CEQA, the process must be open to the public, and premised on full and meaningful disclosure of the project and its impacts. (*County of Inyo v. City of L.A.* (1984) 160 Cal. App. 3d 1178, 1185.) Information relevant to significant impacts of a project must be made available as soon as possible by the lead agency, other public agencies, interested persons and organizations. (Pub. Res. Code § 21003.1.) Non-compliance with the information disclosure provisions constitutes a prejudicial abuse of discretion, regardless of whether the City would have come to a different conclusion. (Pub. Res. Code § 21005.) "A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 712; *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal. App. 4th 99, 118; *See also, Sierra Club v. State Bd. of Forestry* (1994) 7 Cal. 4th 1215, 1235.)

Here, the City avoided and suppressed evidence that did not support its desired outcome of no further environmental review. The City failed to disclose all the dewatering occurring at Playa Vista, making it impossible

for the public or the decisionmaker to determine whether dewatering has a cumulatively significant impact. In addition, the City relied upon models which relied upon hypothetical data, when actual data could have been presented. Finally, the City failed to notify important trustee agencies who could contribute important information to the process, and help evaluate the information presented.

i. The City Failed to Gather or Present Data Necessary for Determining Whether Dewatering Activities Are Cumulatively Significant.

The City, by limiting its review to Playa Capital's groundwater model of five buildings, failed to provide sufficient evidence to determine whether the groundwater dewatering created a cumulatively significant impact. To evaluate the cumulative impacts of dewatering, the City must disclose and consider the total amount of groundwater extraction from all sources in the Playa Vista area, and the
the recharge rate of the aquifers. Without these two vital pieces of information, the City Council cannot determine whether groundwater extraction exceeds the recharge rate of the aquifer resulting in cumulatively significant impacts to the groundwater basin. (See also, 1 CT 54 (2001 CLA Report requiring such study).)

A lead agency must determine not only whether direct and indirect effects of a project are significant, but also whether such impacts are cumulatively significant. (Guidelines §§ 15064(h)(1); 15065(a)(3).) A cumulative impact is described as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." (Guidelines § 15355.) The importance of conducting a serious cumulative impacts analysis cannot be overstated. "One of the most important environmental lessons evident from past experience is that environmental damage often occurs incrementally from a

variety of small sources. These sources appear insignificant assuming threatening dimensions only when considered in light of the other sources with which they interact" (*Kings County Farm Bureau, supra,* 221 Cal. App. 3d at 720.) "[T]he outcome may appear startling once the nature of the cumulative impact problem has been grasped." (*Id.* at 721.) The process required under Public Resources Code section 21166 does not exempt the City from considering cumulative impacts.

Despite Phase I's massive size, the CLA Report does not describe the number of buildings in Playa Vista Phase I or how many buildings require dewatering systems. (See e.g., 7 RR 1328 (noting "several excluded sites have multiple water pumps to each dewater at rates of 60 to 150 gallon per minute. (attachment 1).")[7] A thorough search of the Return Record reveals a table entitled "Construction and Vesting Status of Playa Vista Phase I" submitted by RPI on the date of the final hearing. (2 RR 226.) The table identifies 39 buildings in the "west end of the First Phase." (2 RR 226-29.) 18 buildings are identified as possessing "ground-water dewatering system." Yet, the table fails to identify the volume of dewatering occurring at each building site.

Dewatering information could have been easily provided by the Los Angeles Department of Sanitation which issues Industrial Waste Discharge Permits. RPI's consultant clearly reviewed such permits, noting, "permitted discharge flows under the Industrial Discharge Permits of 35,000 gpd." (3 RR 530.) Despite repeated requests for the Industrial Waste Discharge permits, such information was conspicuously absent from the record. (5 RR 859, 986, 7 RR 1327, 1357-58.) Obviously, the total amount of dewatering is crucial for determining whether dewatering at Playa Vista is cumulatively considerable.

---

[7] "Attachment 1" appears to be missing from the administrative record. Attachment 2 is also missing, which identifies 65 dewatering sites.

Of course, as indicated by the description "Playa Vista Phase I", there is also Playa Vista Phase II. (2 RR 226.) Yet, there is no analysis of Phase II dewatering activities. Dewatering is certainly contemplated in Phase II (aka "Village at Playa Vista"), as demonstrated by the Peer Reviewer's comment: "We note also that the draft EIR for the Village at Playa Vista ... specifically discussed potential impacts of dewatering associated with methane system dewatering and ongoing remediation efforts." (3 RR 491.) The peer review report goes on to state that the dewatering would not result in adverse impacts at the Village at Playa Vista and Phase I, but there are no facts in the record to support such conclusion. (3 RR 491.)

In addition, as indicated by the table identifying the buildings as the "West end of the First Phase", there is an east end of Phase I (aka "Campus"). (2 RR 510.) There is no analysis of the actual or proposed dewatering activities at the east end of Phase I. Though Playa Capital claims dewatering is not anticipated to occur below buildings at the east end (2 RR 230.) But, that is not evidence that no dewatering is occurring or will not occur. (See 15 Supp.RR. 3751 (groundwater depression from extraction in Campus area).)

Dewatering activities independent of buildings must also be evaluated to determine whether there is a significant impact. It was incumbent on the City to request dewatering data from the Regional Water Quality Control Board ("RWQCB"). Despite Petitioners' request that such data be evaluated, there is no evidence that the City requested NPDES permits or flow meter data from RWQCB. (5 RR 986.) Yet substantial dewatering is occurring at Playa Vista. As noted by CDM, "Pumping occurs at locations at the site...associated with remediation at the former TS2 and Fire Safety Training Area (FSTA) sites. A rate of 1.9 gallons per minute ("gpm") is produced at the FSTA site and a net of about 7 gpm in

excess of infiltration is produced from the former TS2 system." (3 RR 528-29.) From this statement, it is unclear how much water is being pumped, because it is impossible to determine the rate or amount of "infiltration," however, it would appear to be a significant amount. (7 RR 1328 (TS2 = 10,000 gpd).)

The prior Appellate Decision found that dewatering may have a significant impact on both subsidence and the migration of the plume. But, there are other impacts that must be considered as well. For example, the 1993 EIR noted that "past overpumping of the local ground water lowered ground water levels and degraded ground water quality as a result of sea water intrusion." (4 RR 822 at 39; See also 2 RR 224-25 ("saltwater control pumping").) This is of particular concern because the Ballona Wetlands, a State-owned ecological reserve, is directly adjacent to Playa Vista. (2 RR 430.) The California Department of Fish and Game requested to review any dewatering plan for this very reason. (5 RR 1004.)

Without knowing the total amount of groundwater dewatering and the total amount of water in the aquifer, it is impossible for the City Council to determine whether overpumping may cause a significant cumulative impact. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 729-30.) Proper analysis of potential cumulative impacts of dewatering at Playa Vista requires a description and analysis of all dewatering activities at Playa Vista. This information is available from the Department of Sanitation and the RWQCB, but the City failed to request or provide such information. Without providing the total volume of all dewatering activities, neither the City nor the public can properly evaluate or participate in the public process. (See, *Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal. App. 4th 74, 95 (recirculation required to address the volume of groundwater in the aquifer).)

ii. The City Abused Its Discretion By Relying on Estimations for Dewatering Instead of Actual Data for the Dewatering.

The CLA Report came to the conclusion that dewatering would cause no significant impact. This conclusion was based on a peer review report describing the groundwater model prepared by CDM, RPI's consultants. (3 RR 502.) Such model analyzed the estimated groundwater extraction of 16,000 gallons per day ("gpd") from five building (actually four).

The estimate of 16,000 gpd was derived by taking the alleged actual, but unstated metered discharge from Avalon, then estimating that only 60% of such total discharge was from groundwater for "a corrected groundwater discharge of 209 cubic feet per day." (3 RR 530.) [8] Based on such assumptions, CDM calculated the estimated groundwater extractions for the South Crescent Park Apartments (294 cu.ft./day), Waterstone (605 cu.ft./day), and North Crescent Park Apartments (1001 cu.ft./day), for a total of approximately 2,100 cubic feet of dewatering per day, assuming 40% of the discharge came from irrigation. (3 RR 530.) South Crescent Park Apartments Building 1was not included, because it was assumed that the South Crescent Park Apartments Bldg 2 would sufficiently lower the groundwater.

Without getting into whether the estimated dewatering should be reduced by 40% for the purpose of modeling, [9] the simple fact that the model was based on estimates and not real world data is problematic under CEQA. (*Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal. App. 4th 99, 121; See also, *County of Amador v.*

---

[8] A cubic foot of water equals approximately 8 gallons. (16,000 gallons/ 2100 cubic feet = approximately 8 gallons.) (3 RR 530.)

[9] If 40% of such discharge comes from irrigation, then Avalon uses approximately 1120 gpd of water for irrigation.

El Dorado County Water Agency (1999) 76 Cal. App. 4th 931, 955 ("focus on existing conditions, not hypothetical situations.") While modeling estimates are appropriate when no data is available, if actual data is available "the impacts of the project must be measured against the 'real conditions on the ground.'" (*Save Our Peninsula, supra,* at 121 (citations omitted).)

In *Save Our Peninsula,* the applicant attempted to use estimated historical irrigation to establish a baseline for water usage. However, project opponents noted that the pasture had not been historically irrigated and requested records demonstrating the actual historical use. (*Id.* at 122.) Although the water district kept well records since 1980, the well records were not in the record. The court took issue with the failure to obtain such documentation:

> We are concerned by this apparent delegation ... to gather the necessary information to support a determination of baseline water use. We believe CEQA requires that the preparers of the EIR conduct the investigation and obtain documentation to support a determination of preexisting conditions.

(*Id.*)

The court noted that the only evidence came from the applicant, who had a vested interest in providing a high estimate of water usage. (*Id.* at 122.) The court concluded, "If further investigation would have uncovered documentary evidence regarding the historical use of water on the property, that was the province of the EIR." (*Id.*) In other words, if actual data is available, then it is an abuse of discretion to use modeling data.

Concern with the lack of actual data was expressed by the Department of Toxic Substance Control ("DTSC") which noted, "the documents do not contain sufficient background information . . . to verify the model input parameters and calibration." (2 RR 210.) In addition, DTSC observed "the model results would be very sensitive to the changes

of certain input parameters." (Id.) While perhaps the model did not show a significant impact, DTSC noted, "The model simulation may not reflect the actual groundwater plume response under the site conditions." (Id.) Therefore, DTSC recommended a strong on-going performance monitoring program. (Id.)

Dewatering data is available in this case, just not provided. Each of the buildings used in the model was fully constructed and occupied, with the exception of the South Crescent Park Apartments, whose methane system was installed and operational. (2 RR 226-229.) Each of these buildings possess industrial waste discharge permits, as evidenced by CDM's claim that the buildings have permitted discharges of 35,000 gpd. (3 RR 530.) There is no legitimate excuse for the failure to disclose and possibly utilize the actual dewatering volumes for the model. (See, 1 RR 21 (claiming actual flows not predictive of impacts).)

Finally, the model appears to conflict with earlier dewatering estimates. For example, one of the buildings, Waterstone (Product 102), was earlier estimated to have 4,815 cu/ft per day of dewatering. (32 Supp.RR 8541.) Even if it was assumed that 40% of the total came from irrigation, that is 2,889 cu.ft. (23,112 gpd) of dewatering, almost five times the 605 cu.ft. estimated by CDM. (3 RR 530; see also, 33 Supp.RR 8838 (100 gpm pump).) Such inconsistency demonstrates the need for actual dewatering information. Because pumping has occurred at the buildings since completion, actual dewatering amounts should have been disclosed and utilized.

iii. The City Failed to Proceed in a Manner Required by Law by Failing to Consult with a Trustee Agency in Violation of CEQA.

Notification and consultation with responsible or trustee agencies is an important part of CEQA. Potential significant impacts could be missed

or ignored if the proper agencies are not notified concerning the scope of a project. Thus, CEQA requires notification and consultation with responsible or trustee agencies even prior to the preparation of an initial study. (*Mejia v. City of Los Angeles* (2005) 130 Cal. App. 4th 322, 340.)

Section 21080.3 of CEQA states:

> Prior to determining whether a negative declaration or environmental impact report is required for a project, the lead agency shall consult with all responsible agencies and trustee agencies. Prior to that required consultation, the lead agency may informally contact any of those agencies.

(Pub. Res. Code § 21080.3(a).)

In this case, the Court ordered the City to make a determination whether a subsequent EIR or supplemental EIR was required. Thus, the City was required to consult with all responsible or trustee agencies prior to making its determination. The Guidelines specifically identify the California Department of Fish and Game as a "trustee agency." The Guidelines state:

> Trustee agencies include...The California Department of Fish and Game with regard to the fish and wildlife of the state, to designated rare or endangered native plants, and to game refuges, ecological reserves, and other areas administered by the department.

(Guidelines § 15386.)

Here, the Department of Fish and Game, as a "trustee agency," requested a copy of any mitigation plan, dewatering plan or any document prepared for CEQA. (5 RR 1004.) They noted that "as the landowner of the Ballona Wetlands Ecological Reserve, the Department is interested in any project or activity that could directly or indirectly impact the ecological reserve." (Id.) But, the City never notified the Department of Fish and Game, and therefore Fish and Game was never able to analyze or comment

on the dewatering and its potential to impact to wetlands. (15 CT 3482.) This violated the information disclosure provisions of CEQA. (*Fall River Wild Trout Found. v. County of Shasta* (1999) 70 Cal. App. 4th 482, 493.)

The City argued that because dewatering would not have a significant effect, they were not required to notify the Department of Fish and Game. (15 CT 3482.) Similar arguments have been rejected by the Courts:

> A public agency is a trustee agency only if it has jurisdiction over resources "affected by" a project. (Guidelines, § 15386; see also § 21080.3, subd. (a).) If the lead agency proposes to adopt a negative declaration, however, then by definition it has found that the project will have no significant effects on any resource.
>
> We conclude that natural resources can be "affected by" a project, and hence the lead agency may have duties toward "trustee agencies," even if the lead agency believes the project will have no significant effect on the environment. This broad construction of "trustee agency" serves the statutory purpose of fostering interagency consultation.

(*Gentry v. City of Murrieta* (1995) 36 Cal. App. 4th 1359, 1387.)

Dewatering could potentially affect the adjacent Ballona Wetlands Ecological Reserve. The City was required to consult with the Department of Fish and Game prior to its determination to not prepare a subsequent or supplemental EIR. The City abused its discretion by failing to notify a trustee agency in violation of CEQA's information disclosure provisions. (Pub. Res. Code § 21005.)

iv. The Informational Process of CEQA was Violated Because a Corrupt Disk Prevented the Public from Independently Verify Playa Vista's Groundwater Modeling.

Playa Vista's data and model for groundwater dewatering was not independently verifiable by the public, because the raw data was not available for use by Petitioner's experts. (7 RR 1328.) The disk provided to Petitioners purportedly containing such data was corrupt and unreadable. (4 RR 845.) The peer reviewers denied that the files were corrupt. (4 RR 846.)

However, other experts could not open the data files from CDM. For example, Dr. Tong from the RWQCB did not review the files. As noted by the City, "Dr. Tong stated that he had scrutinized the CDM site groundwater model concept, the boundary parameters and other input parameters and assumptions. While lacking the resources to physically run every model on every project submitted to his office..." (4 RR 834 (emphasis added).) Notably, the City fails to state that the RWQCB opened CDM's model, which leads to the conclusion that RWQCB never independently verified the model, but only reviewed the parameters.

In fact, the City's peer reviewers also had trouble opening CDM's data disk for the Modflow program, so CDM provided a replacement disk. (8 RR 1512.) Despite not be able to initially access CDM's data, the peer reviewers dismissed Petitioners' assertion that the data disk was corrupt, stating, "it is understandable how these files could be perceived as being corrupt by a user to attempting [sic] to view them without the appropriate software." (4 RR 846.) Neither the City nor CDM provided Petitioners with a replacement disk.

Clearly, if neither the peer reviewers nor the RWQCB could utilize CDM's original data disk, then it is not a problem with Petitioners' experts. When the peer reviewers received a replacement disk, they should have

provided such disk to Petitioners. Failure to do so violated the information disclosure requirements, and constituted an abuse of discretion. (Pub. Res. Code § 21005.)

v. Documents Excluded from the Record Demonstrate a Specific Intent to Suppress Evidence.

The introduction of extra-record evidence has been so narrowly construed that it is uncertain whether even documents intentionally suppressed by a lead agency are admissible. (See *Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal. App. 4th 74, 118 n. 28.) Nevertheless, Petitioners believe that the circumstances in this case require the Court's consideration of two sets of extra-record documents: 1. documents from the LA City Department of Sanitation, including a table showing permitted discharges of up to 72,000 gpd, and 2. documents from the RWQCB showing permitted discharges of 950,000 gallons per day. (16 CT 3696-3700.) Without such information, the City Council could not make an informed decision. (Pub. Res. Code § 21005.)

These documents were in existence at the time of the hearing, and in possession of the City and RPI. Petitioners could not have known that the City would not comply with requests to obtain basic information. (5 RR 985 "Notice of Information.") Thus, the documents fall within the narrow exception for extra-record evidence enunciated under *Western States* and Code of Civil Procedure section 1094.5(e). (*Western States Petroleum Assoc. v. Superior Court* (1995) 9 Cal. 4th 559, 578.)

Nevertheless, the City claims that Petitioners have an affirmative duty to obtain documents and submit them to the City. (15 CT 3586-87.) This would create the absurd requirement to obtain documents from the City simply to resubmit the documents back to the City for consideration. Documents contained in the City's own files on Playa Vista should

automatically be part of the record. (Pub. Res. Code § 21167(e)(10).) "[T]he administrative record will include pretty much everything that ever came near a proposed development or to the agency's compliance with CEQA in responding to that development." (*County of Orange v. Superior Court* (2003) 113 Cal. App. 4th 1, 8.) In addition, the Government bears the burden of environmental investigation. (*Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 311.)

Furthermore, prohibiting Petitioners from submitting documents to the court demonstrating suppression of evidence places Petitioners in a position of proving a violation of the information disclosure provisions, without the ability to show that such documents exist. This could not have been the Legislative Intent in enacting Public Resources Code section 21005. Documents should be permitted to demonstrate a suppression of evidence.

Petitioners request additional briefing to fully address the issue of augmenting the administrative record. A proper brief on the law and cases encompassing Motions to Augment is not possible in the limited space available. We humbly request additional briefing on the issues.

C. The City Should Prepare A Subsequent Or Supplemental EIR On The Methane Mitigation Measures.

i. This Action Provides the Court with the Opportunity to Correct a Legally Erroneous Ruling in Underlying *ETINA v. Los Angeles* Opinion.

It is always difficult to criticize a Court's previous opinion. Undoubtedly, such effort focuses the Court on upholding its previous opinion, instead of freshly analyzing the new issues on the Return to Writ. However, there are circumstances which warrant bringing the same issues, previously decided adverse to Petitioners, to the Court's attention again. (*Searle v. Allstate Life Insurance* (1975) 38 Cal. 3d 425.) In this case,

because of the critical safety issues presented by large pockets of methane, the Court should reevaluate its prior decision.

Generally, the law of the case doctrine precludes an appellate court from reviewing the same issue in subsequent appeals. But, "the doctrine of the law of the case is not inflexible." (*Id.* at 434.) "A court is not absolutely precluded by law of the case from reconsidering questions decided upon a former appeal." (*Id.* at 435 (citation omitted).) While, absent exceptional circumstances, the Court will not reverse its previous decision, such "law of the case" is a procedural doctrine, based on the policy of judicial economy. (*Id.* at 435.) The Supreme Court noted that when a case must be reversed on grounds not considered in the prior appeal, the law of the case doctrine has even less weight. (*Id.*) Judicial economy is not an issue when the case must be remanded on another basis.

In this case, Petitioners urge the Court to reconsider its prior ruling with regard to the methane mitigation measures. Specifically, Petitioners take issue with the statement in the previous decision that "A new or more severe significant effect does not require the preparation of a subsequent EIR or supplement to an EIR, however, if adopted mitigation measures will reduce the impact to a level of insignificance." (1 CT 42.) This Court, relying on an unfortunate statement of law, concentrated on whether the City had substantial evidence that methane mitigation measures were effective, not whether the prior 1993 EIR was legally adequate in failing to identify, mitigate and analyze the alternatives in light of the newly discovered presence of methane. By concentrating on the mitigation measures, and not on the adequacy of the EIR, the Court's decision was inconsistent with the actions mandated under CEQA.

This is not a case about aesthetics! No one can dispute that the existence of methane is a highly important fact that, if known in 1993, may have resulted in the denial or substantial changes in the project. The

consequences of being wrong in this case are catastrophic. The public was and is entitled to a full consideration of the consequences and alternatives prior to risking a future catastrophe. There is a legitimate interest in avoiding what many believe to be an inevitable post-mortem inquiry into who is to blame for approving this project. The presence of methane constitutes "exceptional circumstances" for avoiding the law of the case doctrine.

In addition, judicial economy is not substantially impacted by the Court's reconsideration of this issue. Because the analysis and applicability of CEQA Guidelines 15162 to 15164 is the same for the dewatering issues as it is with the previously decided methane mitigation measures, there is little loss of judicial economy. Petitioners are not re-challenging the factual issue of whether the 2001 CLA report purportedly created substantial evidence that the methane mitigation measures would be effective, but the legal issue of whether the discovery of methane required revisions to the 1993 EIR. This is a very simple analysis, requiring the Court to review the 1993 EIR, which it must do anyway in this Return to Writ, and consider whether the 2001 CLA report compared the new information about methane to the 1993 EIR. If the 1993 EIR did not analyze the methane, which it didn't, then the City must prepare a Supplemental or Subsequent EIR.

Further, because the 18-page CLA Report does not comply with CEQA, remand on both issues does not impact judicial economy. The Court should both overturn the City's process and lack analysis of dewatering, and reverse its previous holding that the discovery of large pockets of methane at Playa Vista is not a significant effect requiring the preparation of a subsequent or supplemental EIR.

ii. This Court's Previous Decision Improperly Concentrated on Whether Substantial Evidence Supported that the Mitigation Would Reduce the Impact to a Level of Insignificance, and Not Whether the Prior EIR was Legally Adequate in Evaluating Methane.

In this Court's opinion discussing the methane mitigation, the Court asserted that "A new or more severe significant effect does not require the preparation of a subsequent EIR or supplement to an EIR, however, if adopted mitigation measures will reduce the impact to a level of insignificance." (1 CT 42.) This misstatement of law is derived from *River Valley Pres. Project v. Metro. Transit Dev. Bd.* (1995) 37 Cal. App. 4th 154, 168, which, in turn, was applying a paraphrase of the law in *Laurel Heights II*. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal. 4th 1112, 1130.)

In *Laurel Heights II* , the Supreme Court was analyzing when an EIR required recirculation prior to certification. (*Laurel Heights II, supra*, 6 Cal. 4th 1124-25.) The entire applicable paraphrase discussing Section 15162 states:

> On the other hand, recirculation is required, for example, when the new information added to an EIR discloses: (1) a new substantial environmental impact resulting from the project or from a new mitigation measure proposed to be implemented (cf. Guidelines, § 15162, subd. (a)(1), (3)(B)(1)); (2) a substantial increase in the severity of an environmental impact unless mitigation measures are adopted that reduce the impact to a level of insignificance (cf. Guidelines, § 15162, subd. (a)(3)(B)(2)); (3) a feasible project alternative or mitigation measure that clearly would lessen the environmental impacts of the project, but which the project's proponents decline to adopt (cf. Guidelines, § 15162, subd. (a)(3)(B)(3), (4));

(*Laurel Heights II*, *supra*, at 1129-30.) The Supreme Court properly enunciated the law requiring recirculation or preparation of a SEIR, when any of these above conditions are present, including, "a new substantial environmental impact resulting from the project *or from a new mitigation measure proposed to be implemented.*" (*Id.* (emphasis added).)

The *River Valley* case, citing solely one section of this passage in *Laurel Heights II*, stated, "even a substantial increase in the severity of an environmental impact does not require recirculation of an EIR, or the preparation of an SEIR if mitigation measures are adopted which reduce the impact to a level of insignificance." (*River Valley, supra,* 37 Cal. App. 4th at 168.) However, the question in the *River Valley* case was whether the increase of a flood control berm from 8 to 10 feet to a height of 20 to 30 feet was a significant change in the project requiring a subsequent or supplemental EIR. Thus, the focus was not on whether new information existed, but whether there was a substantial change in the project. The Court found that such change did not rise to a level requiring the preparation of a supplemental or subsequent EIR. Notably, the EIR in *River Valley* analyzed and mitigated the impacts of the flood control berm. (*River Valley*, *supra*, 37 Cal. App. 4th at 175.)

The Court explained:

> MTDB in the original EIR carefully reviewed, discussed and analyzed the effects of flood flows from the use of elevated berms (at eight to ten feet) including mitigation measures. Subsequently, Chevron's development plans for the RiverWalk Development were revised to cause MTDB to approve an increase in the height of the berms to approximately 20 to 30 feet. *The change in circumstances here does not raise any new effects which the EIR had not already reviewed and analyzed.*

(*River Valley*, *supra*, 37 Cal. App. 4th 154 at 177 (emphasis added).)

Thus, the statement in *River Valley* that, "even a substantial increase in the severity of an environmental impact does not require recirculation of an EIR, or the preparation of an SEIR if mitigation measures are adopted which reduce the impact to a level of insignificance," must only apply where an EIR thoroughly analyzes a similar project, the analysis of such impact is still valid, and the mitigation measures would still reduce the impact to a level of insignificance.

This is a marked contrast from this case, where the presence of large methane seeps at Playa Vista was not known during preparation of the 1993 EIR. (See, 4 RR 822 at 131 to 251 (1993 EIR Summary of Impacts and Mitigation).) Methane mitigation measures were not required in the EIR, which means that both the methane mitigation measures and dewatering for the methane mitigation measures were not considered. Methane was new information and required new mitigation measures, and therefore a supplemental or subsequent EIR is required. (Guidelines § 15162(a)(3)(A).)

A careful reading of Section 15162 discussing the impact of "new information" requires such a result:

> New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
>
> > (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;

There can be no dispute that the discovery of large pockets of methane at Playa Vista is "new information" of substantial importance that was not known at the time of the 1993 EIR. (5 RR 1024.) This is evident from the development of the methane mitigation measures. Mitigation

measures are only required to mitigate the impacts of significant effect. (Guidelines § 15126.4(d)(3).) Thus, when new mitigation measures are proposed to reduce a newly discovered significant effect to a level of insignificance, by definition, a subsequent or supplemental EIR is required.

The public policy behind the focus on the EIR's legal adequacy is absolutely clear. The EIR is an informational document intended to provide the decisionmaker with the tools to determine whether to approve a project. (Guidelines § 15151.) "[The EIR] is intended to provide the fullest information reasonably available upon which the decision makers and the public they serve can rely in determining whether or not to start the project at all, not merely to decide whether to finish it." (*NRDC, Inc. v. City of L.A., supra,* 103 Cal. App. 4th at 271.) There can be little doubt that had the existence of large pockets of methane been known prior to the approval of the Playa Vista project, the project may never have been approved. The City's expert stated, "The safest approach would be to avoid building in this area; however, it is possible to build if it can be demonstrated that the methane is properly mitigated." (28 AR 7478.) By focusing solely on whether the methane mitigation measures adequately mitigate the methane problem, alternatives were never considered.

If Playa Vista had proposed in 1993 to build multifamily residences on the largest methane leak in the Western United States, it is unlikely the City Council would have approved the project. A subsequent or supplemental EIR provides the decisionmaker with the ability to reconsider approving residential housing in such dangerous conditions.

VI. CONCLUSION

For the foregoing reasons, the Court should deny the Return to Writ and order the City to prepare a subsequent or supplemental EIR on both the methane mitigation measures and the dewatering at Playa Vista. In

addition, RPIs should be ordered to send notice to all residences and businesses that have moved into Playa Vista that the methane mitigation measures have not been properly reviewed or approved by the City of Los Angeles.

Respectfully submitted,

DATE: 2/20/2010

Todd T. Cardiff, Esq.
Attorney for Appellants and Petitioners
ETINA, Grassroots Coalition
and Daniel Cohen

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c)(1).)

I certify that the text of this brief consists of **13,983 words** as counted by the Microsoft Word 2007 program used to generate the brief.

Date: 2/2/2010

Todd T. Cardiff, Esq.
Attorney for Appellants and Petitioners
ETINA, Grassroots Coalition
and Daniel Cohen

PROOF OF SERVICE
ETINA v. City of Los Angeles
Appellate Court Case No. B213967

I, Todd T. Cardiff, declare:

My business address is the Law Office of Todd T. Cardiff, 121 Broadway, Ste. 358, San Diego, CA 92101. I am over the age of 18 and not a party to this case. On February 23, 2010, I served the following documents:

- **PETITIONERS ETINA, GRASSROOTS COALITION AND DANIEL COHEN'S JOINT OPENING BRIEF**

by placing such document in a stamped and sealed envelope and serving the Supreme Court, the Superior Court and the parties in this case per the attached service list, in the following manner

(X) (BY MAIL) By placing envelopes containing the above documents for collection and mailing following our ordinary business practices. I am readily familiar with the ordinary business practice of the Law Office of Todd T. Cardiff, that practice being that in the ordinary course of business correspondence is deposited with the US Postal Service the very same day in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury, under the laws of the state of California, that the foregoing is true and correct. Executed this 23rd day of February 2010, in San Diego, California.

Todd T. Cardiff

SERVICE LIST
ETINA v. City of Los Angeles
Appellate Court Case No. B213967

SUPREME COURT OF CALIFORNIA

Supreme Court of California (FOUR COPIES)
Office of the Clerk, First Floor
350 McAllister Street
San Francisco, CA 94102

LOS ANGELES SUPERIOR COURT

Clerk of the Court
Los Angeles Superior Court
111 North Hill Street
Los Angeles, CA 90012

RESPONDENTS: City of Los Angeles and City Council of Los Angeles

Rockard J. Delgadillo, Esq.
Susan D. Phann, Esq.
Timothy McWilliams, Esq.
OFFICE OF THE CITY ATTORNEY
700 City Hall East, 200 North Main Street
Los Angeles, CA 90012-4110
Tel: (213) 978-8239
Fax: (213) 978-8090

REAL PARTIES-IN-INTEREST: Playa Capital Company LLC, Playa Investments, LLC, Playa Commercial Debt Company, LLC, Playa Phase I Apartments, LLC

Edward J. Casey, Esq.
Neal P. Maguire, Esq.
ALSTON & BIRD LLP
333 South Hope Street, 16th Floor
Los Angeles, CA 90071
Tel: (213) 576-1000
Fax: (213) 576-1100

Kathleen O'Prey Truman, Esq.
TRUMAN & ELLIOT LLP
626 Wilshire Boulevard, Ste. 550
Los Angeles, CA 90017

PETITIONER: JOHN DAVIS, *In Pro Per*

JOHN DAVIS
P.O. Box 10152
Marina Del Rey, CA 90295

CLIENTS: ETINA, Grassroots Coalition and Daniel Cohen

Patricia McPherson
Grassroots Coalition and ETINA
3749 Greenwood Avenue
Los Angeles, CA 90066

Daniel Cohen
20950 Colina Drive
Topanga, CA 90290