Case No. S222472

IN THE SUPREME COURT OF CALIFORNIA

FRIENDS OF THE EEL RIVER
Plaintiff and Appellant,
v.
NORTH COAST RAILROAD AUTHORITY et al.,
Defendants and Respondents.

NORTHWESTERN PACIFIC RAILROAD COMPANY,
Real Party in Interest and Respondent.

AND CONSOLIDATED CASE

After a Decision by the Court Of Appeal
First Appellate District, Division Five
Case No. A139222, A139235

Appeal from the Marin County Superior Court,
Case No. CIV11-3605, CIV11-03591
Honorable Faye D'Opal, Judge; Honorable Roy Chernus, Judge

PLAINTIFF CALIFORNIANS FOR ALTERNATIVES TO TOXICS' THIRD REQUEST FOR JUDICIAL NOTICE

*Sharon E. Duggan (SBN 105108)
336 Adeline Street
Oakland, CA 94607
foxsduggan@aol.com
Telephone: (510) 271-0825
Facsimile: By Request

Attorney for Californians for Alternatives to Toxics

Helen H. Kang (SBN 124730)
Environmental Law and Justice Clinic
Golden Gate University School of Law
536 Mission Street
San Francisco, CA 94105
hkang@ggu.edu
Telephone: (415) 442-6647
Facsimile: (415) 896-2450

Attorneys for Californians for Alternatives to Toxics

Additional Counsel for Plaintiff appear on following page

Deborah A. Sivas (SBN 135446)
Environmental Law Clinic
Mills Legal Clinic at
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305
dsivas@stanford.edu
Telephone: (650) 723 -0325
Facsimile: (650) 723 -4426

Attorneys for Californians for Alternatives to Toxics

William Verick (SBN 140972)
Klamath Environmental Law Center
424 First Street
Eureka, CA 95501
wverick@igc.org
Telephone: (707)268-8900
Facsimile: (707)268-8901

Attorney for Californians for Alternatives to Toxics

MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Pursuant to Rules 8.520(9) and 8.252(a) of the California Rules of Court and Sections 452(d) and 459 of the Evidence Code, Plaintiff Californians for Alternatives to Toxics hereby moves this Court to take judicial notice of Exhibit A, attached hereto. This document was not presented earlier because it did not exist until September 11, 2015, when it was created and filed by the People of the State of California ex rel. Kamala D. Harris, Attorney General. It is relevant to the issues of preemption and state sovereignty presented in the case at bar, including arguments raised in an amicus brief filed in this proceeding by the California Attorney General on behalf of the California High Speed Rail Authority.

Exhibit A contains a true and correct copy of Reply Brief in Support of People's Petition for Writ of Mandate in Intervention, dated September 11, 2015, filed by Intervenor People of the State of California ex rel. Kamala D. Harris, Attorney General, in the captioned case "*Fast Lane Transportation, Inc., a California corporation v. City of Los Angeles, et al.*," Contra Costa Case No. CIV MSN14-0300 (Consolidated with Case Nos. CIV MSN14-0308, MSN14-0309, MSN14-0310, MSN14-0311, MSN14-0312, MSN14-0313).

Evidence Code section 459 allows a reviewing court to take judicial

notice of any matter specified in section 452. Section 452(d) allows a court to take judicial notice of "[r]ecords of . . . any court of record of the United States." Exhibit A is an official court record filed by the California Attorney General's Office on behalf of the People of the State of California in a proceeding before the Superior Court of the State of California in the County of Contra Costa challenging an Environmental Impact Report ("EIR"). This brief is relevant to the questions presented in this case regarding whether the Interstate Commerce Commission Termination Act ("ICCTA") preempts the California Environmental Quality Act ("CEQA") when a public agency is reviewing the environmental effects of one of its discretionary projects. This issue was also addressed in an amicus brief the Attorney General filed on behalf of the California High Speed Rail Authority.

In Exhibit A, the Attorney General argues on behalf of the People of the State of California ("the People") that the ICCTA does not preempt CEQA because the CEQA claims do not regulate rail transportation or force restrictions on the operator; rather they seek to require the public agency landowner ("the Port") to comply with its obligations under CEQA before signing a lease with the operator, Burlington Northern Santa Fe ("BNSF"). The People also argue that any relief under CEQA is not preempted because

the CEQA claims are directed at the Port's decision-making process, and any court-ordered relief must be left to the Port to "determine the appropriate means for correcting the EIR's deficiencies."

The People also argue that "the Port's actions would be exempt from preemption analysis under the market participant doctrine" because the Port's lease transaction with BNSF is proprietary.

Finally, the People invoke *Nixon v. Missouri Municipal League* (2004) 541 U.S. 125, 140, arguing that "[t]here is no suggestion that Congress, in enacting the ICCTA, intended to preempt the ability of parties that contract with rail carriers and operators in the marketplace to seek environmental improvements and other efficiencies."

These assertions support Plaintiffs' arguments in the present case that the ICCTA does not preempt the application of CEQA to a public rail agency's internal decisionmaking process regarding the repair and reopening of the North Coast Rail Line.

For the foregoing reasons, Plaintiff Californians for Alternatives to Toxics respectfully requests that the Court grant this Motion.

Dated: September 25, 2015 Respectfully submitted,

LAW OFFICES OF SHARON E. DUGGAN

By: _____

SHARON E. DUGGAN

Attorney for Californians for Alternatives To Toxics

KAMALA D. HARRIS
Attorney General of California
SALLY MAGNANI
Senior Assistant Attorney General
SARAH E. MORRISON (State Bar No. 143459)
Supervising Deputy Attorney General
CATHERINE M. WIEMAN (State Bar No. 222384)
BRIAN J. BILFORD (State Bar No. 262812)
Deputy Attorneys General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2640
Fax: (213) 897-2802
E-mail: Sarah.Morrison@doj.ca.gov

Attorneys for Intervenor the People of the State of California ex rel. Kamala D. Harris, Attorney General

Exempt from Filing Fees pursuant to Government Code section 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

FAST LANE TRANSPORTATION, INC., a California corporation,

Petitioner,

v.

CITY OF LOS ANGELES; CITY COUNCIL OF THE CITY OF LOS ANGELES; PORT OF LOS ANGELES; LOS ANGELES BOARD OF HARBOR COMMISSIONERS; and DOES 1 through 50, inclusive,

Respondents.

BNSF RAILWAY COMPANY, a Delaware corporation,

Real Party in Interest.

AND RELATED CONSOLIDATED CASES.

Case No. CIV MSN14-0300 (Consolidated with Case Nos. CIV MSN14-0308, MSN14-0309, MSN14-0310, MSN14-0311, MSN14-0312, MSN14-0313)

REPLY BRIEF IN SUPPORT OF THE PEOPLE'S PETITION FOR WRIT OF MANDATE IN INTERVENTION

(California Environmental Quality Act)

Judge: Honorable Barry Goode
Dept.: 17

Actions Filed: June 5 and 7, 2013

Trial Date: November 16-17, 2015

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REGULATIONS

CONSTITUTIONAL PROVISIONS

I. PRELIMINARY STATEMENT.

The Opposition Brief filed jointly by the Port and BNSF to the CEQA claims raised by Petitioners and Intervenor the People of the State of California, ex rel. Attorney General Kamala Harris ("People"), does not refute the People's allegations that the Port abused its discretion in approving the EIR for the SCIG Project. Nor does BNSF's separate brief asserting that Petitioners' and the People's claims are barred by federal preemption defeat the CEQA claims.

The Port and BNSF's objections are without merit for the following reasons. First, the People's CEQA claims are not preempted by federal law, because such claims do not improperly regulate rail transportation. Second, the EIR does not analyze whether the Project is consistent with the State's overarching, long-term climate stabilization objectives, supported by science and included in Executive Order S-3-05, AB 32, the AB 32 Scoping Plan, and the Port's own Climate Action Plan, among other documents. Third, the EIR fails to analyze the additional impacts of operations at BNSF's Hobart railyard and Sheila maintenance yard caused by the Project. Fourth, the EIR violates CEQA by failing to meaningfully analyze the Project's cumulative impacts combined with other related projects, most notably the planned expansion of the adjacent ICTF facility and the Hobart railyard. Fifth, the EIR fails to comply with CEQA's mandates to adequately consider all feasible mitigation and a reasonable range of alternatives.

Moreover, to the extent that the Port contends that the People or Petitioners are barred from challenging the EIR based on a failure to exhaust administrative remedies, the Port is wrong. CEQA does not require that the Attorney General exhaust administrative remedies prior to intervening in an action. (Pub. Resources Code § 21177, subd. (d).)[1] Here, to comply with the Court's request to minimize repetitive briefing, the People incorporated Petitioners' briefing on arguments supporting the People's claims. Exhaustion was therefore not required on these claims.

[1] Parties may join in the Attorney General's CEQA arguments even when that party may not have exhausted its administrative remedies as to that issue. (See *Maintain Our Desert Environment v. Town of Apple Valley* (2004) 124 Cal.App.4th 430 ("*MODE*").) In *MODE*, the Court considered both MODE's and the Attorney General's arguments regarding the disputed issue as though MODE had properly exhausted its administrative remedies. (*Id.* at 443.)

The People incorporate the arguments in Petitioners' Reply Brief that the EIR violates CEQA, that the Port abused its discretion in approving the EIR, and that CEQA is not preempted. For the reasons set forth in Petitioners' briefs, the People's Opening Brief, and below, the People request that this Court issue a writ of mandate directing the Port to vacate its decision and conduct an analysis of the Project's environmental impacts that complies with CEQA.

II. CEQA CLAIMS ARE NOT PREEMPTED BY ICCTA.

BNSF asserts that "Petitioners' use of CEQA litigation to obtain changes in rail operations is barred by ICCTA." (BNSF's Opposition Brief on Federal Preemption ("BNSF PB") at 8.) BNSF argues that the CEQA claims are preempted by ICCTA because they "relate directly and exclusively to BNSF's rail operations with the goal of forcing BNSF to agree to restrict its operations if it wants to proceed with the SCIG project." (BNSF PB at 1.) This argument fails on two grounds. First, the CEQA claims neither regulate rail transportation nor "force" restrictions on BNSF's operations; rather, they seek to require the Port—which is not a rail carrier or rail operator, but instead a public agency landowner—to comply with its obligations under CEQA before signing a lease with BNSF.[2] Second, any actions by the Port in compliance with CEQA that might have an effect on BNSF are non-regulatory as to BNSF and therefore exempt from preemption under the "market participant doctrine."

A. CEQA Controls the Port's Decisionmaking Process, Not BNSF's Rail Operations.

BNSF asserts that "Petitioners not only seek to delay the SCIG project, but they also seek to use their CEQA claims to regulate rail construction and operations [and] forc[e] changes to the environmental lease terms negotiated between POLA and BNSF that would impact BNSF's operations." (BNSF PB at 3.) That assertion reflects a fundamental misunderstanding of CEQA, which neither "forces changes" on the Project nor improperly regulates rail operations.

As discussed in Petitioners' Reply Brief ("PRB"), the CEQA claims do not seek a court order imposing "additional operating restrictions" on BNSF's operations. (PRB at 36.) Instead,

[2] Because the Port is not a rail carrier, its decisions are not subject to the exclusive jurisdiction of the federal Surface Transportation Board, and therefore preemption analysis under section 10501 of ICCTA does not apply. (49 U.S.C. § 10501(a)(b).)

the People and Petitioners seek to apply CEQA's mandates *to the Port's decision to lease its property*. Moreover, relief under CEQA would not "force" or "impose" restrictions on the Project. Rather, "upon a finding of the agency's noncompliance with CEQA, the court must enter an order mandating that the agency set aside its decision and take any necessary actions to achieve compliance." (*City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 414-415 [citing Pub. Resources Code, §21168.9].) The court may order an agency to undertake further environmental review, but must leave it to the agency to determine the appropriate means for correcting the EIR's deficiencies. (*POET, LLC v. California Air Resources Board* (2013) 218 Cal.App.4th 681, 758 [citing Pub. Resources Code § 21168.9, subd. (c)].) The CEQA claims are directed at the Port's decisionmaking process, and the Court has jurisdiction to hear these claims.

B. Under the Market Participant Doctrine, the CEQA Claims Are Not Preempted.

BNSF asserts that "an order requiring further POLA review of rail construction and operations beyond that identified by the certified EIR and lease negotiated by POLA and BNSF would have the effect of regulating rail operations." (BNSF PB at 8.) The People agree with Petitioners that this assertion is wrong, because even if the Port's future compliance with CEQA would affect the Port's lease negotiations with BNSF, the Port's actions would be exempt from preemption analysis under the market participant doctrine. (PRB at 35-38.) Under this doctrine, ICCTA does not preempt state proprietary actions, and the Port is clearly acting in its proprietary capacity when negotiating and entering into a lease with BNSF for use of the Port's property. (*Id.*) BNSF does not claim that the Port is preempted from taking the actions it has taken so far to certify the EIR and impose mitigation as lease conditions. (BNSF PB at 2.) Indeed, the only issue in this case is whether those actions satisfy CEQA. If the Court finds that the Port did not comply with CEQA, the current lease will be vacated and the Port will be required to conduct additional analysis of environmental impacts and possibly impose additional feasible mitigation based on that analysis. This may require the Port and BNSF to engage in additional lease negotiations. These actions by the Port are just as proprietary as its actions to date. The Port's lease transaction with BNSF is not transformed from proprietary into regulatory merely because the Port must fully comply with CEQA. (PRB at 37-38.)

By only objecting to future CEQA compliance and not past CEQA compliance by the Port (BNSF PB at 2), BNSF implies that the Port can choose to partially comply with CEQA when engaging in proprietary transactions, but cannot be subject to statutorily-authorized enforcement actions for CEQA violations. (BNSF PB at 2.)[3] This claim ignores the Port's character as a political subdivision of the State, which is subject to the State's sovereign control. (*Nixon v. Missouri Municipal League* (2004) 541 U.S. 125, 140.) In *Engine Manufacturers Assn. v. SCAQMD* ("*EMA*") (9th Cir. 2007) 498 F.3d 1031, 1040, the Ninth Circuit held that the market participant exception to preemption applied to SCAQMD's rules requiring state and local governments to choose clean-fuel vehicles for their proprietary fleets. The exception likewise applies to require a local government to apply CEQA when making proprietary decisions. Just as the rules upheld in *EMA* "constitute direct state participation in the market, ... even though not only the state, but also some of its political subdivisions, are directed to take these actions" (*EMA, supra*, 498 F.3d at 1045-1046), so do CEQA's mitigation requirements.[4]

Here, state laws, including CEQA, constrain or guide the Port's proprietary actions. As a subdivision of the State, the Port is not free to choose whether to comply with these requirements when engaging in commercial transactions. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 16; Cal. Const., art. XI, section 5(a).) The Port's decision to enter into the BNSF lease must fully comply with CEQA, and that compliance is subject to the market participant doctrine. (*EMA, supra*, 498 F.3d at 1046; see also *Town of Atherton v. Ca. High Speed Rail Authority* (2014) 228 Cal.App.4th 314 [state agency must comply with CEQA when selecting general train route alignments for further study and the agency's decision is not subject to Surface Transportation Board jurisdiction or approval].)[5] There is no suggestion that Congress,

[3] Without any precedential authority, BNSF suggests that CEQA can be enforced by the Port against BNSF in their business dealings, but that the broad private right of action that CEQA provides to the public is effectively nullified by ICCTA preemption.

[4] The *EMA* court stated "[t]hat a state or local governmental entity may have policy goals that it seeks to further through its participation in the market does not preclude the doctrine's application, so long as the action in question is the state's own market participation." (*Ibid.*)

[5] A different analysis would apply to a state law that imposes permitting requirements on a railroad operating in interstate commerce and subject to federal regulation. (See, e.g., *City of Auburn v. U.S. Government* (9th Cir. 1998) 154 F.3d 1025, and other cases cited by BNSF [BNSF PB at 6].) Those cases are not relevant here. (PRB at 38.) Cases cited by BNSF err by conflating *environmental review* statutes, like CEQA, that apply to public agency decisionmaking (continued...)

in enacting ICCTA, intended to preempt the ability of parties that contract with rail carriers and operators in the marketplace to seek environmental improvements and other efficiencies. Therefore, the Court has jurisdiction over the CEQA claims.

III. THE EIR'S FAILURE TO ANALYZE THE PROJECT'S CONSISTENCY WITH CALIFORNIA'S LONG-TERM CLIMATE STABILIZATION OBJECTIVES VIOLATES CEQA.

The Port incorrectly argues that the EIR need not evaluate the Project's consistency with California's long-term greenhouse gas ("GHG") emissions reduction goals, which are based in science and embodied in AB 32, Executive Order ("EO") S-3-05, the AB 32 Scoping Plan, and the Port's own Climate Action Plan. (Respondents' Opposition Brief ("RB") at 94.) In the alternative, the Port wrongly asserts that the EIR sufficiently discloses the potential impacts of the Project related to inconsistency with the State's long-term emissions reduction goals, even though the EIR's "analysis" is a brief, incorrect, and unsupported conclusion that "[t]he project is consistent with key legislation, regulations, plans and policies." (RB at 92-93; AR 12600.) The Port's failure to disclose all that it reasonably can about the Project's short- and long-term environmental effects in light of available facts and science, including whether the project may undermine well-established, long-term environmental objectives, renders the EIR misleading and defective as an informational document, and therefore violates CEQA.

A. Guidelines Section 15064.4(B) Does Not Excuse the Port From Analyzing the Project's Consistency with the State's GHG Emission Reduction Policies and Plans.

To analyze SCIG's GHG impacts, the EIR adopts a significance threshold that asks whether the Project "conflict[s] with State and local plans and policies adopted for the purpose of reducing GHG emissions." (AR 12600.) Section 3.6.3 of the EIR identifies at least 16 different State and local plans and policies relating to climate change, including AB 32, EO S-3-05, and the Scoping Plan. (AR 12575-12588.) The Port's "analysis" of the Project's consistency with these plans and policies, however, consists of only two cursory sentences: "The proposed project would result in

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processes, with *permitting* laws that apply directly to a privately-operated railroad like BNSF. (*Atherton*, 228 Cal.App.4th at 333 ["Although *City of Auburn* spoke of 'environmental review laws' ..., which would appear to include CEQA, the case concerned only *permitting* laws." (italics in original).])

more efficient use of fossil fuels to move goods as a result of increased use of rail versus trucking between the Ports and the SCIG facility. The project is consistent with key legislation, regulations, plans and policies described in section 3.6.3, Applicable Regulations."[6] (AR 12600.)

The Port justifies the EIR's unsupported conclusion by contending that Guidelines section 15064.4, subdivision (b), only requires analysis of consistency with *regulations or requirements* adopted to implement a GHG reduction plan, not consistency with general policy objectives such as those included in EO S-3-05. (RB at 95.) However, the EIR itself adopts a significance threshold that is not so limited. Rather, the EIR asks whether the Project would "conflict with State and local *plans and policies* adopted for the purpose of reducing GHG emissions." (AR 12600.) As the Port emphasizes, it has some discretion to select appropriate significance thresholds. (RB at 99 [citing Guidelines § 15064, subd. (b)].) It may not now disavow its chosen threshold. (*See, e.g., Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1108-1111.) Given that the EIR identifies EO S-3-05, AB 32, the Scoping Plan, and the Port's Climate Action Plan among the State's climate change regulatory setting, the Port should have analyzed the Project's consistency with each of these policies and plans.

Additionally, Guidelines section 15064.4, subdivision (a), states that consideration of the effects of a potential project must be "based to the extent possible on scientific and factual data." Science tells us that to stabilize our existing climate, we must achieve substantial GHG emissions reductions by mid-century. (See, e.g., AR 85079, 85095, 85208.) This scientific conclusion is incorporated into EO S-3-05, AB 32, and the Scoping Plan. (*See id.*) Thus, EO S-3-05, AB 32, and the Scoping Plan are relevant to the overarching environmental objective of climate stabilization, and the Port abused its discretion by failing to analyze the Project's consistency with the GHG emission reduction targets established in these documents.[7] Its failure to do so renders the EIR fatally defective.

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[6] The Port also summarily concludes that the Project is consistent with the part of the Scoping Plan addressing reductions of GHG emissions from the goods movement sector because the Project will "increase fuel efficiency of regional cargo movement and decrease GHG emissions." (AR 12600; RB at 92.) But this perfunctory claim does not address whether the Project is consistent with the Scoping Plan's GHG emissions reduction trajectory.

[7] The People do not assert that the Port must engage in an excessively strict "consistency" analysis, under which any failure of its Project to follow in lockstep with the statewide reductions (continued...)

B. The EIR's Claim that the Project Is Consistent with Relevant GHG Reduction Plans and Policies Is Misleading and Violates CEQA.

The EIR fails as an informational document because it is affirmatively misleading. The EIR does not explain how the Project, which will increase GHG emissions over the long term, is consistent with EO S-3-05, the Scoping Plan, AB 32, and the Port's Climate Action Plan, all of which are grounded in the need to *reduce* emissions aggressively over the longer term to meet the State's mid-century climate objectives. (*Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1158, 1175 [agency unlawfully failed to analyze project's inconsistency with AB 32 and EO S-3-05's mandate for continuous GHG reductions through 2050].) In fact, any "alarm" that might have been raised by the Port's determination that the Project's total GHG emissions are significant (Impact GHG-1) is undercut by the EIR's finding that the Project is consistent with the State's plans and policies for sharply reducing long-term GHG emissions throughout the State to stabilize the climate. (See *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.) Because the EIR concludes that the Project is consistent with "applicable GHG reduction plans and policies," it encourages the public and decisionmakers to discount the fact that the Project's GHG emissions will increase post-2020. The EIR's assurance of compliance with AB 32, the Scoping Plan, and EO S-3-05 was, therefore, misleading and violative of CEQA. (*Sierra Club, supra*, 231 Cal.App.4th at 1175.)

The Port implies that, although the EIR allegedly analyzes the Project's consistency with relevant GHG plans, this analysis is not necessary because CEQA is concerned with impacts on the existing environment, not with impacts on plans. (RB at 94.) But in order to understand whether the Project will affect existing climatic conditions, it is necessary to compare the Project's GHG trajectory with the trajectory set forth in EO S-3-05, the Scoping Plan, and the Port's Climate Action Plan. Even if the Project maintained current emissions levels, this would

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discussed above would render the Project's GHG impacts necessarily significant. But *some* meaningful analysis is necessary. The Port could comply with CEQA by, for example, discussing whether the Project's projected increases in GHG emissions may interfere with statewide reductions required to meet the State's longer-term climate objectives.

not maintain existing climatic conditions. (See AR 85086.) The EIR fails to analyze the Project's consistency with the State's GHG emission reduction trajectory as described below.

1. The EIR Ignores the Port's Own Climate Action Plan.

The EIR's climate analysis does not mention the Port's Climate Action Plan, let alone analyze whether the Project is consistent with that plan. (Intervenor's Opening Brief ("IOB") at 17; AR 183449-183482.) This oversight is both telling and fatal to the EIR. The Climate Action Plan was adopted to help the City of Los Angeles, through the Los Angeles Harbor Department, achieve its goal to reduce GHG emissions to 35% below 1990 levels by 2030. (AR 183453.) The Port does not explain the EIR's failure to analyze the Project's consistency with this relevant policy goal.

2. The EIR Fails to Analyze the Project's Inconsistency with the Greenhouse Gas Reduction Trajectory Embodied in EO S-3-05.

The Port puts forth numerous arguments alleging that the EIR need not address the emissions reduction trajectory identified in EO S-3-05. (RB at 96.) The Port also claims that it would be infeasible to analyze consistency of an individual project with the statewide goal established in EO S-3-05. (RB at 96-97.) These excuses lack merit.[8] Contrary to the Port's assertion, EO S-3-05 was subject to scientific review and developed based upon the best available science. (AR 85079, 85095, 85208.) And it is irrelevant that EO S-3-05 is not directly binding on the Port or other local agencies; what matters is that it forms the basis for the State's climate policy, which has subsequently been endorsed by the Legislature (in AB 32) and CARB (in the Scoping Plan). (See *Sierra Club, supra*, 231 Cal.App.4th at 1157.)

EO S-3-05's 2050 emissions reduction goals also reflect scientific facts regarding the reductions needed to stabilize our climate. (AR 85079, 85095, 85208.) CEQA requires the Port to confront these facts, regardless of whether they are recognized in an Executive Order, legislation, local plan, or scientific whitepaper. (Guidelines § 15064, subd. (a) [significance determinations should be based on scientific and factual data].) As the Port emphasizes, CEQA

[8] The California Supreme Court is reviewing whether an EIR for a long-term regional transportation plan must include an analysis of that plan's consistency with the GHG reduction goals reflected in EO S-3-05 in order to comply with CEQA. (See *Cleveland Nat. Forest Foundation v. San Diego Assn. of Governments*, review granted March 11, 2015, S223603.)

requires analysis of a project's impacts on existing, physical conditions. (RB at 94.) Here, EO S-3-05's 2050 target is intended to stabilize existing climactic conditions; thus, comparing the Project's GHG trajectory against this target would inform the public of SCIG's physical impacts. Moreover, and contrary to the Port's assertion, analysis of consistency with EO S-3-05's emissions reduction trajectory is feasible, as demonstrated by the fact that other agencies are conducting the analysis. (See *Sierra Club, supra*, 231 Cal.App.4th at 1157 [noting that agencies have been able to analyze long-term GHG impacts].)

3. The EIR's Perfunctory Analysis of Consistency with AB 32 Is Legally Inadequate.

The Port admits that the EIR contains only "a brief statement of the reasons for [its] conclusion" that the Project is consistent with AB 32. (RB at 92.) The Port further states that, while lead agencies in other cases may have analyzed consistency with AB 32 differently, the Port has discretion to choose its own analysis. (*Id.*) The Port relies on *CREED v. Chula Vista* (2011) 197 Cal.App.4th 327, 335-336 in support of this argument. (RB at 99.) However, *CREED* does not state that the Port has discretion to approve a fundamentally misleading EIR devoid of any substantive analysis of consistency with AB 32's GHG reduction objectives. (See, e.g., *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 841, 844.)

The Port also argues that AB 32's targets will be achieved primarily through technological changes and state legislative measures, not by local agencies. (RB at 98.) This effort to disclaim responsibility for addressing climate change is unavailing. The Scoping Plan emphasizes the important role that local agencies must play in meeting state climate targets, and CEQA demands that *every* agency adopt all feasible climate mitigation.[9] (AR 85117-85118; Guidelines § 15126.4, subd. (c).) The EIR's unsupported conclusion that the Project does not conflict with objectives to reduce GHG emissions is not supported by substantial evidence and violates CEQA.

The EIR misleadingly portrays the Project as helping achieve the state's climate objectives, when in reality a meaningful analysis might reveal that the Project will interfere with

[9] The Port's own Climate Action Plan acknowledges this role. (AR 183449-183482.)

environmental measures of vital importance. The Port abused its discretion and violated CEQA by discounting California's goals to halt and reverse climate change.

IV. THE EIR FAILS TO ADEQUATELY ANALYZE SCIG'S INDIRECT IMPACTS RELATED TO THE HOBART AND SHEILA YARDS.

The Port asserts that the EIR need not consider impacts of BNSF's operations at the Hobart railyard because "there is no evidence that SCIG will have any effect at Hobart that will result in environmental impacts." (RB at 69.) The Port also asserts that "[a]s the SCIG Project will not change operations at Sheila [maintenance yard], the EIR properly does not include them as part of the Project." (RB at 71.) These assertions are incorrect. The Port violated CEQA by concealing the Project's injurious effects relating to operations at the Hobart and Sheila yards.

A. The EIR Does Not Provide Full Disclosure of Impacts Related to the Hobart Railyard.

The People agree with Petitioners that the EIR violates CEQA by failing to analyze the direct and growth-inducing impacts of the Project on BNSF's Hobart operations. (PRB, at 6-12.) For the same reasons, the Port is incorrect that the EIR need not consider *indirect* impacts of the Project related to the Hobart railyard. (RB at 69.) If SCIG is built, BNSF will operate two huge railyards in the Port region with combined cargo-handling capacity nearly double that of Hobart's existing capacity. (AR 3964, 12319.) In fact, BNSF has represented that it plans to operate Hobart at full capacity, and that Hobart will operate at an expanded capacity in the future. (AR 6186-87, 12960.) Moreover, there is substantial evidence in the record that during the life of the Project, demand for cargo handling in the Port region will increase significantly for all types of goods movement (including international, transloaded, and domestic cargo).[10] (AR 6186-6817, 80739, 80744, 81669, 12341.) Therefore, it is reasonably foreseeable that BNSF's cargo handling operations in the region will expand, increasing the number of train and truck trips and generating additional air quality, noise, and traffic impacts. However, the EIR does not disclose the effects of changes in BNSF's cargo-handling operations at Hobart that will occur because of SCIG. (Guidelines § 15126.2; *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 188-89 ["when a fair argument can be made that the proposed project will

[10] In fact, the Port acknowledges such growth in cargo volumes. (RB at 61.)

... result in a reasonably foreseeable indirect environmental impact ... then the CEQA lead agency is obligated to assess this indirect environmental impact."].) Particularly problematic is the fact that the EIR takes credit for positive impacts related to Hobart operations ("reducing the number of trucks going to Hobart") (RB at 69), yet conceals the negative effects of Hobart operations by claiming they are unrelated to SCIG. (*Id.*) As a result, the EIR violates CEQA's disclosure requirement.

B. The EIR Improperly Omits Sheila Yard Impacts.

The EIR also ignores impacts relating to the Sheila yard, although it acknowledges that locomotives from SCIG will be serviced there. (RB at 70.) According to the Port, the number of trains moving cargo will remain the same whether or not SCIG is built, and thus, "the volume of locomotives serviced at Sheila would likewise remain constant with or without SCIG." (*Id.*) However, if the Project is built, it is reasonably foreseeable (if not certain) that the volume of cargo handled by BNSF will grow and that locomotive usage by BNSF in the Port region will increase. (See Section IV.A, above.) It is equally foreseeable that this increase in locomotives will result in a corresponding need for increased maintenance at the Sheila yard, along with associated air quality and noise impacts. Under CEQA, the EIR must analyze these reasonably foreseeable indirect impacts. (Guidelines § 15064, subd. (d).)

The Port incorrectly asserts that the People "[do] not provide any reason why the [Sheila yard] discussion is not supported by substantial evidence." (RB at 70.) As set forth in the People's Opening Brief, the EIR's conclusion that the Project will not cause impacts at the Sheila yard (AR 12388) is not substantial evidence under CEQA. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198.) Because the EIR contains no description of maintenance of locomotives accessing SCIG, other than that servicing will occur at the Sheila yard (AR 3966), it lacks meaningful discussion of the Project's impacts related to servicing of SCIG locomotives.[11] By failing to consider the adverse environmental impacts

[11] Even assuming that the same number of locomotives from SCIG will be serviced at the Sheila yard at the same frequency, the locomotives from SCIG will have to travel at least 20 miles further to the Sheila yard than do locomotives from the Hobart railyard. (AR 12376.) The EIR does not address this increased distance, despite its obvious significance as a reasonably foreseeable impact.

related to reasonably foreseeable changes at the Hobart and Sheila facilities associated with the Project's expansion of BNSF's cargo handling capacity, the Port abuses its discretion and violates CEQA. (Pub. Resources Code, § 21168.5.)

V. THE EIR FAILS TO MEANINGFULLY ANALYZE CUMULATIVE IMPACTS RELATING TO ICTF, HOBART, AND HEALTH RISKS.

The Port asserts that "[t]he EIR carefully and comprehensively analyzes the full scope of cumulative impacts of the SCIG Project." (RB at 99.) To the contrary, the EIR is devoid of meaningful discussion of cumulative impacts of the adjacent ICTF railyard and the Hobart railyard. The EIR also obscures the health risks of combined past, present, and future projects in the Port region. The EIR's failure to provide a meaningful cumulative impact analysis is particularly troubling given that nearby communities are already overburdened by other Port-related impacts, including air pollution, noise, and traffic. (AR 6032, 84313-14, 12682-85.)

A. The EIR Does Not Meaningfully Analyze Combined Impacts of the SCIG Project and Neighboring ICTF.

The Port asserts that "[p]articularized discussion of the cumulative impacts of the SCIG Project together with the ICTF expansion project (and existing ICTF yard) appear frequently throughout the EIR's cumulative impacts chapter." (RB at 101-102.) However, while the EIR identifies the ICTF expansion on its list of 170 presently approved or reasonably foreseeable future projects analyzed for potential cumulative impacts, the references to the cumulative impacts of ICTF's expansion fail to provide meaningful information regarding ICTF's environmental effects. For example, as to land use impacts, the EIR states only that, "the related projects, particularly ... the Port projects (e.g., the ICTF Modernization and Expansion Project (#44)) ... can be expected to have secondary impacts related to air quality, traffic, and noise." (AR 12873; see also AR 12842, 12867, 12872, 12876.)

CEQA requires that the EIR's cumulative impacts analysis "be guided by the standards of practicality and reasonableness." (Guidelines, § 15130, subd. (b); see *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 723 ["The primary determination is whether it was reasonable and practical to include the projects and whether, without their inclusion, the severity and significance of the cumulative impacts were reflected adequately."].) "An EIR must

include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." (*Bakersfield, supra*, 124 Cal.App.4th at 1197.) The EIR's cursory analysis of ICTF's impacts merely states the obvious and does not satisfy CEQA's disclosure requirement. (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831 [EIR inadequate where conclusion regarding impact was "only stating the obvious" because "[w]hat is needed is some information about how adverse the adverse impact will be."])

Moreover, the initial Draft EIR included a detailed combined analysis of the SCIG/ICTF impacts, but that analysis was deleted from the Recirculated Draft EIR ("RDEIR"). (IOB at 22.) The Port asserts "progress on environmental review of the ICTF expansion project had slowed and fallen behind the SCIG Project, creating a circumstance that rendered quantified cumulative SCIG/ICTF expansion analysis impracticable for the RDEIR." (RB at 102, fn.29.) This assertion lacks credibility. The Port is a member of the joint powers authority that governs the ICTF facility, and therefore has access to information on the ICTF project. (AR 80779, 5085, 119031.) The EIR also utilized ICTF data to determine the Project's traffic impacts. (AR 9231, 12784, 12884, 12886.) The Port clearly has access to data regarding the proposed ICTF project, and therefore it was reasonable and practical for the Port to prepare a meaningful discussion of the combined effects of the ICTF and SCIG projects.[12] The Final EIR did not include this analysis, and therefore fails to satisfy CEQA as an informational document.

B. Hobart Railyard Impacts Should Be Included in the EIR'S Cumulative Impact Analysis.

The Port states that "[t]here is no requirement for the EIR to include past and present operations at Hobart in its scope of cumulative projects." (RB at 104.) The Port makes two arguments in support of this conclusion, and both are without merit.

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[12] Several cases support this conclusion. In *Bakersfield, supra*, 124 Cal.App.4th 1184, the court held that the cumulative impact analyses contained in two EIRs for two proposed shopping centers located less than four miles apart were inadequate, because each failed to analyze the cumulative effects of the other. (*Id.* at 1217.) In *San Franciscans for Reasonable Growth* (1984) 151 Cal.App.3d 61, the court concluded that the EIR's cumulative impact analysis violated CEQA by failing to include other nearby proposed developments, because the agency had easy access to information about those projects. (*Id.* at 81.) Similarly, the SCIG EIR violates CEQA by failing to provide meaningful analysis of the ICTF project.

First, the Port claims that Hobart is "outside the geographic scope of cumulative impacts" analyzed in the EIR. (RB at 104-105.) The CEQA Guidelines require the lead agency to consider "the nature of each environmental resource being examined, the location of the project and its type" when determining whether to include a related project. (Guidelines § 15130, subd. (b)(2).) Here, the EIR analyzes the Project's air quality and traffic impacts relating to truck trips on the I-710 freeway and other nearby freeways. (AR 12879-12900, 12475.) In fact, the EIR's cumulative project list includes the "I-710 (Long Beach Freeway) Major Corridor Study (project # 111)." (AR 12833.) Therefore, the EIR's cumulative impact analysis should include air quality impacts on the I-710 freeway and other nearby freeways, which would encompass trucks that access the Hobart railyard. (*Long Beach v. Los Angeles Unified School District* (2009) 176 Cal.App.4th 889, 907.) In addition, the EIR selectively discusses the favorable air quality and traffic impacts related to truck trips traveling to and from Hobart itself. (AR 12377, 12474, 12476, 12782, 12787, 12804, 12880, 12960.) It is reasonable and practical for the Port to fully analyze cumulative air quality, noise, and health impacts associated with Hobart operations, including trucks utilizing local freeways.

Second, the Port asserts "there are no 'reasonably foreseeable potential future projects' at Hobart that would qualify for inclusion in the EIR's cumulative impact analysis." (RB at 105.) As stated above, it is reasonably foreseeable that BNSF's cargo handling operations in the Port region will increase, including operations at the Hobart railyard. (See Section IV.A, above; AR 12959-60, 3964.) Therefore, the EIR should have analyzed the impacts of BNSF's expanded cargo handling operations at the Hobart railyard, including air quality, noise and health impacts from trains and trucks accessing Hobart.[13] The EIR's data regarding Hobart's future operations constitutes sufficient evidence of a reasonably foreseeable future project under the *City of Maywood* case cited by the Port. (RB at 106; *City of Maywood v. Los Angeles Unified School Dist.* (2012) 208 Cal.App.4th 362, 397.)

[13] Although it is reasonably foreseeable that BNSF's expanded cargo handling operations will cause adverse impacts, the Port asserts that the EIR need not evaluate them, either as Project-specific impacts or in the EIR's cumulative impacts analysis. (RB at 57-69.) By not considering these impacts *at all*, the EIR fails as an informational document.

C. The EIR Obscures Cumulative Health Risks.

The Port states that the EIR "determines that cumulative non-cancer [health risk] impacts, in combination with the Project's non-cancer impacts, which are dramatically less than the significance threshold, are not likely to exceed the significance threshold." (RB at 104.) This assertion is inaccurate. The hazard index chart included in the EIR and referenced by the Port lists the Project's non-cancer health impacts for recreational and occupational users as .4 (chronic) and .5 (acute). (AR 12557.) These levels are not "dramatically less" than the significance threshold of 1. (*Id.*) Moreover, the EIR provides no analysis or data to support its conclusion that the combined health impacts of the past, present, and reasonably foreseeable projects will not exceed the significance threshold. It is reasonable to assume that the ICTF expansion project, a proposed railyard project of similar size and operations as the SCIG Project, may result in similar health impacts. (AR 119034, 119037, 3913, 3917.) The combined health impacts for just the SCIG and ICTF projects will likely exceed the acute hazard index significance threshold for recreational and occupational uses. If the health impacts from other past, present, and reasonably foreseeable projects are also considered, the cumulative impacts will probably be more severe. A meaningful analysis of the cumulative health risks on recreational uses is particularly important given that children play in the parks and fields near the SCIG site. (AR 6373, 12478.)

Thus, it was reasonable and practical for the Port to include meaningful discussion in the EIR of the cumulative impacts relating to ICTF, the Hobart railyard, and non-cancer health risks, but the Port did not do so. Given these deficiencies, the EIR fails to fulfill its function as an informational document for decisionmakers and the public, in violation of CEQA.

VI. THE EIR'S MITIGATION AND ALTERNATIVES ANALYSES APPLY INCORRECT STANDARDS AND EVADE CEQA'S REQUIREMENTS.

Throughout its brief, the Port repeatedly seeks to evade CEQA's mandates regarding mitigation and alternatives. First, the Port applies an incorrect standard for determining the feasibility of mitigation. Second, the EIR fails to select a single potentially feasible alternative for consideration. Third, the Port wrongly maintains that its rejection of an access ramp and an alternate location for storage tracks was based on substantial evidence. The Port's approach

undermines the heart of CEQA's substantive mandate to require significant environmental impacts to be avoided when it is feasible to do so.

A. The EIR Improperly Rejects Mitigation Based on an Incorrect Standard and Instead Adopts Misleading and Illusory "Project Conditions."

The Port does not meaningfully respond to the People's argument that the EIR improperly rejects proposed performance standards for zero- and low-emission technologies by applying an improper feasibility standard. (IOB at 27.) The Port asserts that "the inclusion of new zero-emission technology was determined, based on substantial evidence, not to be feasible *at the time of project approval.*" (RB at 50 (emphasis added).) That is the wrong standard for determining feasibility. A mitigation measure is "feasible" if it is "capable of being accomplished in a successful manner *within a reasonable period of time.*" (IOB at 24 and 27 [quoting Guidelines, § 15364, emphasis added].) The Port acknowledges this. (RB at 42.) However, it cites to no regulation, statute, or case – and there is none – that supports its application of an instantaneous standard requiring demonstration of feasibility "at the time of project approval." (RB at 50.)

Had the EIR applied the proper definition of "feasible," it would have meaningfully evaluated enforceable requirements to employ zero-emissions trucks and low-emission locomotives on a specific schedule during the fifty-year life of the Project. As it stands, the EIR's analysis does not evaluate whether such measures could be adopted within "a reasonable period of time." (Guidelines, § 15364.) Instead, the Port adopted PC AQ-11 and PC AQ-12, which are unenforceable, precatory versions of the mitigation required by CEQA. The Port's continued representation that these measures constitute "extensive commitments" misleads the public and decisionmakers. (RB at 50.)

B. The EIR'S Selection of Alternatives Was Improper.

The Port claims that the People objected to the EIR's discussion of alternatives because it only gave full consideration to two Project alternatives. (RB at 106.) That is a mischaracterization of the People's argument. The People's objection to the EIR's selection of alternatives is that it includes only a *single* alternative (the "reduced project" alternative), in addition to the statutorily mandated "no project" alternative. That single alternative, however,

was never "potentially feasible," as is required by CEQA. (Guidelines, § 15126.6, subd. (b); *California Native Plant Soc. v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 981.) The Port knew or should have known that BNSF would not build the reduced project as designed. (IOB at 31; RB at 108.) The Port decided to analyze this alternative when it was known in advance that it would be inevitably rejected, while at the same time excluding any other potentially feasible alternative designed to lessen the Project's impact on the environment. That decision not only violates CEQA's requirement to examine a reasonable range of alternatives, but also means that the EIR in essence failed to evaluate any feasible alternatives. (See *Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1305 ["Because the ... EIR failed to discuss any feasible alternative ... that could avoid or lessen the significant environmental impact of the project ... the alternatives discussions in the ... EIR did not comply with CEQA." (emphasis in original)].)

C. Substantial Evidence Does Not Support the Port's Rejection of Measures to Reduce Impacts.

The EIR's rejection of proposals to construct an access ramp and relocate storage tracks, either as mitigation or alternatives, is not supported by substantial evidence.

1. The EIR's Analysis of the Access Ramp Violates CEQA.

The Port acknowledges that the potential reconfiguration of the access ramp to the SCIG facility would serve "to increase the distance between the designated truck routes and the existing community." (RB at 53.) However, the EIR cursorily dismisses this measure, concluding that "[because] the SCIG Project would not result in any significant *traffic* impacts, the proposal to reconfigure the Terminal Island Freeway would not serve to lessen any significant traffic impacts." (*Id.* (quoting AR 004753) (emphasis added).) This conclusion entirely ignores the air quality and health benefits that would derive from distancing diesel particulate matter and other dangerous pollutants from the sensitive receptors immediately adjacent to the facility. (IOB at 33-34 [quoting multiple commenters noting that a reconfigured access ramp would *distance* emissions made by thousands of diesel trucks travelling within feet of sensitive receptors.])

The Port claims that the People have ignored "extensive evidence in the record supporting the EIR's conclusions that there are no significant *traffic* impacts justifying this proposed mitigation measure." (RB at 53, emphasis added.) The Port misconstrues the People's primary argument: that the EIR relies only on speculation and unsupported conclusions in determining that the reconfigured access ramp would not avoid or reduce *air quality* harms imposed on the surrounding community. Specifically, the Port's "evidence" with respect to air quality impacts consists of a single sentence within the EIR speculating that the flyover option would "*possibly* [have] greater environmental impacts, as trucks would produce greater emissions climbing the flyover grade than they would on the at grade additional lane." (RB at 110 [quoting AR 012957] (emphasis added).) Speculative, conclusory statements are not substantial evidence. (Guidelines § 15384.) More critically, there is no analysis of whether such a speculative increase in emissions from the ramp might be an acceptable trade-off for the benefits resulting from the ramp moving those emissions much further from sensitive receptors. (See *Habitat and Watershed Caretakers*, *supra*, 213 Cal.App.4th at 1305 [A potential alternative cannot be rejected "on the *unanalyzed* theory that such an alternative *might* not prove to be environmentally superior to the project."] [emphasis in original].) Whether the access ramp is analyzed as a mitigation measure or an alternative, the EIR's rejection of the measure is not supported by substantial evidence.

2. The EIR's Misstatements Regarding the Location of the Storage Tracks Violate CEQA.

Commenters on the Draft EIR noted that the Project's storage tracks were too close to adjacent sensitive receptors, and suggested they be moved further from those receptors to reduce air quality impacts. (IOB at 35; AR 4434 [City of Long Beach noting that storage tracks would be located "within two hundred feet of several sensitive receptors."]; AR 4740 [City Fabrick noting same, suggesting locating tracks elsewhere "to maximize the distance between all proposed rail operations and existing schools and homes, thus reducing the impacts to sensitive receivers."].) In response, the Final EIR repeatedly – and falsely – states that because the tracks will be located within the SCIG facility, those concerns were unfounded. (AR 4471 [response to City of Long Beach claiming that "[t]he storage tracks would [] be inside the railyard, and thus no

less than 600 feet from any sensitive use."]; 4750 [response to City Fabrick indicating same].) The Port now claims that these repeated and detailed misstatements were "an inadvertent textual error." (RB at 113.) The Port also claims that because this error was "limited in nature," and because the track location was properly analyzed in other portions of the Final EIR, that error is irrelevant for purposes of CEQA. (*Id.* at 113-115.) This claim is incorrect.

First, the EIR's rejection of a proposal to move the storage tracks is based on the "fact" that the storage tracks were located within the SCIG project's boundaries. (AR 4750.) Statements and conclusions that are demonstrably false cannot constitute substantial evidence to support rejection of feasible mitigation. (Guidelines § 15384.) Second, the Port's dismissal of the error in the Final EIR as essentially a "typo" minimizes the importance of an EIR as an informational document designed to inform both the public and the permitting agency in an accurate and consistent manner that can be relied upon. (See *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1355 ["[A]mbiguity in the FEIR's analysis of the reduced-size alternative meant that the public and the City Council were not properly informed of the requisite facts that would permit them to evaluate the feasibility of this alternative."]; *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 455 ["The public and decision makers are entitled to the most accurate information on project impacts practically possible."].)

Thus, the EIR violates CEQA both by rejecting mitigation measures based on unsupported conclusions and incorrect facts and by including inaccurate information that misleads both the public and decisionmakers.

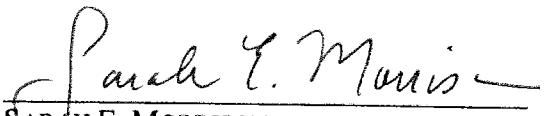
VII. CONCLUSION

For the reasons outlined above, in the People's Opening Brief, and in the briefs submitted by Petitioners, the People respectfully request that the Court issue a writ of mandate directing the Port to vacate its decision and conduct a CEQA-compliant analysis of the Project.

Dated: September 11, 2015

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
SALLY MAGNANI
Senior Assistant Attorney General
CATHERINE M. WIEMAN
BRIAN J. BILFORD
Deputy Attorneys General



SARAH E. MORRISON
Supervising Deputy Attorney General

Attorneys for Intervenor the People of the State of California ex rel. Kamala D. Harris, Attorney General

LA2013509506

DECLARATION OF SERVICE BY E-MAIL and OVERNIGHT COURIER

Case Name: **Fast Lane Transportation, Inc., et al. v. City of Los Angeles, et al.**

Case No.: **CIV MSN14-0300**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with the **[FED EX]**. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business.

On September 11, 2015, I served the attached

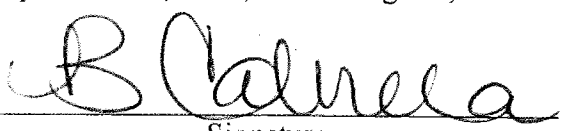
REPLY BRIEF IN SUPPORT OF THE PEOPLE'S PETITION FOR WRIT OF MANDATE IN INTERVENTION

by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 11, 2015, at Los Angeles, California.

Blanca Cabrera
Declarant



Signature

SERVICE LIST

John S. Peterson
Stacy Thomsen
Peterson Law Group
19800 MacArthur Blvd., Suite 290
Irvine, CA 92612
Telephone: (949) 955-0127
Facsimile: (949) 955-9007
Email: jsp@petersonlawgroup.com
swt@petersonlawgroup.com

Attorneys for Petitioners
Fast Lane Transportation, Inc., California Cartage Company Inc., Three Rivers Trucking, Inc., and San Pedro Forklift. Inc.

Michael N. Feuer, City Attorney
Janna B. Sidley, General Counsel
Joy M. Crose, Assistant General Counsel
Minah Park, Deputy City Attorney
Office of the City Attorney of Los Angeles
425 South Palos Verdes Street
San Pedro, CA 90731
Telephone: (310)732-3750
Facsimile: (310) 831-9778
Email: jsidley@portla.org
jcrose@portla.org
MPark@portla.org

Attorneys for Respondents/Defendants
City of Los Angeles; Los Angeles City Council; City of Los Angeles Harbor Department; Los Angeles Board of Harbor Commissioners

Margaret M. Sohagi
Philip A. Seymour
The Sohagi Law Group, PLC
11999 San Vicente Boulevard, Suite 150
Los Angeles, CA 90049-5136
Telephone: (310) 475-5700
Facsimile: (310) 475-5707
Email: msohagi@sohagi.com
pseymour@silcom.com

Attorneys for Respondents/Defendants
City of Los Angeles; Los Angeles City Council; City of Los Angeles Harbor Department; Los Angeles Board of Harbor Commissioners

Charles Parkin, City Attorney
Michael J. Mais, Assistant City Attorney
City of Long Beach
333 West Ocean Boulevard, 11th Floor
Long Beach, CA 90802
Telephone: (562) 570-2200
Facsimile: (562) 436-1579
Email: Charles.Parkin@longbeach.gov
Michael.mais@longbeach.gov

Attorneys for Petitioner
City of Long Beach

David R. Pettit Esq.
Melissa Lin Perrella
Morgan Wyenn
Ramya Sivasubramanian
Natural Resources Defense Council
1314 Second Street
Santa Monica, CA 90401
Telephone: (310) 434-2300
Facsimile: (310) 434-2399
Email: dpettit@nrdc.org
mlinperrella@nrdc.org
mwyenn@nrdc.org
rsivasubramanian@nrdc.org

Attorneys for Petitioners/Plaintiffs
East Yard Communities For Environmental Justice, Coalition For Clean Air, Century Villages At Cabrillo, Elena Rodriquez, Evelyn Deloris Knight, and Natural Resources Defense Council, Inc.

Amrit S. Kulkarni
Julia L. Bond
Peter S. Hayes
Meyers, Nave, Riback, Silver & Wilson
555 12th Street, Suite 1500
Oakland, CA 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108
Email: akulkarni@meyersnave.com
jbond@meyersnave.com
phayes@meyersnave.com

Attorneys for Real Party in Interest
BNSF Railway Company

Rachel B. Hooper
Winter King
Erin B. Chalmers
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816
Email: hooper@smwlaw.com
king@smwlaw.com
chalmers@smwlaw.com

Attorneys for Petitioner
City of Long Beach

Michael H. Zischke
James Purvis
Cox Castle & Nicholson LLP
555 California Street, 10th Floor
San Francisco, CA 94104-1513
Telephone: (415) 392-4200
Facsimile: (415) 392-4250
Email: mzischke@coxcastle.com
jpurvis@coxcastele.com

Attorneys for Petitioner
Long Beach Unified School District

Daniel P. Selmi
919 S. Albany Street
Los Angeles, CA 90015
Telephone: (213) 736-1098
Facsimile: (949) 675-9861
Email: dselmi@aol.com

Attorneys for Petitioner
City of Long Beach

Kurt R. Wiese
Barbara Baird
Veera Tyagi
Shahrzod Hanizavareh
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, CA 91765
Telephone: (909) 396-2000
Facsimile: (909) 396-2961
Email: kwiese@aqmd.gov
bbaird@aqmd.gov
vtyagi@aqmd.gov
shanizavareh@aqmd.gov

Attorneys for Petitioner
South Coast Air Quality Management District

Raymond W. Johnson
Abigail Smith
Johnson & Sedlack
26785 Camino Seco
Temecula, CA 92590
Telephone: (951) 506-9925
Facsimile: (951) 506-9725
Email: ray@socalceqa.com
abby.socalceqa.com

Attorneys for Petitioners
Coalition for a Safe Environment, Apostalic Faith Center, Community Dreams and California Kids IAQ

Russel Light
BNSF Railway
2500 Lou Menk Drive
AOB-3
Fort Worth, TX 76161
Telephone: (817) 352-2152
Facsimile: (817) 352-2398
Email: Russell.light@bnsf.com

Attorney for Real Parties in Interest
Burlington Northern Santa Fe Railway; BNSF Railway Company

Marisa E. Blackshire
BNSF Railway
2770 East 26th Street
Vernon, CA 90058
Telephone: (323) 267-4103
Email: marisa.blackshire@bnsf.com

Attorney for Real Parties in Interest
Burlington Northern Santa Fe Railway; BNSF Railway Company

CERTIFICATE OF SERVICE

LYNDA F. JOHNSTON declares:

I am over the age of eighteen years and not a party to this action. My business address is 559 Nathan Abbott Way, Stanford, California 94305-8610.

On September 25, 2015, I served the foregoing **PLAINTIFF CALIFORNIANS FOR ALTERNATIVES TO TOXICS' THIRD REQUEST FOR JUDICIAL NOTICE** on each person named below by placing a true and correct copy thereof in a sealed envelope, with postage thereon fully prepaid, in the United States Mail at Stanford, California, addressed to each recipient respectively as follows:

Christopher J. Neary, Esq.
Neary and O'Brien
110 South Main Street, Suite C
Willits, California 95490-3533

Attorneys for North Coast Railroad Authority and Board of Directors of North Coast Railroad Authority

Andrew B. Sabey, Esq.
Linda C. Klein, Attorney at Law
Cox, Castle & Nicholson LLP
555 California Street, 10th Floor
San Francisco, California 94104-1513

Attorneys for Northwestern Pacific Railroad Company

Clare Lakewood, Attorney at Law
Center for Biological Diversity
1212 Broaway, Suite 800
Oakland, California 94612-1805

Attorneys for Amicus Curiae Center for Biological Diversity

Kurt R. Wiese, General Counsel
Barbara Baird, Chief Deputy Counsel
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, California 91765-4178

Attorneys for Amicus Curiae South Coast Air Quality Management District

Jason W. Holder, Esq.
Holder Law Group
339 15th Street, Suite 202
Oakland, California 94612-3319

Attorneys for Amici Curiae Madera County Farm Bureau and Merced County Farm Bureau

Stuart M. Flashman, Esq.
5626 Ocean View Drive
Oakland, California 94618-1533

Attorney for Amici Curiae Town of Atherton, California Rail Foundation, Transportation Solutions Defense and Education Fund, Community Coalition on High-Speed Rail, and Patricia Hogan-Giorni

Mark N. Melnick
Myung J. Park
Carolyn Nelson Rowan
Deputy Attorneys General
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102-7004

Attorneys for Amici Curiae the California Environmental Protection Agency, the California Natural Resources Agency, and certain of their Departments and Boards

Brian C. Bunger, District Counsel
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, California 94101-7714

Attorney for Amicus Curiae Bay Area Air Quality Management District

David Pettit, Esq.
Melissa Lin Perrella, Attorney at Law
Ramya Sivasubramanian, Attorney at Law
Natural Resources Defense Council
1314 Second Street
Santa Monica, California 90401-1103

Attorneys for Amici Curiae Sierra Club, Coalition for Clean Air, Natural Resources Defense Council, Planning and Conservation League, and Communities for a Better Environment

Danae J. Aitchison, Deputy Attorney General
Office of the Attorney General
1300 I Street, Suite 125
P. O. Box 944255
Sacramento, California 94244-2550

Attorneys for Amicus Curiae California High-Speed Rail Authority

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed September 25, 2015 at Stanford, California.

Lynda F. Johnston

LYNDA F. JOHNSTON