

Orcem California  
Vallejo Marine Terminal

February 8, 2017

Honorable Mayor Sampayan and Council Members (via email)  
Commission Chair Graden and Planning Commission Members (via email)  
Also Via Email to: City Clerk Dawn Abrahamson & Commission Executive Secretary Leslie Trybull

**RE: Appeal of Staff Decision Refusing to Certify EIR for Consideration of Orcem & VMT Projects**

Dear Council and Commission Members,

This letter is to serve as a formal appeal pursuant to Vallejo MCS 16.102.030 of the decision issued in writing by City staff on February 2, 2017 that the EIR prepared for the Vallejo Marine Terminal (VMT) and Orcem California (Orcem) Projects will *not* be considered or certified prior to conducting a public hearing and making a decision on the Major Use Permit Applications filed for our Projects.

As you know, the City entered into contractual Reimbursement Agreements with Orcem and VMT in July of 2014 for purposes of *preparing and certifying a complete and accurate Environmental Impact Report (EIR)* for the combined projects. We subsequently entered into another agreement to pay for the preparation of a complete and accurate Environmental Justice Analysis (EJA) for the Projects. Relying in good faith on these agreements, our companies expended several million dollars to have the required environmental studies and the Draft and Final EIR documents completed to serve as a factual basis for evaluation and decision making on our Projects (including approximately \$1,000,000 in City fees and City consultant charges alone). We were shocked last week to receive the attached email from the City staff indicating that City staff have taken it upon themselves to determine that the Planning Commission ***"will not being asked to consider and certify the document"***.

It is an unbelievable breach of good faith, the City's own CEQA Implementation Guidelines, and the City's contractual obligation for the staff to place the City of Vallejo in a position of refusing to complete the EIR and accompanying EJA before making its recommendations on the projects. It is even more unconscionable (*and a direct violation of the contractual Reimbursement Agreements*) that the staff would put the Planning Commission in a position of conducting deliberations and potentially taking action on the Projects without first completing and certifying the EIR and approving the EJA, as the complete, accurate and objective basis for decision making.

When our legal counsel saw Ms. Plowman's email, they were compelled to prepare the additional attached letter dated February 7, 2017. The attached letter provides the complete legal and common sense basis for this appeal, including the City Planning Commission's legal obligation to certify an accurate and complete FEIR and approve the EJA **before** it takes any actions on the project entitlements.

We urgently ask that you direct your staff to complete preparation of the EIR and EJA, provide proper notice, and present these documents to the Commission for your review and certification before the decision-making process is commenced, as required by the contractual Reimbursement Agreements and the City's own adopted procedures.

Sincerely,



Steve Eryan, Orcem



Matt Fettig, VMT

Cc: Andrea Duse, Dan Keen, Claudia Quintana

# Attachment #1: Staff Determination

**Richard T. Loewke, AICP**

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**From:** Plowman, Lisa A. <maplowman@rrmdesign.com>  
**Sent:** Thursday, February 02, 2017 10:44 AM  
**To:** Richard T. Loewke, AICP; 'Ms. Andrea Ouse'  
**Cc:** steve@orcem.com; cmoutray@ecocem.ie; 'Matt Fettig';  
'Michael T. Loewke, AICP';  
Claudia.Quintana@cityofvallejo.net; 'Sean Marciniak';  
'Wilson Wendt'; 'Art Coon'  
**Subject:** RE: Availability of Draft Final EIR, Revised EJA, and  
Resolution of Overriding Considerations for Orcem &  
VMT Projects

Hi Dick,

The staff report, Draft Final EIR (with the Response to Comments), and the EJA will be made available to the public on Monday February 6<sup>th</sup>. Please be advised that the Draft Final EIR is being shared with the Planning Commission for informational purposes only. They are not being asked to consider and certify the document in this hearing. Staff is relying on the CEQA exemption 15270 – Projects Which are Disapproved, which states that projects which are denied are not subject to CEQA.

A brief discussion of the applicant's statement of community benefits is included in the staff report and the original submittal will be attached. The Draft Statement of Overriding considerations prepared by the applicants will not be included in the Planning Commission packet, but you are free to submit it to the Commission separately.

We will be happy to provide you with the link to the City's website once all of the documents are posted.

Best,  
Lisa



LISA PLOWMAN

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**From:** Richard T. Loewke, AICP [mailto:dick@loewke.com]  
**Sent:** Wednesday, February 01, 2017 11:02 AM  
**To:** 'Ms. Andrea Ouse' <Andrea.Ouse@cityofvallejo.net>; Plowman, Lisa A. <maplowman@rrmdesign.com>  
**Cc:** steve@orcem.com; cmoutray@ecocem.ie; 'Matt Fettig' <mfettig@vallejomarinetterminal.com>; 'Michael T. Loewke, AICP' <mike@loewke.com>; Claudia.Quintana@cityofvallejo.net; 'Sean Marciniak' <sean.marciniak@msrlegal.com>; 'Wilson Wendt' <wilson.wendt@msrlegal.com>; 'Art Coon' <arthur.coon@msrlegal.com>  
**Subject:** Availability of Draft Final EIR, Revised EJA, and Resolution of Overriding Considerations for Orcem & VMT Projects  
**Importance:** High

Andrea and Lisa,

When will the City will be making the Draft Final EIR and Revised Environmental Justice Analysis available for the combined Orcem and VMT projects? While there is no statutory requirement for preparation or circulation of an EJA, as you are aware, both CEQA (10-day) and local Vallejo (21-day) statutes prescribe timeframes for notice and availability of the Final EIR prior to its consideration by the decision-making body.

Also, will you please provide me with a direct link to both documents as soon as they are available, so that I may commence timely review? I am contractually obligated to review both documents for accuracy and completeness. In the event that substantive errors are identified in either document (and I hope that is not the case), it will be imperative that the proceedings before the Planning Commission be delayed to facilitate correction and availability once again.

Finally, will you be providing the Commissioners with copies of the revised Draft Resolution of Overriding Considerations Resolution (with the list of community benefits) which we provided to you on 11/23/16?

Thank you very much, Dick

Richard T. Loewke, AICP  
925.804.6225 | Loewke.com  
CBRE Broker #01933504



# Attachment #2: Attorney Letters



**MILLER STARR  
REGALIA**

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Direct Dial: 925 941 3233  
arthur.coon@msrlegal.com

February 7, 2017

## VIA E-MAIL AND U.S. MAIL

Dan Keen  
City Manager  
City of Vallejo  
555 Santa Clara Street  
Vallejo, CA 94590  
E-Mail: citymanager@cityofvallejo.net

Andrea Ouse  
Community and Economic Development Director  
City of Vallejo  
555 Santa Clara Street  
Vallejo, CA 94590  
E-Mail: andrea.ouse@cityofvallejo.net

Re: Staff's Unlawful Refusal To Schedule Vallejo Marine Terminal and Orcem  
Project FEIR For Consideration At February 27, 2017 Planning Commission  
Hearing

Dear Mr. Keen and Ms. Ouse:

I have received and reviewed Mr. Keen's February 2, 2017 email to Richard Loewke and others disavowing City staff's agreement to a three-hearing procedure on the above project, and otherwise stating in pertinent part as follows:

The VMT/Orcem project is scheduled to be heard at a special Planning Commission meeting on February 27, 2017 at 6:00 p.m. in the City Hall Council Chambers.... It will be up to the majority of the Planning Commission in attendance at that time to determine if they have enough information and adequate time to hear public testimony, deliberate and make a well-informed decision that night, or to vote to continue the public hearing to a future meeting date. (Underscored emph. in orig.)

I am also in receipt of City EIR consultant Lisa Plowman's February 2, 2017 email to Mr. Loewke and Ms. Ouse stating in pertinent part regarding the Planning Commission hearing:

The staff report, Draft Final EIR (with the Response to Comments), and the EJA will be made available to the public on Monday, February 6th. Please be advised that the Draft Final EIR is being shared with the Planning Commission for informational purposes only.

They are not being asked to consider and certify the document in this hearing. Staff is relying on the CEQA exemption 15270 – Projects Which are Disapproved, which states that projects which are denied are not subject to CEQA.

The City staff's apparent refusal to schedule the VMT/Orcem Project FEIR for consideration for certification at the scheduled February 27, 2017 Planning Commission hearing on the Project is outrageous, patently unlawful and in bad faith. Moreover, the proposed action is wholly beyond staff's lawful discretion and authority under CEQA or the City's Municipal Code and local law. I urge you to rethink your position while there is still time to comply with the law and avoid embroiling the City in the litigation that your actions will force my clients to bring if these matters are not rectified.

I explained in great detail in my (apparently unread) letter to both of you, dated October 3, 2016, why staff's proposed course of action (as again set forth in Mr. Keen's and Ms. Plowman's above-quoted emails) would violate CEQA, the City's contractual obligations to my clients, and my clients' constitutionally protected property and due process rights. A copy of that letter is enclosed herein and incorporated by reference as Exhibit A. You were again apprised of the legal requirements of CEQA and the parties' contractual obligations in a detailed January 17, 2017 letter from my partners, Wilson Wendt and Sean Marciniak, a copy of which letter is also enclosed herein and incorporated by reference as Exhibit B.

You have not only ignored the legal requirements and obligations brought to your attention by this firm's enclosed letters, but also have arbitrarily and capriciously disregarded the City's own local CEQA implementation procedures, which are quite simply and accurately summarized in its September 27, 2005 "Environmental Review, Planning Handout No. PH-13," a true and correct copy of which is enclosed herein and incorporated by reference as Exhibit C. That City document states in relevant part:

Following the [DEIR] review period a Final EIR is prepared consisting of amendments to the draft and written responses to the comments received. . . . **A certification hearing is then scheduled before the Planning Commission and/or City Council. Action on the project can follow certification if all other City requirements have been satisfied.**

(Ex. C, PH-13 at p. 2, *emph. added.*)

The City's own document thus confirms the legally required CEQA procedures and relevant principles that apply here. Most notably, and as pertinent here, these include: (1) after FEIR preparation, an EIR certification hearing must be scheduled

before the Planning Commission; and (2) the Planning Commission can only take action on the Project after EIR certification has occurred.

The supposed February 27, 2017 Planning Commission hearing on the Project mentioned in Mr. Keen's email can thus, as you both well know, be nothing but a sham "hearing" if the FEIR is not considered and certified since the Commission will then have no legal option, authority or power to act on the Project except to deny it and its decision in that regard would be anything but well informed without consideration of the FEIR and its compliance with CEQA. That the City staff has deliberately proceeded in bad faith and in an unlawful manner – such that Planning Commission denial will be a preordained outcome and forgone conclusion – is further underscored by Ms. Plowman's statement that staff intends to rely on the CEQA Guidelines § 15270 exemption for projects which are disapproved. Apart from the fact that staff has absolutely no legal authority to approve or disapprove the Project, and cannot predict or predetermine how the City's authorized decisionmaking bodies will vote on it if given the opportunity, staff also ignores the full text of the exemption which shows it was never intended to apply to circumstances like those existing here:

- (a) CEQA does not apply to projects which a **public agency** rejects or disapproves.
- (b) ***This section is intended to allow an initial screening of projects for quick disapprovals prior to the initiation of the CEQA process where the agency can determine that the project cannot be approved.***
- (c) This section shall not relieve an applicant from paying the costs for an EIR or negative declaration prepared for his project prior to the lead agency's disapproval of the project ***after normal evaluation and processing.***

(CEQA Guidelines, § 15270(a)-(c), emph. added.)

Staff is not a "public agency" as defined by CEQA. (CEQA Guidelines, § 15379.) The context presented by this project's processing is a completed FEIR following years of analysis and millions of dollars expended by my clients for project planning, processing and environmental review – a far cry from the quick initial screening and disapproval prior to initiation of CEQA review to which the exemption is intended to apply. And, as has been repeatedly demonstrated to both of you and other City staff in excruciating detail, the unlawful and bad faith procedure that staff continues to propose is a far cry from "normal evaluation and processing" of a project under

Dan Keen  
Andrea Ouse  
February 7, 2017  
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CEQA or the City's own rules.

Quite frankly, in my approximately 30 years of practicing law, I have never seen such a shocking, unlawful and breathtaking attempted usurpation of legal authority on the part of a local public agency's staff.

Having been fully advised, it is hoped and anticipated that you will conform your actions and conduct to what the law requires and cease your unlawful efforts to discriminate against and force the denial of my clients' Project without a lawful, fair and unbiased hearing before the City's authorized decisionmaking body or bodies.

Very truly yours,

MILLER STARR REGALIA



Arthur F. Coon

AFC:gaw:klw

Enclosures: (Exhibits A, B & C)

cc: Claudia Quintana, City Attorney (w/encs.)  
Clients  
Richard T. Loewke

**EXHIBIT A** - See Attachment B  
**EXHIBIT B** - See Attachment D

**EXHIBIT C**

# City of Vallejo

## Planning Division

555 Santa Clara Street, Vallejo, CA 94590  
Phone: (707) 648-4324 Fax: (707) 552-0163

*Planning Handout No. PH-13*

## ENVIRONMENTAL REVIEW

### What is an Environmental Review?

The City uses the environmental review process to analyze the potential environmental impacts that could result from a project. The California Environmental Quality Act of 1970 (CEQA) governs the standards and procedures for environmental review.

### What is the purpose of an Environmental Review?

The purpose of environmental review is to evaluate a project's physical effects on man-made and natural conditions; consider measures for minimizing significant effects; and make findings on the project's environmental impact. The City may not approve a project unless adopted findings indicate one of the following:

1. The project will not have a significant impact on the environment
2. Significant effects have been substantially mitigated.
3. The significant remaining effects are unavoidable or are acceptable because of overriding considerations.

### What are the steps in the process?

Environmental review is initiated when you submit an application. Staff will review the application and determine if the project is exempt from CEQA. Specific exemptions are listed in the City of Vallejo "Guidelines and Procedures for Implementation of CEQA".

If your project is not exempt, you must submit an Environmental Informational Form. Staff will review the environmental form and prepare an Initial Study identifying potential significant impacts. At this stage, you can modify your project or incorporate mitigation measure so the project may, if appropriate, qualify for a Negative Declaration.

There is a filing fee of \$ \_\_\_\_\_ for Negative Declaration.

There is a filing fee of \$ \_\_\_\_\_ for Mitigated Negative Declaration.

There is an additional fee of \$ \_\_\_\_\_ payable to the City of Vallejo for the filing of the Notice of Determination by Solano County.

### **What are the types of determinations?**

**Negative Declaration:** If the Initial Study reveals that your project will not have a significant effect on the environment, a Negative Declaration will be processed and posted. A minimum 21 day public notice period is required before a Negative Declaration can be certified.

**Environmental Impact Report:** An EIR will be required if substantial evidence shows that significant adverse environmental effects may result from your project.

### **What is an EIR required?**

An EIR would be prepared by an independent consultant selected by a committee of the Planning Commission and paid for by the applicant. Next a meeting between the applicant, staff and consultant is scheduled. You may be required to submit additional technical information to assist in preparing the EIR.

### **What is the timing involved?**

A draft EIR is generally prepared in 3 to 6 months, depending on the complexity of the project, followed by a minimum 30 day public review period (45 days for projects requiring review by State agencies). This review will include a Planning Commission public hearing.

Following the review period a Final EIR is prepared consisting of amendments to the draft and written responses to the comments received. Depending on the degree of public response, this process generally takes 30 to 90 days. A certification hearing is then scheduled before the Planning Commission and/or City Council. Action on the project can follow certification if all other City requirements have been satisfied.

### **Where can I get additional information?**

Refer to the City's "Guidelines and Procedures for Implementation of CEQA" for more detailed information or contact the Planning Division at (707) 648-4326.