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May 14, 2020

VIA E-MAIL ONLY

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RE: **World Logistics Center Revised Final Environmental Impact Report
(SCH # 2012021045)**

Dear Ms. Descoteaux:

Attorney General Xavier Becerra, in his independent capacity,¹ and the California Air Resources Board (CARB) jointly submit the following comments on the April 2020 Final Environmental Impact Report (FEIR) prepared for the World Logistics Center (the Project) in advance of the Project's May 14, 2020 Moreno Valley (City) Planning Commission hearing.

The Attorney General and CARB have the following concerns regarding the FEIR, as explained in detail below:

1. The FEIR does not correct the improper GHG analysis the Attorney General and CARB critiqued in multiple comment letters on prior versions of the Project's environmental impact report.²

¹ The Attorney General's Office submits these comments pursuant to his independent power and duty to protect the environment and natural resources of the State from pollution, impairment, or destruction, and in furtherance of the public interest. (See Cal. Const., art. V, § 13; Gov. Code, §§ 12511, 12600–12612; *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 14–15.) This letter is not intended, and should not be construed, as an exhaustive discussion of the FEIR's compliance with the California Environmental Quality Act (CEQA).

² The Attorney General and CARB previously reviewed the City's July 2018 Revised Final Environmental Impact Report (RFEIR) and submitted comments regarding the RFEIR on September 7, 2018. As noted in those comment letters, the RFEIR's analysis of greenhouse gas (GHG) related impacts does not meet CEQA's requirements. On January 30, 2020, CARB also

2. The FEIR also continues to misrepresent CARB's positions.
3. The FEIR's new GHG Mitigation Measure 4.7.7.1 is inadequate.
4. The FEIR fails to adopt feasible mitigation measures that would substantially lessen the Project's significant adverse effects.
5. The addition of Mitigation Measure 4.7.7.1 is "significant information" that requires recirculation of the FEIR.

Until these shortcomings are corrected, the FEIR should not be certified by the City.

I. THE FEIR CONTINUES TO RELY ON ENVIRONMENTALLY IRRESPONSIBLE AND LEGALLY FLAWED ARGUMENTS TO AVOID PROPERLY ANALYZING AND MITIGATING THE PROJECT'S ENORMOUS GREENHOUSE GAS IMPACTS.

Under CEQA, a project's significant GHG impacts must be disclosed and mitigated to the extent feasible whenever the lead agency determines that the project contributes to a significant, cumulative climate change impact. 14 Cal. Code Regs. (CEQA Guidelines) § 15064.4. Yet, the FEIR continues to improperly divide the Project's GHG emissions into two categories, which it terms "capped" and "uncapped"; classifications that are created by the FEIR and have no relevance under CEQA. The FEIR asserts that "capped" emissions are "covered" by CARB's Cap-and-Trade Program, and therefore claims that they are exempt from any further CEQA analysis or mitigation.³

To purportedly support its improper approach to GHG analysis and mitigation, the FEIR relies on a few weak, misguided bases: (1) two mitigated negative declarations (MND); (2) an outdated guidance document from an air district with no jurisdiction in the South Coast Air Basin; (3) an inapposite appellate court decision that did not benefit from the input of California's expert agencies and other key stakeholders, and (4) unsupported arguments about indirect costs.

The FEIR does not, and cannot, explain why its GHG analysis and mitigation approach did not comply with the CEQA Guidelines, applicable case law, and other relevant guidance regarding GHG analysis and mitigation. In addition, the FEIR ignores the objections in our previous comment letters.

filed comments on the Draft Recirculated Revised Sections of the Final Environmental Impact Report (RRSFEIR). These three comment letters are attached to this letter as Exhibits A-C. Further, the Attorney General and CARB's amicus brief in *Paulek et al. v. Moreno Valley Community Services District et al.* (E071184) (*Paulek*), which further discusses the legal inadequacies of the GHG analysis, is attached hereto as Exhibit D.

³ Though Mitigation Measure 4.7.7.1 agrees to offset "capped" emissions in the event the City's GHG analysis is invalidated in *Paulek*, the improper legal arguments regarding the distinction between "capped" and "uncapped" emissions will remain.

The City cites the San Joaquin Valley Air Pollution Control District (SJVAPCD) Policy APR-2025, issued in 2014, and two MNDs approved by SCAQMD in 2014. The City states that its approach has been applied “for years” in light of those same documents. (FEIR at 23.) However, as the California Supreme Court has repeatedly held in more recent years, GHG law continues to evolve, and lead agencies have an obligation under CEQA to “stay in step.” *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 504 (*SANDAG*).⁴ The documents the City relied on are out of date and not the appropriate guidance for analyzing GHG impacts under CEQA.

Note that in 2014, the California Supreme Court had not yet issued its seminal *Newhall* decision, which was published on November 30, 2015. *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 230 (*Newhall*). The Court then issued the *SANDAG* decision on July 13, 2017. (*SANDAG, supra*, (2017) 3 Cal.5th 497.) The FEIR ignores post-2014 materials that establish its approach is unlawful, including the *SANDAG* California Supreme Court decision referenced above, as well as CARB’s 2017 Scoping Plan.⁵

The City also relies on *Association of Irrigated Residents v. Kern County Board of Supervisors* (2017) 17 Cal.App.5th 708 (*AIR*). However, as previously noted, *AIR* did not broadly validate the City’s approach of excluding all fuel and electricity related emissions from its GHG analysis, particularly for a project that is not regulated by the Cap-and-Trade Regulation. (See FEIR at 22, 23.) That issue simply was not before the court, and was not given due consideration as a result. (See Exhibit A at 6; Exhibit B at 11-12; Exhibit D at 30-31.) *AIR* is thus inapposite.

Finally, the City also attempts to argue that the Project would effectively be paying for GHG mitigation through fuel and electrical costs passed down to the end consumer. (FEIR at 18-19.) It still remains unclear how there would be any price signal to Project proponents in this situation, given that any fuel-related costs would be paid by the fuel suppliers, and potentially passed down to the Project’s tenant logistics companies. Regardless, these fuel costs would not be paid by the Project proponents.

⁴ As the California Supreme Court has held, “CEQA requires public agencies ... to ensure that such analysis stay in step with evolving scientific knowledge and state regulatory schemes.” (*SANDAG* at 504.) The Court viewed the Scoping Plan as a particularly useful source of information, given the extensive study and public participation involved in its preparation. (*Ibid.*) A recent article provides a useful primer on this body of law. (See Janill Richards, *The SANDAG Decision: How Lead Agencies Can “Stay in Step” with Law and Science in Addressing the Climate Impacts of Large-Scale Planning and Infrastructure Projects* (2017) 26:2 Environmental Law News 17.)

⁵ Available at https://ww3.arb.ca.gov/cc/scopingplan/scoping_plan_2017.pdf. See, in particular, the “Climate Action through Local Planning and Permitting” chapter beginning at page 99, which describes the critical role played by local government contributions to CEQA reductions, including through the CEQA review process. See also CARB’s 2018 comment letter for more information on this point.

In sum, the City's weak attempts to support the FEIR's unlawful GHG analysis and mitigation approach are without merit. Thus, the FEIR violates CEQA by failing to fully analyze and mitigate the significant GHG impacts of the Project.

II. THE FEIR CONTINUES TO INCORRECTLY CLAIM THAT CARB SUPPORTS THE WLC'S GHG APPROACH.

The FEIR continues to misrepresent CARB's views on GHG analysis and mitigation.⁶ As noted in CARB's September 7, 2018 letter and in its *Paulek* amicus brief, CARB does not support the approach proposed; the approach is unlawful, inconsistent with relevant climate plans and regulations, and likely to set back the state's climate mitigation efforts if applied. Once again, the Cap-and-Trade Program was not designed to mitigate all GHG impacts associated with land use planning decisions. Rather, it was designed with responsible local CEQA compliance in mind as a complementary strategy. (See, e.g., 2017 Scoping Plan at 99-102.) Cap-and-Trade, which is neither tailored to nor affected by the Project, simply does not provide project-level mitigation in this case.

The FEIR points to several cherry-picked provisions from the 2011 Final Statement of Reasons for the Cap-and-Trade Project. (FEIR at 18-19.) Yet it fails to explain why there is not a single provision, from any point in time, indicating that CARB intended Cap-and-Trade compliance to constitute CEQA mitigation for unregulated entities and projects, or that it excuses land use projects wholesale from evaluating or mitigating their GHG emissions. Cap-and-Trade does not and CARB plainly never intended Cap-and-Trade to obviate CEQA mitigation requirements; that is a much bigger change that CARB would have expressly addressed had that been the intent. While the FEIR points out selected Scoping Plan provisions (FEIR at 25), it conveniently omits the directly applicable "Climate Action through Local Planning and Permitting" chapter describing how CARB relies on complimentary local planning actions (including robust CEQA analysis and mitigation) to accomplish the state's GHG mandates and goals. (See 2017 Scoping Plan at 99-102.) The City's approach would effectively render superfluous the CEQA mitigation recommendations in CARB's Scoping Plan, as there would be essentially nothing left to mitigate if agencies took the City's approach. It would also allow lead agencies to disregard their CEQA obligations and make less informed decisions. (See, e.g.,

⁶ In the *Paulek* litigation, attorneys for the developer argued that because CARB did not specifically object to the project's GHG significance methodology in its early comment letters, CARB "apparently had no problem with the EIRs not counting capped emissions against the [WLC] in order to determine the significance of greenhouse gas emissions." (Transcript of January 22, 2018 hearing in *Paulek* case, before Hon. Sharon J. Waters, p. 18, lines 3-7.) The City has failed to address this issue or otherwise correct this clear and consequential misrepresentation in its responses to comments.

SANDAG, supra, 3 Cal.5th at p. 519 [“nothing we say today invites regional planners to ‘shirk their responsibilities’ under CEQA”].)

Despite failing to mitigate 95% of the Project’s emissions, the FEIR appears to claim that the Project would be consistent with the “Climate Action through Local Planning and Permitting” chapter of the Scoping Plan mentioned above. (FEIR at 29.) This is incorrect. As noted above, that chapter of the Scoping Plan discusses how the State needs more, not less, responsible GHG planning and mitigation from project developers and lead agencies. Here, the City seeks to avoid almost entirely its obligation to mitigate its GHG emissions.

III. THE NEW GHG MITIGATION MEASURE 4.7.7.1 IS INADEQUATE.

As stated in our previous comments, under CEQA, the City must revise the FEIR to analyze all of the Project’s significant impacts relating to GHG emissions, including capped emissions. The FEIR must also adopt all feasible mitigation to address the Project’s significant GHG impacts. (*Newhall, supra*, 62 Cal.4th at p. 231.) Instead, the City revised the FEIR to add a mitigation measure for the Project, but this measure does not correct the FEIR’s CEQA violations. The new GHG mitigation measure would require the Project to purchase GHG offsets to mitigate its emissions, but only if the City loses the *Paulek* appellate litigation. (Measure 4.7.7.1.) This measure is inadequate for multiple reasons.

First, the City should adopt meaningful GHG mitigation measures in the FEIR, rather than continuing to avoid its responsibility to require mitigation unless specifically so ordered by a court. The City has conceded that such a measure is feasible by including its contingent GHG mitigation measure in the FEIR. (CEQA Guidelines, § 15092, subd. (b)(2)(A) [“A public agency shall not decide to approve or carry out a project for which an EIR was prepared unless . . . [t]he agency has . . . [e]liminated or substantially lessened all significant effects on the environment where feasible.”].) Indeed, more beneficial mitigation measures are feasible – including the use, for instance, of electrified trucks for the Project, which would reduce both GHGs and air pollution risk, as CARB has long recommended. Yet, the Project has not even adopted its inadequate offset measure, much less failed to explain why it has not adopted ostensibly feasible measures presented by CARB regarding design changes to favor zero emission vehicles. There is no indication in the record that even a more robust, legally-adequate GHG mitigation measure would be infeasible for the Project.

Second, the proposed measure, if it ever becomes effective, may not actually reduce the Project’s GHG emissions. Mitigation Measure 4.7.7.1 uses similar language to CARB’s offsets program, it lacks the essential safeguards that make CARB’s program successful. For example, the measure states that any offsets used must be “real, permanent, additional, quantifiable, verifiable, and enforceable by an appropriate agency.” (FEIR at 36.) However, these terms are not defined in the mitigation measure. They are left to the sole interpretation and discretion of the City’s Planning Official and thus not enforceable as CEQA requires. (See Pub. Resources Code, § 21081.6, subd. (b); CEQA Guidelines, § 15126.4, subd. (a)(2).) There is a broad continuum of voluntary-market offsets available for purchase by project proponents, ranging

from ineffective and unenforceable to rigorous. It remains unclear which types of offsets would be deemed by the City's Planning Official to meet these undefined criteria.

In the land-use planning context, offsets—particularly offsets that are not tied to local projects—have distinct disadvantages as compared to on-site mitigation or other direct emission reduction measures. Offsets do not provide the important co-benefits of on-site mitigation such as local jobs, reduced local air pollution, local infrastructure and efficiency improvements. (See e.g. 2017 Scoping Plan at 102 (“CARB recommends that lead agencies prioritize on-site design features that reduce emissions, especially from [vehicle miles traveled], and direct investments in GHG reductions within the project’s region that contribute potential air quality, health, and economic co-benefits locally.”) This is why the 2017 Scoping Plan prioritizes local direct investments, and recommends turning to offset credits “[w]here further project design or regional investments are infeasible or not proven to be effective.” (2017 Scoping Plan at 102.) The proposed measure, by contrast, does not obligate the Project to first consider additional direct reductions, or other local or regional GHG emissions reductions, before deciding to purchase offsets. Such direct or local measures could otherwise benefit those in the Project vicinity. Furthermore, the measure does not in any way limit the percentage of offsets which may be used to mitigate the Project’s GHG emissions, as compared to more direct methods of GHG reduction. California’s Cap-and-Trade Program, for its part, sets a quantitative usage limit, which allows only 4-8% (depending on the calendar year) of an entity’s compliance obligation to be met through surrendering offsets. (See 17 Cal. Code Regs., § 95854.) This helps ensure that offsets are a relatively small part of the overall Cap-and-Trade Program, ensuring that the majority of GHG reductions come from reductions by regulated entities rather than from non-covered sectors.

The FEIR’s proposed measure entirely lacks this protection, instead allowing offsets (even ones that may not actually result in GHG reductions, as described above) as the sole GHG mitigation mechanism. These disadvantages, combined with the lack of any adequate criteria to ensure quality or enforceability of the offsets that may be purchased in this case, make the mitigation measure ineffective and unreliable.

Mitigation Measure 4.7.7.1 also seems to imply that CARB has broadly “approved” the offset registries it lists. The measure’s text states: “Credits registered by a carbon registry approved by the California Air Resources Board, such as, but not limited to, the Climate Action Reserve, American Carbon Registry, Verra (formerly Verified Carbon Standard) or GHG Reduction Exchange (GHG RX), shall be conclusively presumed to meet all of the criteria set forth above.” (FEIR at 36). CARB has approved only the American Carbon Registry, Climate Action Reserve, and Verra for the limited purpose of participation as Offset Project Registries in CARB’s Cap-and-Trade Program, pursuant to the process set forth in section 95986 of Title 17 of the California Code of Regulations. This approval only pertains to the registry’s participation in the Cap-and-Trade Regulation, in connection with issuing CARB offset credits. By contrast, the offsets contemplated by Mitigation Measure 4.7.7.1 are known as “voluntary market” offsets, which are generated under separate protocols adopted by the registries. CARB does not review

these voluntary market protocols. CARB's "approval" of a registry as an Offset Project Registry under the Cap-and-Trade Program does not mean CARB has reviewed or approved that registry's voluntary market offset protocols.

Mitigation Measure 4.7.7.1 improperly bypasses onsite and local mitigation and violates CEQA because of its unenforceability and thus must be revised.

IV. THE FEIR IMPROPERLY DECLINES TO ADOPT FEASIBLE MITIGATION MEASURES THAT WOULD SUBSTANTIALLY LESSEN THE PROJECT'S SIGNIFICANT ADVERSE EFFECTS.

The FEIR simultaneously argues the proposed use of offsets and credits is a feasible mitigation measure, and yet refuses to adopt such a measure now by conditioning it on the outcome of the *Paulek* litigation. This approach violates CEQA, which instructs that "public agencies should not approve projects as proposed if there are... feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects." (Pub. Res. Code 21002). The FEIR recognizes it is possible to offset the entire 232,402 metric tons of GHG from this Project but only guarantees the offset of 8,563 metric tons of GHG emissions. (See FEIR at page 39.) The entire 232,403 metric tons of GHGs will *not* be offset if the "trial court's judgment in *Paulek* is affirmed after the appellate process is completed or if the appeal is dismissed." However, if the appeal is dismissed, an appellate court will not have upheld the City's GHG analysis and, as described above, the City's misleadingly-named "capped" emissions would be considered a significant environmental effect. These emissions would need to be mitigated, and could be via a feasible and rigorous GHG mitigation measure (as described above). By refusing to adopt such a feasible mitigation measure here, the FEIR violates CEQA. (See CEQA Guidelines, § 15092.)

V. MITIGATION MEASURE 4.7.7.1 IS "SIGNIFICANT NEW INFORMATION" THAT REQUIRES RECIRCULATION OF THE FINAL EIR.

Pursuant to Public Resources Code section 21092.1, Mitigation Measure 4.7.7.1 is "significant new information" that requires a new opportunity for public comment. "Significant new information" includes a new "feasible way to mitigate or avoid [a substantial adverse environmental effect]... that the project's proponents have declined to implement." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1129, as modified on denial of reh. (Feb. 24, 1994)). As described above, Mitigation Measure 4.7.7.1 identifies a feasible, although not necessarily proper, way to mitigate the Project's greenhouse gas emissions, yet declines to adopt such mitigation unconditionally.

When "significant new information... is added to an environmental impact report after notice... but prior to certification" the public agency must "give notice again pursuant to Section 21092... before certifying the environmental impact report." (Pub. Resources Code, § 21092.1). Notice pursuant to Public Resources Code Section 21092(b)(2) requires a comment period.

However, Mitigation Measure 4.7.7.1 was added to the FEIR through a “Response to Comments on the Revised Sections of the Final EIR and Draft Recirculated Revised Sections of the Final EIR” without any such comment period. Instead, the City simultaneously released that document and a Notice of Completion informing the public that the Moreno Valley Planning Commission would review the Revised FEIR at a public hearing on May 14, 2020. Moreno Valley should have recirculated the EIR and provided an opportunity for public comment on the EIR with the addition of Mitigation Measure 4.7.7.1.⁷

VI. CONCLUSION

The Attorney General and CARB urge the City of Moreno Valley not to certify the FEIR without further revisions to the GHG analysis as described above. As stated in our previous comments, the City must take its obligations as a local government to mitigate climate change impacts seriously. The addition of a weak GHG measure that would apply only if the City’s approach is invalidated on appeal is not enough. However, if the City implements the actions that the state’s expert agencies have requested for years, the Project could be an important environmental leadership project. Indeed, the Project could create jobs by building a world-leading clean logistics project, protecting communities all along its supply chains. We encourage the City to take this opportunity to innovate and to lead. As always, we would be happy to work with the City to take the additional steps needed to fully comply with CEQA’s GHG analysis and proper mitigation requirements for the Project. We appreciate your consideration of our comments.

Sincerely,



HEATHER LESLIE
Deputy Attorney General

For XAVIER BECERRA
Attorney General

⁷ In its January 30, 2020 comments, CARB informed the City of its concerns with not being able to review the new GHG-related mitigation measure. (See January 30, 2020 CARB comment letter at page 1.) When CARB reached out to a City representative at that time, CARB was informed that the reference to the new GHG mitigation measure was included in the RRSFEIR in error, and it would be removed in the FEIR. Rather than remove that measure, the FEIR now includes a new GHG mitigation measure that has never before been circulated for public review, and which the City had previously indicated would not be part of the FEIR. The City only now has decided to release this measure as part of a vast FEIR package, just 14 days prior to the Project approval hearing.

Ms. Descoteaux
May 14, 2020
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A handwritten signature in blue ink, appearing to read 'R. W. Corey', with a checkmark-like flourish at the end.

Richard W. Corey
Executive Officer, CARB

cc: Albert Armijo, Interim Planning Manager, alberta@moval.org
Kenneth B. Bley, Attorney for Project Proponents, kbley@coxcastle.com

EXHIBIT A

XAVIER BECERRA
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September 7, 2018

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RE: Revised Sections of the Final Environmental Impact Report for the World Logistics Center Project

Dear Mr. Armijo:

Attorney General Xavier Becerra submits the following comments on the Revised Sections of the Final Environmental Impact Report ("RFEIR") prepared for the World Logistics Center (the "Project").¹ The Project, a proposed warehouse and logistics complex in the City of Moreno Valley ("City"), would be one of the largest warehouse facilities in the world, with square footage equaling approximately 700 regulation-size football fields.

INTEREST OF THE ATTORNEY GENERAL

For well over a decade, the Attorney General has actively encouraged lead agencies to fulfill their CEQA responsibilities as they relate to climate change. It is now well-established that California, through law and policy, and consistent with sound science, is committed to achieving a low-carbon future by 2050 in order to reduce and avoid the most catastrophic effects of climate change. California has already begun to experience adverse climate effects, such as rising sea levels and longer, more intense fire seasons. The Attorney General is particularly concerned about how such effects may impact our most vulnerable communities, such as Inland Empire residents, who are already burdened by some of the worst air quality in the country.

¹ The Attorney General's Office submits these comments pursuant to his independent power and duty to protect the environment and natural resources of the State from pollution, impairment, or destruction, and in furtherance of the public interest. (See Cal. Const., art. V, § 13; Gov. Code, §§ 12511, 12600-12612; *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 14-15.) This letter is not intended, and should not be construed, as an exhaustive discussion of the RFEIR's compliance with the California Environmental Quality Act ("CEQA").

Every large development project has the potential either to facilitate, or instead hinder, the State's achievement of its climate goals. It is therefore important that as lead agencies consider the impacts of individual development projects – many of which will operate for decades into the future – they evaluate and impose feasible mitigation for climate change impacts.

With these goals in mind, the Attorney General has provided guidance to local governments, commented on potential projects, and engaged with local interest organizations concerned with climate change and environmental justice. (See California Department of Justice, Office of the Attorney General, *California Environmental Quality Act*, <https://oag.ca.gov/environment/ceqa> (as of Sept. 7, 2018).) The Attorney General has also participated in litigation throughout the State to ensure that local governments comply with state requirements to fully analyze and implement all feasible mitigation measures to lessen significant impacts from greenhouse gas emissions (“GHGs”) caused by land use development projects. (See, e.g., *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497; *People of the State of California v. County of San Bernardino* (Cty. of San Bernardino filed April 12, 2007) No. CIVSS700329.) The Attorney General also has a long-standing interest in ensuring environmental justice throughout the State and for communities in the Inland Empire. (See, e.g., *CCA EJ v. County of Riverside, et al.*, Case No. RIC1112063; California Department of Justice, Office of the Attorney General, *Environmental Justice at the Local and Regional Level: Legal Background* (July 10, 2012) https://oag.ca.gov/sites/all/files/agweb/pdfs/environment/ej_fact_sheet.pdf.)

After review of the GHG analysis in the RFEIR, the Attorney General believes that the City has failed to comply with CEQA's requirements for analyzing and implementing feasible mitigation for the significant GHG emissions that will result from this Project. For the reasons outlined below, the City's approach falls substantially short of meeting the requirements of CEQA, the regulations implementing CEQA – the CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.), and applicable case law. The City's approach in the RFEIR has the potential to seriously undermine the overall effort to meet the State's science-based GHG reduction goals for the transportation and land use sectors, and to disproportionately disadvantage environmental justice communities.

THE RFEIR'S GHG ANALYSIS VIOLATES CEQA AND UNDERMINES THE STATE'S CLIMATE OBJECTIVES.

As the RFEIR acknowledges, this Project at buildout will cause over 281,000 metric tons of GHGs to be released into the atmosphere every year, and will result in over 200,000 metric tons of GHG emissions beginning as early as 2028. (RFEIR at 4.7-35.) These emissions will presumably continue throughout the life of the project, though the RFEIR does not address this.

The RFEIR takes a very unusual and troubling approach to addressing the Project's GHG-related impacts, especially since climate pollution is undeniably a *cumulative* problem. (*Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 256-257.) The RFEIR divides the Project's GHG emissions into two categories, which it terms

“capped” and “uncapped” – classifications created by this RFEIR. What the RFEIR deems “uncapped” emissions constitute only about 3% of the Project emissions. They include the comparatively minor landfill emissions caused by waste generated at the Project and the use of refrigerants at the Project. (RFEIR at 4.7-33.) For these emissions, the RFEIR follows the approach that would be expected under CEQA: the City has, in its discretion, designated a significance threshold (in this case, 10,000 metric tons of GHGs as recommended by the South Coast Air Quality Management District), compared the “uncapped” emissions to that threshold, and required feasible mitigation measures to ensure those emissions fall below that threshold.² (RFEIR at p. 4.7-19.) What the RFEIR terms “capped” emissions, however, constitute the remaining 97% of the Project’s predicted emissions. Those include emissions caused by mobile sources (namely, diesel trucks) and electricity use at the Project. (RFEIR at p. 4.7-33.) With respect to these emissions, the RFEIR deviates dramatically from standard CEQA methodology. The RFEIR asserts that these emissions are “covered” by the California Air Resources Board’s (“CARB”) Cap-and-Trade Program, and therefore claims that they are exempt from any further CEQA analysis or mitigation. (RFEIR at p. 4.7-22.) This is a novel and unsupportable approach under CEQA.

As discussed below, the RFEIR’s approach does not comply with CEQA, for several reasons. First, the Project is not regulated under the State’s Cap-and-Trade Program, so purported compliance with that Program cannot be used to exclude 97% of the Project’s GHG emissions from the analysis of whether the Project’s GHG emissions will result in significant climate change impacts. Second, CEQA requires that all of the emissions attributable to the Project be evaluated for significance, regardless of their source. Third, when comparing all of the Project’s emissions to California’s ambitious, science-based climate goals, as well as statewide, regional, and local plans for the reduction or mitigation of GHG emissions, the Project’s GHG emissions are clearly significant, requiring further feasible mitigation measures.

We are concerned about the City’s use of this analytical approach, both in the context of this Project and more generally. If the RFEIR’s approach is put into general use by the City, or followed by other lead agencies, emissions from transportation and electricity could largely be exempt from analysis and mitigation under CEQA. This is directly counter to the purposes of CEQA, and the Legislature’s considered decision to make clear that GHG emissions must be analyzed. (Senate Bill 97 (2007); Pub. Resources Code, § 21083.05.) The State cannot meet its well-established, long-term environmental GHG reduction goals if new local projects are free to add hundreds of thousands of tons of GHGs to the atmosphere every year without undergoing the

² Lead agencies may choose to use a “threshold of significance,” a working presumption that can assist in determining whether an impact is significant. (Cal. Code Regs., tit. 14, §§ 15064.4(b)(2); 15064.7.) “A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant.” (Cal. Code Regs., tit. 14, § 15064.7, subd. (a).)

analysis and mitigation that CEQA requires. Moreover, the RFEIR's approach will likely expose already-burdened communities in the State to greater amounts of GHG co-pollutants, such as diesel particulate matter and nitrogen oxides.

We urge the City to revise its GHG analysis to comply with CEQA by properly evaluating whether *all* of the Project's emissions—for all phases of the Project, direct and indirect, short-term and long-term—are cumulatively significant, and adopting feasible mitigation to ensure those emissions do not have a significant impact on the environment.

I. THE RFEIR'S NOVEL APPROACH TO "CAPPED" EMISSIONS VIOLATES CEQA.

The purpose of an environmental impact report is "to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." (Pub. Resources Code § 21061.)

The City's approach violates a number of well-established CEQA principles. Lead agencies must "consider the whole of an action, not simply its constituent parts, when determining whether it will have a significant environmental effect." (Cal. Code Regs., tit. 14 § 15003, subd. (h).) This Project as a whole includes both the "capped" and "uncapped" GHG emissions, but the RFEIR fails to analyze and mitigate "capped" emissions. Moreover, both "direct and indirect significant effects" and "short-term and long-term effects" should be considered. (Cal. Code Regs., tit. 14, § 15126.2, subd. (a).) The RFEIR fails to inform the public of the long-term effects of the Project's GHG emissions by failing to analyze GHG emissions past buildout.

In addition to violating these more general principles, the City's approach to "capped" emissions contradicts the CEQA Guidelines specific to GHG analysis. "The determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data." (Cal. Code Regs., tit. 14, § 15064, subd. (b).) The CEQA Guidelines advise lead agencies on how to determine the significance of a Project's GHG emissions. A lead agency should consider three non-exclusive methods for determining climate significance:

- (1) The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting;
- (2) Whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project[.];
- (3) The extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions. . . . If there is substantial evidence that the possible effects of

a particular project are still cumulatively considerable notwithstanding compliance with the adopted regulations or requirements, an EIR must be prepared for the project. (Cal. Code Regs., tit. 14, § 15064.4, subd. (b)).

While “[a]n ironclad definition of significant effect is not always possible,” (Cal. Code Regs., tit. 14 § 15064, subd. (b)), the RFEIR’s conclusion that the Project’s GHG impacts are not significant under CEQA (RFEIR at p. 4.7-33) is based solely on its unjustifiable exclusion of the vast majority of the GHG emissions of the Project. That exclusion is neither consistent with CEQA nor justified by the Cap-and-Trade Program, which does not apply to the Project.

A. Since the Project is Not Regulated Under Cap-and-Trade, The RFEIR Cannot Use Cap-and-Trade to Ignore the Significance of the Project’s GHG Emissions.

The RFEIR effectively treats the Cap-and-Trade Program as if it is a qualified mitigation plan for the Project and its “capped” emissions. (See Cal. Code Regs., tit. 17, §§ 15064, subd. (h)(3); 15064.4 subd. (b)(3). It is not.

California’s Cap-and-Trade Program applies “an aggregate greenhouse gas allowance budget [to] *covered entities* and provides a trading mechanism for compliance instruments.” (Cal. Code Regs., tit. 17, § 95801 (emphasis added).) The Cap-and-Trade Program only applies to expressly identified entities, such as cement producers, petroleum refiners, electricity generators, natural gas supplies, fuel importers, and liquid petroleum gas supplies. (Cal. Code Regs., tit. 17, § 95811.) Warehouse and logistics complexes are *not* covered entities.

Although the operator of a refinery that produces liquefied petroleum gas in California is subject to the Cap-and-Trade Program, (Cal. Code Regs., tit. 17, § 95811, subd. (e)(1)), entities downstream from that refinery in the chain of commerce are not. The refinery itself may have compliance obligations under the Cap-and-Trade Program, which can be met by reducing its own GHG emissions or surrendering compliance instruments, but the gas station that resells the gas, the truck drivers who purchase it, and the warehouses to which the trucks drive do not. Because CEQA Guidelines section 15064.4, subdivision (b)(3) instruct lead agencies to consider the extent to which *the project* complies with GHG regulations or requirements, it is inappropriate to rely upon compliance with Cap-and-Trade by other entities downstream in the chain of commerce as a basis for avoiding analysis of project-related emissions. In the Final Statement of Reasons for the CEQA Guidelines addressing GHG emissions, the California Natural Resources Agency confirmed that, in implementing CEQA Guidelines section 15064.4, a lead agency must show that a GHG reduction plan “actually addresses the emissions that would result from the project.” (California Natural Resources Agency, Final Statement of Reasons for Regulatory Action: Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB 97 (2009), available at http://resources.ca.gov/ceqa/docs/Final_Statement_of_Reasons.pdf, at p. 27.)

Further, the City's approach is not, as the RFEIR claims (RFEIR at 4.7-20), supported by *Association of Irrigated Residents v. Kern County Bd. of Supervisors* (2017) 17 Cal.App.5th 708 ("AIR"). Without commenting on whether or not that case was rightly decided, *AIR* is facially inapposite because the project being evaluated under CEQA in that case was a refinery, a covered entity under the Cap-and-Trade Program. Because this Project is not a covered entity under the Cap-and-Trade Program, it is unjustifiable for the RFEIR to use compliance with Cap-and-Trade as a factor in analyzing the significance of the Project's GHG emissions. There is no basis in the law for the use of Cap-and-Trade to exclude a full 97% of the Project's GHG emissions from analysis or mitigation.

The flaw in the City's approach becomes even more apparent when one considers its incongruous results. The RFEIR describes the Project, in part, as follows: "Goods imported through the Ports of Long Beach and Los Angeles as well as other locations are delivered via truck to the proposed distribution centers and distributed via truck both in and out of state locations. . . ." (Original FEIR at 3-27-3-28.) The heart of this Project is this movement of goods via trucks. Yet, the City's approach avoids any analysis of 210,596 metric tons of GHG emissions associated with the movement of goods via trucks. (RFEIR at p. 4.7-33.) 97% of the Project's total GHG emissions are simply dismissed under this approach. CEQA does not permit such a dismissal.

B. The RFEIR Must Consider All Emissions in Determining Significance.

Correctly applying CEQA requires an evaluation of *all* the Project's GHG emissions in determining significance. (See Cal. Code Regs., tit. 14, §§ 15064.4, subd. (b)(2); 15378 (defining "project" as "the whole of an action. . . .")) There is no basis here for comparing some of the Project's emissions to the significance threshold, but not others. Here, the City elected to use a threshold of 10,000 metric tons of GHGs. (RFEIR at p. 4.7-19.) CEQA Guidelines section 15064.4, subdivision (b)(2), notes that when using a threshold, an agency should compare all of the "project emissions" of GHGs to that threshold. Emissions from trucks and electricity are a result of the Project just as much as the "uncapped" emissions. They therefore must be compared to the significance threshold, and mitigated to the extent feasible.

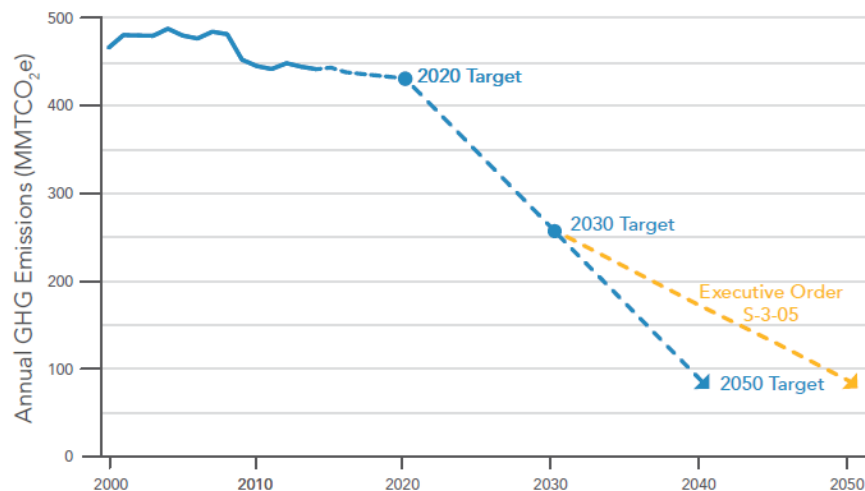
Further, the City's attempt to exempt an impact from any significance analysis based solely on purported compliance with a single rule or regulation is unwarranted. Courts have repeatedly held compliance with a single environmental or land use law or regulation does not create an exemption from CEQA's requirement that lead agencies evaluate all of a project's significant environmental impacts. For example, "compliance with a general plan in and of itself 'does not insulate a project from the EIR requirement, where it may be fairly argued that the project will generate significant environmental effects.'" (*East Sacramento Partnerships for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, 301; see also *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 732 ("[A]n EIR is required if substantial evidence supports a fair argument that [a project] may have significant unmitigated noise impacts, even if other evidence shows the [project] will not generate noise in excess of [a] County's noise ordinance or general plan."))

C. In Light of the Project's Substantial, Long-Term Projected Emissions, Its GHG Impacts Must Be Deemed Significant.

It seems impossible a proper evaluation of the Project's emissions under CEQA could support a finding that the Project's emissions are not significant. This Project—as currently designed—will lock in hundreds of thousands of tons of GHG emissions for decades to come, and may put this City and the region on a path that deeply undermines the State's climate goals.

To reduce and avoid the most catastrophic effects of climate change, science tells us that we must dramatically reduce our annual statewide GHG emissions. California has taken ambitious steps to accomplish that objective. Assembly Bill 32 (“AB 32”) requires California to reduce its total statewide GHG emissions to 1990 levels by 2020. (Health & Saf. Code, § 38550.) Under Senate Bill 32 (“SB 32”), California must reduce its GHG emissions to 40% below 1990 levels by 2030. (Health & Saf. Code, § 38566.) In addition, the Governor's Executive Order S-3-5 (“EO S-3-05”) directs state agencies to reduce statewide GHG emissions to 80% below 1990 levels by 2050. To achieve such ambitious but necessary goals, California will have to reduce GHG emissions from various sectors of the economy. Transportation, industry, and electricity generation are the top three contributing sectors to the State's total GHG emissions. (CARB, 2017 Climate Change Scoping Plan (Nov. 2017) at p. 11 (“Scoping Plan”).) Below is a graph showing the dramatic downward trajectory of statewide GHG reductions necessary to achieve the State's climate goals.

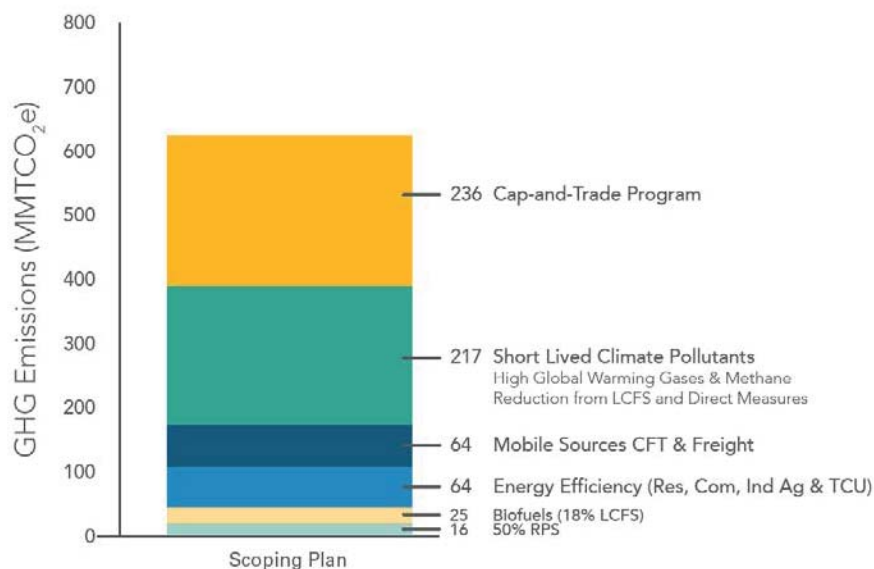
FIGURE 5: PLOTTING CALIFORNIA'S PATH FORWARD



(Scoping Plan at p. 24.)

California has adopted a multitude of regulations, requirements, plans, and policies to achieve the substantial reductions in statewide GHG emissions required by AB 32, SB 32, and EO S-3-5. CARB identified, in its Climate Change Scoping Plan, multiple required and voluntary measures working in concert as necessary for California to achieve its ambitious climate goals as depicted in the graph below. (See Scoping Plan at p. 28.)

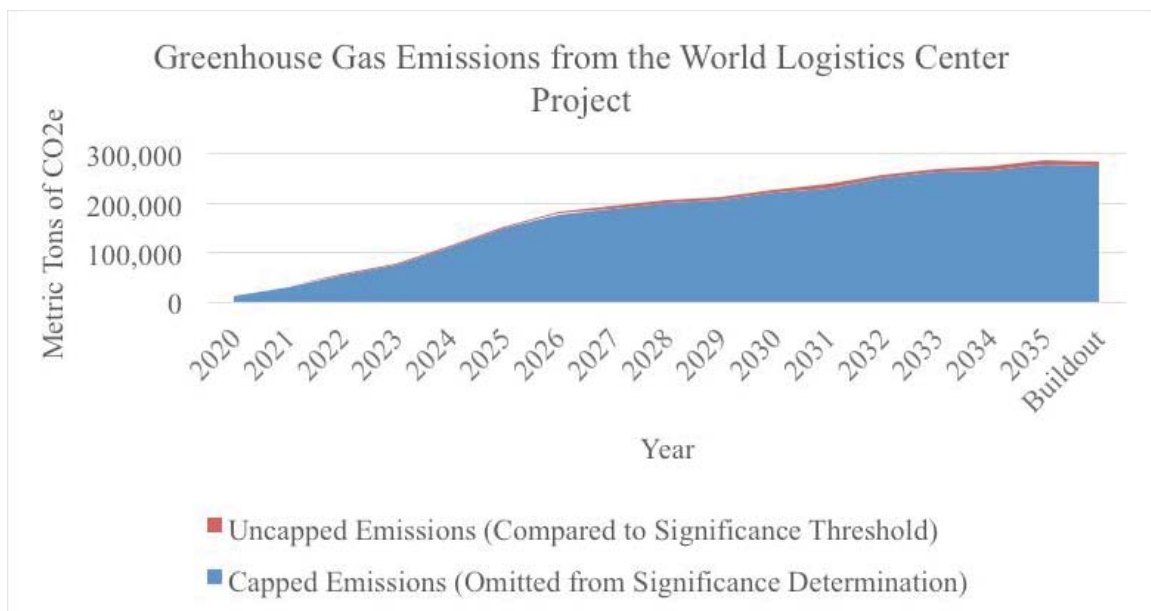
FIGURE 7: SCOPING PLAN SCENARIO – ESTIMATED CUMULATIVE GHG REDUCTIONS BY MEASURE (2021–2030)⁶⁴



The Scoping Plan proposes various strategies for reductions in emissions from transportation and energy sectors. The Scoping Plan notes that for the GHG reductions from the transportation sector, “[vehicle miles traveled (“VMT”)] reductions are necessary to achieve the 2030 target and must be part of any strategy evaluated in this plan.” (Scoping Plan at p. 112.) In addition, under SB 375, CARB assigns California’s 18 Metropolitan Planning Organizations targets for GHG emission reductions in the transportation sector which are to be achieved based on land use patterns and transportation systems. (CARB, Updated Final Staff Report: Proposed Update to the SB 375 Greenhouse Gas Emission Reduction Targets (2017), available at https://www.arb.ca.gov/cc/sb375/final_staff_proposal_sb375_target_update_october_2017.pdf.) CARB’s recommended target for the Southern California Association of Governments is a 19% reduction in GHG emissions from transportation by 2035. (*Id.* at p. 34.)

CEQA requires the City evaluate the consistency of the Project’s substantial increases in GHG emissions with state and regional plans and policies calling for a dramatic reduction in GHG emissions. The Supreme Court in *Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 3 Cal.5th 497 (“SANDAG”) affirmed that an EIR should consider the project’s long-range greenhouse gas emission impacts through the year 2050, and address whether the project as a whole is in accord with the state’s climate goals. (*Id.* at p. 515.) The Supreme Court further instructed lead agencies to “stay in step with evolving scientific knowledge and state regulatory schemes.” (*Id.* at p. 504.)

The RFEIR estimates that the Project's total emissions will increase from the existing conditions of no emissions at the Project site to over 281,000 metric tons of GHG emissions annually at full buildout of the Project in 2040. (RFEIR at p. 4.7-33.) See the graph below depicting the trajectory of the Project's GHG emissions.³



The Project's substantial *increase* in GHG emissions conflicts with the downward trajectory for GHG emissions necessary to achieve state climate goals. This is illustrated clearly in the sharp difference in the upward trajectory of the graph of the Project's GHG emissions versus the steep downward trajectory in the graph of the State's climate goals as depicted in Figure 5 of the Scoping Plan and reproduced above. Yet, the RFEIR failed to evaluate the Project's consistency with state and regional goals, requirements, plans, and policies to reduce

³ Visual depictions such as this graph make it easier to understand the significant impact of GHG emissions from the Project on the environment. Such clarity is encouraged by the CEQA Guidelines, which state that EIRs should be "written in plain language and may use appropriate graphics so that decisionmakers and the public can rapidly understand the documents." (Cal. Code Regs., tit. 17, § 95811.) Such graphs are also helpful because they allow the decisionmakers to see a project's proposed greenhouse gas emissions as a trajectory and assess the "significance of the *shape* of that emissions curve as a whole." (Janill Richards, *The SANDAG Decision: How Lead Agencies Can "Stay in Step" with Law and Science in Addressing the Climate Impacts of Large-Scale Planning and Infrastructure Projects* (2017) 26:2 Environmental Law News 17, 19, available at <http://legal-planet.org/wp-content/uploads/2018/09/environmental-law-news-2017-vol-26-no-2-fall-the-sandag-decision.pdf>.) To better inform the public of the Project's unmitigated GHG emissions, we recommend revising the RFEIR to include graphical representations of the emissions trajectory of the project.

GHGs that should have been analyzed under CEQA. Comparing the Project's GHG trajectory against the state's climate goals would inform the public of the Project's GHG impacts. For example, the RFEIR's GHG analysis should have considered whether the Project will increase VMT. Because it did not, it is inconsistent with SB 375. Although the RFEIR's revised traffic analysis does include a VMT analysis, it is included only to address air quality issues, and not GHGs. (RFEIR at pp. 4.7-19 and 4.15-3.) Under CEQA, the City is required to consider how the project can reduce VMT and electricity use, "rather than expecting[ing] these reductions to come [only] from technological advances or other measures." (SANDAG, at 523.) The City ignores its CEQA obligations and instead, the RFEIR obscures the Project's GHG impacts by improperly exempting them from CEQA analysis.

In addition, there is no discussion in the RFEIR of the GHG emissions from the Project over its expected lifespan. GHG emissions are estimated up until the Project's full buildout in 2040 (RFEIR at p. 4.7-33), but the Project will clearly continue beyond that point, and the RFEIR gives no indication of how long that will be. The cumulative impact of the Project's GHG emissions over its entire lifespan should be considered and mitigated to the greatest extent feasible. Notably, by failing to estimate emissions through 2050, the RFEIR obscures the extent to which the Project does or does not comply with California's explicit 2050 climate goals.

D. The RFEIR Should Analyze and Adopt Feasible Mitigation Measures to Avoid or Lessen the Project's GHG Impacts.

CEQA requires that an EIR consider and adopt feasible alternatives or mitigation measures that would substantially lessen the significant and harmful environment effects of the project being analyzed. (See Pub. Resources Code, § 21002.) The RFEIR's failure to properly analyze the Project's significant GHG impacts also results in a failure to mitigate those impacts as required by CEQA. If the RFEIR's analysis were done properly, the Project's GHG emissions from vehicles and electricity would have vastly exceeded the significance threshold selected by the City. Those emissions would therefore have to be reduced through changes or alterations in the Project, or the City would be required to explain why "[s]pecific economic, legal, social, technological, or other considerations including provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or project alternatives..." (Cal. Code Regs., tit. 22, § 15091, subds. (a)(1) and (a)(3).) There may be mitigation measures or project alternatives that could reduce or avoid the Project's GHG emissions, such as the adoption of requirements mandating the use of zero emission vehicles or a certain percentage of electricity from renewable electricity sources, such as on-site solar power generation.⁴ By

⁴ The Attorney General recognizes that devising climate mitigation on a project-by-project basis can be challenging. Many local governments have therefore elected to move toward enforceable Climate Action Plans ("CAPs") integrated with their general plans. (CARB, California Climate Action Portal Map, <https://webmaps.arb.ca.gov/capmap/> (as of Sept. 7, 2018).) Done correctly, CAPs can put local governments on the path to a lower-carbon future

excluding 97% of the Project's GHG emissions from its significance determination, the RFEIR obscures the extent of the Project's emissions and improperly evades the City's obligation to mitigate the Project's GHG impacts.

II. ADOPTION OF THIS METHOD OF EXEMPTING "CAPPED" EMISSIONS FROM CEQA ANALYSIS WILL UNDERMINE THE STATE'S VARIOUS POLICIES AND PROGRAMS TO REACH OUR AMBITIOUS CLIMATE GOALS.

The RFEIR's failure to comply with CEQA will have real consequences. If this RFEIR's approach is widely adopted, the State will not be able to achieve its ambitious climate goals. The RFEIR exempts the Project's emissions attributable to mobile sources and electricity use from CEQA analysis and mitigation. And yet transportation and electricity are two of the State's three largest sources of GHG emissions. (Scoping Plan at p. 11). Transportation and electricity are thus two of the most important areas in which GHG emissions must be reduced.

The RFEIR's approach to the transportation and electricity sectors incorrectly presumes that the Cap-and-Trade Program will achieve *all* GHG reductions necessary in those areas. But as CARB's 2017 Scoping Plan points out, "[l]ocal land use decisions play a particularly critical role in reducing GHG emissions associated with transportation, both at the project level, and in long-term plans..." (Scoping Plan at pp. 100-101.) If other lead agencies adopt the City's approach, millions of metric tons of GHGs resulting from development projects would be ignored and unmitigated through what amounts to a categorical exemption from CEQA. Local governments would therefore not be doing their part to help the State reach its ambitious, yet necessary, climate goals of emitting 40% below 1990 GHG levels by 2030 and 80% below 1990 levels by 2050. (Heath & Saf. Code, § 38566, Governor's Executive Order No. S-3-05 (June 1, 2005).)

Instead of claiming that no amount of transportation and electricity emissions can be significant under CEQA, and thus excluding them from any analysis and mitigation, lead agencies have an obligation to acknowledge the significance of such emissions and work to implement feasible mitigation of them.⁵

III. REVISING THE GHG ANALYSIS WILL LIKELY LEAD TO GREATER PROTECTION OF ENVIRONMENTAL JUSTICE COMMUNITIES.

In addition to, and separate from, the CEQA issues, revising the RFEIR's GHG analysis will likely help mitigate some of the Project's direct harmful effects on environmental justice communities. Moreno Valley contains some of the most pollution-burdened census tracts in the

while substantially streamlining the approval of individual projects that are consistent and comply with the CAP.

⁵ There are several examples of economically viable land use development projects that contributed no net additional GHG emissions. (Scoping Plan at p. 99.)

State according to California Environmental Protection Agency's CalEnviroScreen tool.⁶ City residents experience ozone and particulate matter (PM) 2.5 at rates higher than 90% of the State. The South Coast Air Basin, where Moreno Valley is located, exceeds federal public health standards for ozone, ozone precursors, and particulate matter. Exposure to these air contaminants contributes to asthma, lung cancer, and cardiovascular disease. Indeed, residents in Moreno Valley experience higher than average emergency room visits due to asthma and higher than average rates of cardiovascular disease, particularly residents living along freeways.

Furthermore, environmental justice concerns are significant for the residents of Moreno Valley. Moreno Valley residents are predominately people of color, made up of 56.5% Hispanic and 18% African American populations. (United States Census Bureau, Quick Facts for Moreno Valley, California, <https://www.census.gov/quickfacts/fact/table/morenovalleycitycalifornia.ca/PST045217> (as of Sept. 7, 2018).) The rates of poverty are dramatically higher in Moreno Valley compared to the state—according to U.S. Census data, 18.6% of Moreno Valley residents live in poverty, compared with the statewide poverty rate of 14.4%. (*Ibid.*, and United States Census Bureau, Quick Facts for California, <https://www.census.gov/quickfacts/fact/table/ca/PST045217> (as of Sept. 7, 2018).) They experience high rates of unemployment and housing burdens (paying more than 50% of their income for housing costs). These socioeconomic characteristics of Moreno Valley residents increase their sensitivity to the health effects of the heavy pollution burdens they experience.

Adding to these burdens, Riverside County as a whole, and the City of Moreno Valley specifically, are experiencing a great influx of logistics warehouse projects. Recent developments in Moreno Valley alone include an 825,000 square-foot distribution facility for the Aldi grocery chain, a 1.6 million square-foot distribution facility for Deckers Brands footwear company, and a 1.25 million square-foot fulfillment center for Amazon. These large projects, and their related impacts on the low-income communities of color who live nearby and in the communities residing along the freeways serving them, are dwarfed by the over 40 million square-foot Project.

By conducting a proper GHG analysis in the RFEIR and adopting feasible mitigation, the City will likely better protect the environmental justice communities living near both the Project and along the freeways that trucks will use to reach the Project. Reduction of GHG emissions leads to the reduction of co-pollutant emissions. (See Nicky Sheats, *Achieving Emissions Reductions for Environmental Justice Communities Through Climate Change Mitigation Policy* (2017) 41 WM. & MARY ENVTL. L. & POL'Y REV. 377, 387 (“[E]ven without the intentional maximization of co-pollutant reduction, there should be incidental co-pollutant

⁶ CalEnviroScreen is a tool that uses environmental, health, and socioeconomic information to produce scores and rank every census tract in the state. A census tract with a high score is one that experiences a much higher pollution burden than a census tract with a low score. (See CalEnviroScreen 3.0 Report, Office of Environmental Health Hazard Assessment, January 2017, available at <https://oehha.ca.gov/media/downloads/calenviroscreen/report/ces3report.pdf>.)

reductions as GHGs are being reduced [which] should improve the health of local communities.”)) This is especially true in the context of diesel truck emissions, where a VMT reduction would reduce both GHG emissions and co-pollutant emissions. Indeed, the RFEIR acknowledges that “[t]he *most effective way to reduce air pollution* impacts on the health of our nearly 17 million residents, including those in disproportionately impacted and environmental justice communities that are concentrated along our transportation corridors and goods movement facilities, *is to reduce emissions from mobile sources*,” and that those mobile sources constitute “the principal contributor to our air quality challenges.” (RFEIR at 4.3-11 (emphasis added).) Therefore, while revising the GHG analysis is necessary to comply with CEQA, the City should also see this as an opportunity to implement mitigation measures that would benefit the City’s residents and the other environmental justice communities impacted by this Project.

CONCLUSION

We appreciate the difficulty in analyzing GHG emissions under CEQA. However, local agencies must comply with the CEQA Guidelines for GHG analysis and cannot exempt GHG emissions from any significance analysis because of California’s Cap-and-Trade Program. We urge the City of Moreno Valley to revise the GHG analysis in the RFEIR as described above so as to support this State’s efforts to reduce GHG emissions, achieve our ambitious but necessary climate goals, and benefit local communities in the area who are already suffering some of the worst air pollution in the country. We would be happy to work with the City of Moreno Valley to take the additional steps needed to fully comply with CEQA’s GHG analysis and mitigation requirements for the Project. We appreciate your consideration of our comments.

Sincerely,



HEATHER LESLIE
BRIAN BILFORD
Deputy Attorneys General

For XAVIER BECERRA
Attorney General

EXHIBIT B

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Re: World Logistics Center Revised Final Environmental Impact Report
(SCH # 2012021045)

Dear Mr. Armijo:

The California Air Resources Board (CARB) has reviewed the World Logistics Center (WLC or project) Revised Final Environmental Impact Report (RFEIR). CARB appreciates the opportunity to comment on the RFEIR. Unfortunately, despite revisions, the RFEIR mischaracterizes (1) the scope of the Cap-and-Trade Program administered by CARB as they relate to the state's overall greenhouse gas reduction mandates, and (2) how that program may be relevant to a CEQA analysis. Because the RFEIR's GHG analysis relies almost entirely on those mischaracterizations for its GHG analysis and significance determination, it does not meet California Environmental Quality Act (CEQA) requirements.

The RFEIR's core flaw with regard to greenhouse gases (GHGs) is that it declines fully to analyze or mitigate emissions from fuel and electricity demand that the project will cause - the vast majority of the project's emissions - on the ground that CARB's Cap-and-Trade Program purportedly "covers" the project's emissions for this purpose. In fact, the Program does not, and was never designed to, adequately address emissions from local projects and CEQA does not support a novel exemption for such emissions on this ground. The RFEIR's approach obscures the project's significant potential contribution to greenhouse gas emissions, and does not properly account for the combination of federal, state, and local approaches to address climate change that the crisis demands and the law requires.

We also note that the project still has not been modified to address serious health concerns from criteria and toxic air pollutants that CARB discussed in prior letters. Although this letter focuses on GHGs, we continue to be very concerned that local communities may face undue pollution from this project, if completed, as a result of inadequate mitigation.

We urge the City of Moreno Valley (City) to address the criteria and toxics issues we previously raised, and to revise its GHG analysis to accurately account for all GHG emissions that would result from the project, apply those emissions against the applicable significance threshold identified in the RFEIR, adopt feasible mitigation to

ensure those emissions would not cause significant impacts, and recirculate the RFEIR, all as required by CEQA.

I. CARB's Participation in This Project's Review Process

CEQA requires analysis of a project's GHG emissions. Like all CEQA analyses, these disclosures must inform the public and provide appropriate information on mitigation. Planning for greenhouse gas reductions is critical at the project level, as CARB and other state agencies have repeatedly determined. Although various statewide programs address the climate change crisis as well, the CEQA guidelines, and state guidance documents, are clear that achieving the necessary reductions requires project-level focus.

The WLC project proponents have taken a different view in prior versions of the RFEIR and in related litigation, *Paulek v. City of Moreno Valley* (Riverside County Superior Court Case No. RIC 1510967) ("*Paulek*"). That case addresses, among other topics, the initial GHG analysis conducted for the WLC, and in the RFEIR. There, WLC advocates contended that, because some of the suppliers of the fuels and electricity consumed by the project are in the Cap-and-Trade Program CARB administers, the project was not required to analyze or mitigate the significant emissions impacts it would cause. Attorneys for the WLC also argued that because CARB did not specifically object to the project's GHG significance methodology, CARB "apparently had no problem with the EIRs not counting capped emissions against the [WLC] in order to determine the significance of greenhouse gas emissions."¹

CARB had, in fact, recommended an array of project-based emissions reductions strategies contrary to these claims. CARB takes this opportunity to reiterate those recommendations (prior letters are attached) and to explain why the Cap-and-Trade Program's operations do not allow a departure from CEQA's general rule that project-level impacts be properly addressed.²

¹ Transcript of January 22, 2018 hearing in *Paulek* case, before Hon. Sharon J. Waters, page 18, Lines 3-7.

² In both of CARB's comment letters, which we again incorporate by reference, CARB indicated that its recommendations were for the purpose of reducing not only criteria and toxics pollutants, but also for GHG emissions. CARB reviewed the Draft Environmental Impact Report (DEIR) and provided comments to the City of Moreno Valley in a letter dated April 16, 2013. CARB's comment letter expressed concern over the increase in health risk in the immediate area and the significant and unavoidable air quality and greenhouse gas (GHG) related impacts caused by the proposed WLC. To address those concerns, CARB recommended actions to support the development, demonstration, and deployment of zero and near-zero emission technology at the WLC. On June 8, 2015, CARB again provided comments on the Final Environmental Impact Report (FEIR), making similar recommendations. In those comments, CARB noted that the FEIR was unresponsive to the comments CARB provided in its April 16, 2013 letter regarding the DEIR. (See CARB April 16, 2013 letter at 2; CARB June 8, 2015 letter at 1, 3, and 8.)

II. The RFEIR's Claims About CARB's Cap-and-Trade Regulation Are Incorrect

CEQA translates between high-level policy goals, and individual project choices to better inform the public and support decision-making. The GHG section of the RFEIR takes a novel, and factually unsupported, departure from ordinary CEQA practice by essentially excusing analysis and potential mitigation of GHG emissions when they are indirectly “covered” by a state program. Yet, state programs regularly address at least some aspect of essentially all CEQA impact areas – from state water pollution standards to habitat conservation laws to building codes to endangered species mandates, projects are always considered against a backdrop of state rules. In the ordinary course, the presence of state programs is not taken simply to “cover” the relevant project level impact. On the contrary, CEQA requires project proponents to inquire as to how the project affects environmental resources of statewide concern and to focus on project-level analysis and mitigation. The same rule applies with regard to greenhouse gases. As the California Supreme Court has held, “[l]ocal governments thus bear the primary burden of evaluating a land use project’s impacts on greenhouse gas emissions.”³

Project proponents may refer to statewide analyses and programs, but, as the Court held, ultimately must provide “substantial evidentiary support” explaining how project-level decisions relate to state-level programs to justify findings of significance based on those programs.⁴ This is particularly important for new projects, as, per the Court, “a greater degree of reduction may be needed from new projects than from the economy as a whole.”⁵ And these projects may not simply point to *any* statewide regulations; on the contrary, “[a] significance analysis based on compliance with such statewide regulations ... only goes to impacts within the area governed by the regulations.”⁶

In this instance, the Cap-and-Trade Program simply does not cover the project, or require it do anything to mitigate its emissions. As the Court explained, CARB has not “propose[d] statewide regulations of land use planning, but relies instead on local governments.” (*Id.* at 230).

CARB has expressed its non-binding views on these matters via the Scoping Plans it is required to prepare under AB 32. The California Supreme Court has recognized the

CARB was not silent. Moreover, an inference from silence would be improper, in any event. CARB sometimes does not comment on individual projects’ GHG or other analyses due to resource constraints and other considerations. Nothing should be inferred from silence on a particular matter.

³ *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 230).

⁴ *Id.* at 226-230.

⁵ *Id.* at 225.

⁶ *Id.* at 229.

Scoping Plan as a valuable source of data for local governments.⁷ As each version of CARB's Scoping Plan, including the recent 2017 Scoping Plan Update, explains, on the basis of extensive modeling and analysis, the Cap-and-Trade Program is not intended to address project-level impacts and does not do so. Rather, complementary measures, including land-use planning and project-level analyses, are vital adjuncts to the Cap-and-Trade Program, serve additional purposes to address climate change, and, if neglected, put undue and unanticipated pressure on the Program. The RFEIR's analysis would thus make the problem it purports to analyze even worse; if followed generally, it would result in development patterns and mitigation choices that would lessen the state's ability to address climate change, and would contribute to cumulatively considerable impacts.

Rather than address project-level emissions, the Cap-and-Trade Program covers activities related to electricity generation, natural gas supply, oil and gas extraction, refining, and transportation fuel supply and combustion. The points of regulation are the operators of electricity generating plants, natural gas fuel suppliers, operators of oil and gas extraction facilities, refinery operators, and transportation fuel suppliers at the rack. See Tit. 17, Cal. Code Regs., § 95811. The Program also addresses GHG emissions in aggregate at the state level and is not intended nor designed to mitigate greenhouse gas from, or otherwise inform, local land use decisions. Without adequate analysis and mitigation, local jurisdictions may not appropriately consider the greenhouse gas implications of their decisions, conflicting with a core CEQA principle of promoting informed decisionmaking. Rather, demand for fuels and electricity created by poorly-planned local projects creates unnecessary demand on the Cap-and-Trade system, potentially raising prices in the system and making statewide compliance more difficult.

These impacts could be substantial because the transportation sector is the state's largest source of GHG emissions (as well as criteria and toxic pollutant emissions, as we have previously addressed with regard to this project). The recently released California Greenhouse Gas Emission Inventory – 2018 Edition shows that while the state's overall GHG emissions declined from 2015 to 2016, the emissions in the transportation sector increased 2 percent over that same time period.⁸ This increase was driven by increases in fuel purchases and use. To effectively achieve the State's GHG target, both production and demand for energy and fuels must be addressed. The

⁷ As the California Supreme Court has held "CEQA requires public agencies...to ensure that such analysis stay in step with evolving scientific knowledge and state regulatory schemes." The Court viewed the Scoping Plan as a particularly useful source of information, given the extensive study and public participation involved in its preparation. (*Cleveland National Forest Foundation v. San Diego Ass'n of Governments* (2017) 3 Cal. 5th 497, 504.) A recent article provides a useful primer on this body of law. (See Janill Richards, *The SANDAG Decision: How Lead Agencies Can "Stay in Step" with Law and Science in Addressing the Climate Impacts of Large-Scale Planning and Infrastructure Projects* (2017) 26:2 Environmental Law News 17))

⁸ See https://www.arb.ca.gov/cc/inventory/pubs/reports/2000_2016/ghg_inventory_trends_00-16.pdf.

Legislature recognized this need with regard to electricity when passing SB 350 (Stats. 2015 Ch. 547, De León) to increase the Renewable Portfolio Standard and double energy savings. A similar approach is needed for transportation sector emissions. State-level production side policies such as the Renewable Portfolio Standard, Low Carbon Fuel Standard, and Cap-and-Trade Program cannot alone achieve the State's GHG reduction targets.

In this instance, the RFEIR not only improperly relies on the Cap-and-Trade Regulation; it also fails fully to address consistency with the local measures that *do* more clearly apply. There are a suite of potential emissions reduction strategies identified in the 2017 Scoping Plan aimed at reducing GHG emissions from on-road vehicle travel (e.g., fuel economy standards, technology advancements, SB 375⁹), and the majority of such emissions are not covered in any way by the Cap-and-Trade program.

The City chose not to analyze the project's consistency with the applicable Regional Transportation Plan (RTP), for example, which is subject to GHG emissions reduction targets set by CARB pursuant to SB 375. The City asserted that the RTP does not apply to this project (Table 4.7-11, page 4.7-41 of the RDEIR). We disagree, and suggest that a more appropriate analysis would be whether the project's GHG emissions from on-road transportation would be consistent with, or conflict with, assumptions in the applicable RTP found to comply with SB 375. The city might also refer to the additional nonbinding recommendations offered in CARB's Scoping Plan, though the application of these recommendations, if used, depend on the circumstances of a particular project.

We discuss these points in more detail below.

A. The Cap-and-Trade Regulation Was Never Designed to Achieve All Necessary GHG Reductions From Land Use and Logistics Planning.

The Cap-and-Trade Program was designed from the start as one of a diverse suite of measures, some statewide and some local, to move California toward achieving its GHG targets. To understand the Cap-and-Trade Program's purposes and limitations, the Scoping Plan provides helpful context. The Cap-and-Trade Program covers about 80 percent of all GHG emissions in California.¹⁰ Crucially, just because emissions are "covered" by Cap-and-Trade does not mean all of those emissions from any particular covered entity are mitigated or reduced. It simply means they are included in the cap.

⁹ SB 375 (Steinberg, Statutes of 2008).

¹⁰ Scoping Plan at ES16.

Thirty-nine percent of California's GHG emissions come from the transportation sector, including logistics-related transportation (like the WLC would involve).¹¹ Another 19 percent of the state's GHG emissions comes from electricity generation.¹² In addition to Cap-and-Trade, the Scoping Plan includes various other CARB measures, some of which also address transportation and electricity sector emissions, including SB 350, the Low Carbon Fuel Standard, the Mobile Source Strategy, and the Sustainable Freight Action Plan. In addition to the other complementary Scoping Plan measures, the Scoping Plan also clearly states that "[l]ocal government efforts to reduce emissions within their jurisdiction are critical to achieving the State's long-term GHG goals."¹³

The RFEIR's GHG methodology departs from this science, and has enormous implications for other projects across the state: it would amount to a determination that massive logistics centers, sprawling far-flung residential developments, and other types of remote greenfield development need not do anything to address and mitigate their GHG emissions because those emissions are already "taken care of" by the Cap-and-Trade Program. This is simply not true.

B. The Cap-and-Trade Regulation Is Not Intended to Bear the Burden of Achieving the State's Transportation and Energy Sector GHG Goals Alone.

Cap-and-Trade is not intended to achieve California's climate goals on its own. Rather, Cap-and-Trade is designed to motivate behavior by capping and pricing carbon at the regulated entity level – that is, at the industrial facility and fuel/energy supplier level. It does not send a direct price signal to developers of land use or logistics projects. This means, if CEQA and other "checks" on unsustainable development are weakened as the WLC analysis proposes, such development would simply continue without direct cost to the developers, while adding market demand without mitigating the WLC's emissions.

Moreover, if land use development does not account for GHG emissions, more and more of our state's carbon "cap" would be taken up by increasing transportation emissions. Developers do not receive a price signal from Cap-and-Trade, meaning that there will be no clear incentive to alter this pattern, even as it impacts the Cap-and-Trade system. Thus, the prices of compliance instruments under the Cap-and-Trade Program would increase at a higher rate than was contemplated when CARB developed the Cap-and-Trade Program. This would eventually cause a greater cost burden than

¹¹ As noted above, transportation-related GHG emissions have increased, from 37% in 2015, to 39% in 2016. See CARB, *California Greenhouse Gas Emissions for 2000 to 2016, Trends of Emissions and Other Indicators* (July 2018) at 1 (available at https://www.arb.ca.gov/cc/inventory/pubs/reports/2000_2016/ghg_inventory_trends_00-16.pdf); see also Scoping Plan at ES1.

¹² Scoping Plan at ES1.

¹³ Scoping Plan at 99.; see also page 101.

anticipated, and it would be borne by all Californians rather than dealt with during the project design phase. Properly-designed local policies, by contrast, may account for GHG emissions of development in a direct way—which furthers the equity objectives of AB 32, complements Cap-and-Trade, and better achieves California’s climate goals.

C. There Is No Substantial Evidence Showing that the Project’s Transportation and Electricity Related Emissions Would Actually Be Mitigated.

In the face of these substantial difficulties, the RFEIR does not articulate substantial evidence demonstrating a rational connection to the Cap-and-Trade Program – and that connection is badly attenuated, as we have explained. The project developer in this instance is claiming it may do nothing with regard to fuels and electricity, and will rely on reductions other entities may achieve. This is not the tight evidentiary connection required by the Supreme Court and by CEQA, and it is not consistent with the State’s GHG reduction programs.

The Final Statement of Reasons (FSOR) prepared when section 15064.4 of the CEQA guidelines, concerning GHGs, was promulgated demonstrates that to properly rely on subsection (b)(3), concerning compliance with statewide programs, a project must demonstrate *with evidence in the record* how the regulations of GHG emissions would actually address the emissions that result from the project. That document states:

Reading section 15064.4 together with 15064(h)(3), however, to demonstrate consistency with an existing GHG reduction plan, a lead agency would have to show that the plan actually addresses the emissions that would result from the project. *Thus, for example, a subdivision project could not demonstrate consistency with the ARB’s Early Action Measures because those measures do not address emissions resulting from a typical housing subdivision.* (ARB, Expanded List of Early Action Measures to Reduce Greenhouse Gas Emissions in California Recommended for Board Consideration, October 2007; see also State CEQA Guidelines, §§ 15063(d)(3) (initial study must be supported with information to support conclusions), 15128 (determination in an EIR that an impact is less than significant must be briefly explained).)¹⁴

Here, there is no evidence in the RFEIR regarding who is responsible for complying with Cap-and-Trade for all the GHG emissions at issue in this case – and it certainly is not the project itself. The project is a logistics facility, with trucks involved in interstate commerce, and it is not covered by that Program. Indeed, there is no basis for the

¹⁴ See Natural Resources Agency, Final Statement of Reasons for Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB97 (December 2009) at 27 (emphasis added).

RFEIR's conclusion that the fuel for all of the vehicles serving the project would be covered under the Cap-and-Trade regulation, since it is not clear that all of these vehicles would even purchase their fuel in California.

D. The Project Fails to Account for the Duration of the Project Compared to the Duration of the Cap-and-Trade Program.

The RFEIR states the project's buildout year is 2035,¹⁵ yet the GHG analysis seems to stop after 2035. This raises multiple problems for the RFEIR analysis.

First, it is unclear why the analysis stops at buildout, when GHG emissions (and other environmental impacts) would continue into the indefinite future – at their highest levels – once full operations begin. Without further analysis throughout the project's anticipated life (which does not appear to be stated in the RFEIR but, presumably, would be at least 30 years after buildout), the analysis is incomplete and dramatically understates the project's GHG emissions. This also means the project would likely place a much higher burden on the Cap-and-Trade program than disclosed in the RFEIR – a burden that, as described above, is pushed onto all Californians instead of the project developer as a result of the project's failure to mitigate the vast majority of its GHG emissions.

Second, the RFEIR fails to account for, or even consider, the fact that the current Cap-and-Trade regulation extends only to 2030 – which is five years *before* the project's full buildout is achieved. This means that the RFEIR has no plan whatsoever to account for its GHG emissions once the project is fully built out. The RFEIR also does not address the inconsistency between the project's GHG emissions and Executive Order S-03-05, which, among other things, establishes a state GHG reduction target to reduce GHG emissions to 80 percent below 1990 levels by 2050.¹⁶ The California Supreme Court has emphasized the importance of California's GHG targets in selecting appropriate CEQA thresholds.¹⁷ Despite these considerations, there is no substantial evidence in the record to ensure that *any* of the project's post-buildout operational emissions are mitigated by the Cap-and-Trade program.

E. The Project Fails to Include a Backstop In Case Cap-and-Trade is Altered.

¹⁵ Revised FEIR at 3-1.

¹⁶ See Governor's Executive Order No. S-03-05 (June 1, 2005) (available at [http://static1.squarespace.com/static/549885d4e4b0ba0bff5dc695/t/54d7f1e0e4b0f0798cee3010/1423438304744/California+Executive+Order+S-3-05+\(June+2005\).pdf](http://static1.squarespace.com/static/549885d4e4b0ba0bff5dc695/t/54d7f1e0e4b0f0798cee3010/1423438304744/California+Executive+Order+S-3-05+(June+2005).pdf)); see also Governor's Executive Order No. B-30-15 (April 29, 2015) (available at <https://www.gov.ca.gov/2015/04/29/news18938/>).

¹⁷ See *Cleveland Nat'l Forest Found. v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497 at 516-519.

In addition to its other evidentiary flaws, the RFEIR does not analyze how the analysis would change, and how the project's significant GHG impacts would be mitigated, if Cap-and-Trade were revised in a way that affects the state's GHG levels. In other words, the RFEIR's approach puts an almost complete reliance on the Cap-and-Trade Program in ways that, if adopted generally, would considerably affect the Program, and then fails to consider the possibility that the Program might change even as the Project continues to exist. This could include, for example, a scenario in which:

- The Cap-and-Trade program ceased to exist, or
- If the scope of the program were limited to exclude fuels and electricity, or
- If the Legislature or other factors required the program to be amended in a way that allows a higher cap.

Rather than anticipating any of these or other potential contingencies and building in an appropriate backstop to ensure the project's GHG emissions are mitigated below significance, the RFEIR instead blindly relies on the current Cap-and-Trade Program, with no further commitments or requirements. As a result, the RFEIR fails to provide substantial evidence supporting its conclusion that the project will result in less than significant GHG emissions, while forwarding an analysis that, if accepted, would make the state significantly less able to address climate change impacts resulting from its built infrastructure.

III. The RFEIR is Inconsistent with CEQA Requirements.

The RFEIR's multiple errors with regard to the Cap-and-Trade Program render it contrary with CEQA law. The RFEIR misapplies the key CEQA Guideline, section 15064.4(b), which provides in pertinent part:¹⁸

- (b) A lead agency should consider the following factors, *among others*, when assessing the significance of impacts from greenhouse gas emissions on the environment:
1. The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting;
 2. Whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project.
 3. The extent to which *the project complies* with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions. Such requirements must be adopted by the relevant public agency through a public review process and

¹⁸ CEQA Guidelines § 15064.4(b) (emphasis added).

must reduce or mitigate the project's incremental contribution of greenhouse gas emissions. *If there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding compliance with the adopted regulations or requirements, an EIR must be prepared for the project.*

Thus, the CEQA Guidelines focus on project-level compliance and project-level impacts. State programs are available for consideration, but they are not held out as a panacea, for GHGs any more than for any other resource area.

Yet, the RFEIR relies upon subsection (b)(3) of this provision to claim that emissions which are indirectly included under the “cap” created by the Cap-and-Trade Program (referred to in the RFEIR as “capped emissions”) need not be analyzed and mitigated under CEQA. This approach would excuse all of the WLC’s transportation and electricity related emissions, leaving the project only “on the hook” for analyzing and mitigating a tiny fraction of its emissions. The following sections explain why this approach is legally and factually flawed.

A. Subsection (b)(3) Itself Does Not Allow The Approach Used in the Revised Final EIR.

As noted above, subsection (b)(3) of CEQA Guidelines section 15064.4 can be used as a factor to assess GHG significance when “*the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions...*” Here, the RFEIR concedes that the project is not subject to the Cap-and-Trade Regulation.¹⁹ This in itself should be sufficient to demonstrate that subsection (b)(3) is inapplicable to the project, as “the project” does not “comply” with Cap-and-Trade at all.

B. The RFEIR’s Hybrid Approach Used To Determine Significance Is Not Allowed.

In addition to improperly relying on subsection (b)(3), as described above, the RFEIR improperly attempts to create a “hybrid” significance scheme based on selectively combining subsection (b)(3) with the South Coast Air Quality Management District’s (SCAQMD) bright-line threshold. As explained in the RFEIR, a potentially appropriate significance threshold in this case is the SCAQMD’s 10,000 metric ton threshold.²⁰ The problem here is that the RFEIR does not compare the project’s GHG emissions against this 10,000 metric ton threshold, and then mitigate those emissions to below that threshold to the extent feasible. Rather, the RFEIR simply subtracts from its emissions quantifications any GHG emissions that it deems to be “capped,” and compares only the net “non-capped” emissions against the bright-line threshold.

¹⁹ See page 4.7-4.

²⁰ RFEIR at 4.7-21.

This approach is unsupported in law. Regardless of which threshold applies, CEQA requires lead agencies to “make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project.”²¹ CEQA then provides that the lead agency must consider “whether *the project emissions* exceed a threshold of significance the lead agency determines applies to the project.”²² Thus, even if subsection (b)(3) properly applied here (which it does not, as explained above), nothing in the CEQA Guidelines allows this hybrid approach of cherry-picking what emissions are applied to an otherwise-applicable bright-line threshold. The City has not even attempted to satisfy its burden of providing such substantial evidence. As noted elsewhere in this letter, Cap-and-Trade does not result in ton-for-ton mitigation of each metric ton covered by the program. Rather, it is a declining market-wide cap designed to achieve certain statewide goals – which, as explained elsewhere in this document, is not designed to mitigate all GHG emissions from land use and logistics facilities.

Because the REFIR fails to properly apply the vast majority of the project’s GHG emissions to the applicable bright-line significance threshold, it also fails to mitigate those emissions, as it simply dismisses them as “less than significant”. If the full scope of the GHG emissions attributable to the project were compared to the applicable bright-line threshold, the mitigated emissions would still be substantially over the threshold. CEQA requires that the project’s significant GHG emissions must be mitigated to the extent feasible. Additional mitigation measures are available to further reduce the project’s GHG emissions that were not considered due to the inappropriate exclusion of the majority of project-generated emissions from the analysis.

C. Reliance Upon *AIR v. Kern County* Is Improper.

While the RFEIR provides little support for the GHG significance approach it takes, the briefing for *Paulek* further explains the reasoning behind the project’s GHG analysis. In those briefs, attorneys for the developer claim that an unrelated appellate ruling, the *AIR v. Kern County* decision²³ is relevant. That decision concerned CEQA analyses for sources actually covered by the Cap-and-Trade Regulation, but the claim is that it somehow applies not only to GHGs from projects that are directly subject to the Cap-and-Trade Regulation, but also to all transportation and electricity related GHG

²¹ CEQA Guidelines § 15064.4(a).

²² CEQA Guidelines § 15064.4(b)(2).

²³ *Association of Irrigated Residents v. Kern County Board of Supervisors* (2017) 17 Cal. App. 5th 708. In CARB’s view this case was wrongly decided as to the Cap-and-Trade issue, and it is certainly not apposite in this very different context.

emissions, the logic being that those emissions are technically included in the statewide “cap” on emissions. This is incorrect factually, for all the reasons discussed above.

It is also not a controlling case legally. The holding in *AIR v. Kern County* addressed whether it “is appropriate for a lead agency to conclude a *project compliance* [sic] with the cap-and-trade program provides a sufficient basis for determining the impact of the project’s greenhouse gas emissions will be less than significant.”²⁴ The project at issue in that case was a refinery that was directly subject to the Cap-and-Trade Regulation. The court did not address the broader question of whether *all* GHG emissions from resources that are indirectly covered by Cap-and-Trade, at some undefined upstream point, may be cast aside as less than significant. Here, as noted above, the WLC is *not* subject to the Cap-and-Trade regulation. It therefore does not “comply” with the Cap-and-Trade program, and is distinguishable from the project at issue in *AIR v. Kern County*.

C. Reliance Upon Obscure 2013 Negative Declarations and a Policy Document from Another District Is Similarly Uncompelling.

The RFEIR itself also attempts to justify excluding “capped emissions” from its significance analysis by referencing two seemingly cherry-picked 2013 mitigated negative declarations,²⁵ and one 2014 guidance document from the San Joaquin Valley Air Pollution Control District (SJVAPCD) titled Policy APR-2025. The RFEIR does not explain why it chose to follow the methodology allegedly used in two obscure mitigated negative declarations and in a 2014 policy document from an air district in a different air basin, rather than following traditional CEQA GHG analysis and mitigation principles. Furthermore, the primary SJVAPCD guidance documents regarding analyzing and mitigating GHG emissions under CEQA make no mention of Policy APR-2025, including the guidance documents relied upon in the *AIR v. Kern County* decision.²⁶

To the extent the RFEIR is considering what other air districts have done, it is worth noting that the California Air Pollution Control Officers’ Association (CAPCOA) has considered a range of potential CEQA significance thresholds, none of which summarily

²⁴ *AIR v. Kern County* at 743 (emphasis added).

²⁵ The Revised FEIR only cryptically references these MNDs, without citations or links to the documents, and without any other information explaining the basis for their CEQA significance approach. The RFEIR’s failure to include or adequately reference these mitigated negative declarations hampers the public’s ability to review and comment on the RFEIR.

²⁶ See, e.g., *AIR v. Kern County* at 743-744; see also http://www.valleyair.org/transportation/GAMAQI_3-19-15.pdf; http://www.valleyair.org/transportation/GAMAQI_3-19-15.pdf; and <http://www.valleyair.org/Programs/CCAP/12-17-09/3%20CCAP%20-%20FINAL%20LU%20Guidance%20-%20Dec%2017%202009.pdf>.

exclude emissions that are indirectly included within the Cap-and-Trade program.²⁷ While that document was generated in 2008, it makes multiple references to the Cap-and-Trade program, and does not endorse simply subtracting all so-called “capped emissions” from GHG analyses.

D. Even If CEQA Guideline 15064.4(b)(3) Applied Here, The RFEIR Ignores Other Requirements in the CEQA Guidelines.

The sections above provide in-depth analysis regarding why subsection (b)(3) of CEQA Guideline 15064.4 does not allow this project to simply disregard the vast majority of its GHG emissions. Even if that subsection did apply, there are other deficiencies in the RFEIR’s GHG analysis that must be addressed.

First, the CEQA Guidelines make clear that an agency cannot focus solely on a single significance consideration while ignoring other evidence or indicators showing potentially significant impacts. For example:

- Section 15064.4(b) states that “[a] lead agency should consider the following factors, *among others*, when assessing the significance of impacts from greenhouse gas emissions on the environment.”
- Section 15064.4(b)(3) provides in pertinent part: “If there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding compliance with the adopted regulations or requirements, an EIR must be prepared for the project.”
- Section 15064(h)(3) provides: “If there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding that the project complies with the specified plan or mitigation program addressing the cumulative problem, an EIR must be prepared for the project.”

As discussed in depth above, there is evidence in this record showing significant GHG impacts that were not analyzed or mitigated in the RFEIR. CEQA does not allow these impacts to be overlooked, even if the lead agency believes the project’s GHG emissions would be less than significant under one particular (and here, improper) significance metric.

IV. Criteria Pollutants and Toxic Emissions Must Still Be Considered

In its 2013 and 2015 comment letters, CARB noted its substantial concerns regarding the project’s air pollutant and toxics emissions, and suggested several feasible means of reducing the significant impacts from those emissions. These emissions raise

²⁷ See CAPCOA, CEQA & Climate Change (January 2008). Available at <http://www.capcoa.org/wp-content/uploads/downloads/2010/05/CAPCOA-White-Paper.pdf>.

substantial local exposure and environmental justice concerns, as Moreno Valley already suffers from very substantial air pollution exposures. These exposures would likely be worsened without appropriate mitigation measures.²⁸ CARB incorporates the comments from those letters into this letter by reference, and strongly recommends that the RFEIR be revised to incorporate all mitigation recommended in its 2013 and 2015 comment letters.

V. Conclusion

While the WLC has enormous GHG implications in itself, the attention this project has received, and the recent legal developments in the emerging *AIR v. Kern County* and *Paulek* line of cases, demonstrate that the City's decisions in the RFEIR have implications beyond the WLC project as well. The City should revise its GHG analysis to accurately account for all GHG emissions that would result from the project, apply those emissions against the applicable significance threshold identified in the RFEIR, and adopt feasible mitigation to ensure those emissions would not cause significant impacts, as required by CEQA.

Sincerely,



Richard W. Corey
Executive Officer

²⁸ On these issues of acute local exposure, especially to roadway emissions, and the importance of fully addressing these sources of risk, see Ann Carlson, *The Clean Air Act's Blind Spot: Microclimates and Hotspot Pollution* (2018) 65 UCLA L. Rev. 1036.

EXHIBIT C

January 30, 2020

Albert Armijo, Interim Planning Manager
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Re: World Logistics Center Draft Recirculated Revised Sections of the Final Environmental Impact Report (SCH # 2012021045)

Dear Mr. Armijo:

The California Air Resources Board (CARB) has reviewed the Draft Recirculated Revised Sections of the Final Environmental Impact Report (RRSFEIR) for the World Logistics Center (WLC or Project). CARB appreciates the opportunity to comment on the RRSFEIR, and raises two primary issues with the RRSFEIR in this letter.

1. The RRSFEIR contains the same flawed GHG analysis as the RFEIR.

CARB previously reviewed the City's July 2018 Revised Final Environmental Impact Report (RFEIR), and submitted comments regarding the RFEIR on September 7, 2018. As noted in that comment letter, CARB believes the RFEIR's analysis of greenhouse gas (GHG) related impacts does not meet California Environmental Quality Act (CEQA) requirements, as it relies almost entirely on mischaracterizations to reach its less-than-significant impact determination.

Unfortunately, the flaws described in CARB's September 7, 2018 comment letter remain in the RRSFEIR, which continues to rely upon mischaracterizations regarding California's Cap-and-Trade Program to dismiss any serious analysis or mitigation of the Project's GHG emissions. Therefore, as part of its comments on the current draft RRSFEIR, CARB re-submits its September 7, 2018 comment letter (attached to this letter) in its entirety. CARB directs its comments toward both the direct and cumulative impact analysis sections in the RRSFEIR.

2. The RRSFEIR does not include the new GHG mitigation measures it references.

The RRSFEIR includes passing references to new GHG-related mitigation measures, particularly measures 4.7.6.1E-1 and 4.7.6.1E-2 (see pages 4.7-20, 6.7-14, and 6.7-20). However, it appears the measures themselves have not been included in the RRSFEIR. Without the ability to review the mitigation measures relied upon by the City in reaching its significance determinations, the public has no way to evaluate the effectiveness of those measures, thwarting CEQA's public disclosure purpose.

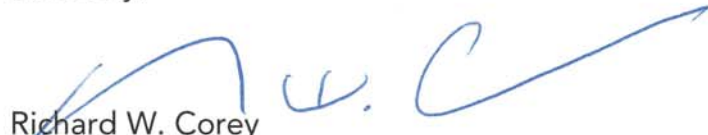
Mr. Albert Armijo
January 30, 2020
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Conclusion

Both this comment letter and CARB's September 7, 2018 comment letter set forth substantial deficiencies in the environmental analysis prepared for the WLC project. Given these deficiencies, the City should revise the RRSFEIR to include adequate analysis and mitigation regarding all of the Project's environmental impacts, including GHG, air quality, and cumulative impacts. The City should then re-circulate the document for public review to allow the public to review and comment on the City's revised proposal.

Thank you for your consideration. As always, we welcome any questions from the City regarding ways to adequately analyze and mitigate the Project's GHG emissions.

Sincerely,



Richard W. Corey
Executive Officer

Enclosure: CARB's September 7, 2018 comment letter regarding the WLC RFEIR.

EXHIBIT D

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO**

ALBERT THOMAS PAULEK, et al.,

Plaintiffs and Respondents,

v.

**MORENO VALLEY COMMUNITY
SERVICES DISTRICT, et al.,**

Defendants and Appellants.

HF PROPERTIES, et al.,

Real Parties in Interest and Appellants.

**LABORERS INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 1184, et al.,**

Plaintiffs and Appellants,

v.

**MORENO VALLEY COMMUNITY
SERVICES DISTRICT, et al.,**

Defendants and Respondents.

HF PROPERTIES, et al.,

Real Parties in Interest and Respondents.

Case No. E071184
(Riverside Cty.
Super. Ct. No.
RIC1510967 MF,
RIC1511279, RIC1511327,
RIC1511421, &
RIC1511195)

(Riverside Cty. Super. Ct.
No. RIC 1511279 &
RIC1511327)

Riverside County Superior Court
The Honorable Sharon J. Waters, Judge

**BRIEF OF AMICI CURIAE THE ATTORNEY GENERAL AND THE
CALIFORNIA AIR RESOURCES BOARD IN SUPPORT OF PLAINTIFFS
AND RESPONDENTS ALBERT THOMAS PAULEK, ET AL. AND
PLAINTIFFS AND APPELLANTS LABORERS INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 1184, ET AL.**

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Resources Board*

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INTRODUCTION

The massive World Logistics Center (Project) will cause approximately 70,000 daily truck trips transporting goods from the ports of Long Beach and Los Angeles to Moreno Valley. (AR 003039, 058605–06.) These vehicle trips will emit hundreds of thousands of metric tons of greenhouse gas (GHG) emissions every year over the life of the Project. (AR 002729.) These GHG emissions, along with emissions from electricity needed to power the more than 40-million-square-foot project, will add to the existing climate pollutant problem, accumulating in the atmosphere and persisting for decades or longer.

Rather than analyzing and mitigating the Project’s emissions, lead agency Respondents Moreno Valley Community Services District, *et al.* (Respondents) shirk their responsibility as a local government to address climate change. They improperly rely on CARB’s statewide Cap-and-Trade climate program (Cap-and-Trade Program), which does not impose any regulatory requirements on this Project, as an excuse not to analyze and mitigate the Project’s climate change impacts. Respondents improperly ignore roughly 95% of the GHG emissions from the Project (AR 002718–19), disregarding the significance of those emissions, avoiding their duty to adopt all feasible mitigation measures, and failing to properly disclose their responsibility for this pollution to the public.

Respondents’ approach mischaracterizes the way state climate policies work and violates the California Environmental Quality Act (CEQA). CEQA directs that Respondents take “all action necessary” to protect the environment, recognizing the importance of local action driven through “meaningful” consideration of environmental impacts. (See Pub. Resources Code, §§ 21000, 21001, 21002, 21002.1.) CEQA does not allow Respondents to waive their CEQA obligations by pointing to a regulation that does not bind them (Cal. Code Regs., tit. 14, § 15000 et seq. (CEQA

Guidelines), § 15064.4), and Respondents wholly misconstrue the regulatory scheme they seek to use.

Although Respondents claim their approach is consistent with state climate policy, it is not. (See Plaintiffs/Appellants’ Supplemental Request Regarding Judicial Notice, Exhibit 1, California Air Resources Board, California’s 2017 Climate Change Scoping Plan (Nov. 2017) (2017 Scoping Plan) at pp. 19 [“Local actions are critical for implementation of California’s ambitious climate agenda”], 97–99 [more extensive discussion about the need for local action to achieve California’s climate goals]; see also Health & Saf. Code, §§ 38502, subd. (h) [identifying competing priorities to balance in emissions reductions], 38592 [nothing in this division relieves any person, entity, or agency of compliance with other law], 38690 [identifying overlapping automobile emissions policy].) Respondents’ approach has been repudiated by CARB, the Attorney General’s Office, and the Natural Resources Agency, as contrary to critical state climate goals. The state has long—and expressly—relied on a portfolio of climate change measures, including significant efforts by local governments, to address emissions that result from their land use decisions.

Respondents rely on the Cap-and-Trade Program to excuse their obligation to make better land use decisions. Cap-and-Trade is not intended as a stand-alone climate policy; instead, it assumes steady efforts to reduce emissions across the state. While Cap-and-Trade has an important role to play in limiting emissions from entities like power plants and refineries, the Program does not cover a host of other sources, including warehouses. Although the Program creates financial and legal obligations on fuel suppliers and electricity generators that may ultimately supply this Project, the Project experiences neither the direct legal requirements of the Program nor the full economic costs associated with its additional emissions. If projects were allowed to evade responsibility in

this way, they would steadily increase Cap-and-Trade Program costs upstream, while locking the state into ever-more expensive and inappropriate high-emitting development patterns. This is a recipe for failure in achieving the state’s climate goals. To avoid this scenario, the state relies on local governments to limit emissions from new development projects. Emissions from such projects are the responsibility of local governments and should be mitigated through the proper application of CEQA. Eliminating this crucial piece of the state’s portfolio approach undermines the state’s climate goals.

We have arrived at a crossroads for the future of GHG analysis under CEQA. If Respondents prevail, this case could singlehandedly undo the will of the Legislature by excusing essentially all projects from the obligation to consider GHG impacts from vehicle trips and energy use. This Court should reject Respondents’ argument and confirm that all lead agencies must do their part if we are to meet the state’s long-term climate stabilization objective.

STATEMENT OF INTERESTS

I. INTEREST OF THE ATTORNEY GENERAL

California has already begun to experience significant adverse impacts from climate change such as “more frequent, more catastrophic and more costly” wildfires, drought, “coastal erosion, disruption of water supply, threats to agriculture, spread of insect-borne diseases, and continuing health threats from air pollution.” (2017 Scoping Plan at p. ES2.) As California’s chief law enforcement officer, the Attorney General has the independent power and duty to protect the interest of all of California’s current and future residents in a clean, health, and safe environment. (See Cal. Const., art. V, § 13; Gov. Code, §§ 12511, 12600–12612; *D’Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 15.)

Upholding this duty, the Attorney General has actively encouraged lead agencies to fulfill their CEQA responsibilities as they relate to climate change for well over a decade. (See, e.g., *Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 3 Cal.5th 497 (SANDAG) at p. 519 [“nothing we say today invites regional planners to ‘shirk their responsibilities’ under CEQA”]; *City of Long Beach v. City of Los Angeles* (2018) 19 Cal.App.5th 465; *People v. County of San Bernardino* (San Bernardino County 2007) No. CIVSS0700329.)

The World Logistics Center, like every large development project, has the potential to either facilitate or hinder the state’s achievement of its climate goals. Here, Respondents’ unsupported approach to analyzing the Project’s GHG emissions has the potential to seriously undermine the overall effort to meet the state’s science-based GHG reduction goals for the transportation and land use sectors and to disproportionately affect environmental justice communities.¹ Given these significant interests, the Attorney General submits this amicus brief in support of Appellants,² in compliance with rule 8.200(c)(7) of the California Rules of Court in his independent capacity and on behalf of the California Air Resources Board (CARB).

¹ The Attorney General opposed this methodology in a comment letter it submitted on the revised sections of the Final EIR for this Project (Revised Final EIR or RFEIR). (Letter re: Revised Sections of the Final Environmental Impact Report for the World Logistics Center Project, Sept. 7, 2018, at:

<<https://oag.ca.gov/sites/all/files/agweb/pdfs/environment/comments-revised-sections-feir.pdf?>>.) The Revised Final EIR is not at issue in this litigation, but it includes the original EIR’s same flawed GHG analysis.

² This brief is submitted in support of Plaintiffs and Respondents Albert Thomas Paulek, et al. and Plaintiffs and Appellants Laborers International Union of North America, Local 1184, et al.

II. INTEREST OF THE CALIFORNIA AIR RESOURCES BOARD

CARB has a strong interest in participating in this case as *amicus curiae*. CARB is charged with protecting the public from the harmful effects of air pollution and developing programs and actions to fight climate change. As creator and administrator of the Cap-and-Trade Program, and as the lead agency on the Scoping Plan setting out many of the state's climate policies, CARB is an expert on how the Cap-and-Trade Program was designed to function and interact with other state laws and programs as part of California's portfolio approach to addressing GHG emissions. In their briefing, Respondents misrepresent CARB as effectively endorsing the EIR's approach to GHG analysis. (Combined Respondents' and Cross-Appellants' Opening Brief at pp. 17, 36–38, 47–48, 56, 63.) But CARB has repeatedly made clear it does *not* support Respondents' approach.³ As explained more fully below, Respondents' arguments regarding GHG analysis are contrary to the construction given to applicable regulations by CARB, and by the Natural Resources Agency, agencies charged with interpreting and enforcing the programs at issue.

BACKGROUND

I. LEGAL BACKGROUND REGARDING CALIFORNIA'S EFFORTS TO COMBAT CLIMATE CHANGE

In 2006, recognizing the importance of combatting climate change and furthering the objectives of Executive Order S-3-05, the Legislature enacted the Global Warming Solutions Act of 2006, commonly known as

³ CARB also explained this approach when it formally opposed the GHG analysis Respondents rely on here through its comments on the RFEIR for this Project. (Letter re: World Logistics Center Revised Final Environmental Impact Report, Sept. 7, 2018, at: <https://ww3.arb.ca.gov/toxics/ttdceqalist/logisticsfeir.pdf?_ga=2.236813640.855160185.1575908432-1460774677.1564163003>.)

AB 32. (Health & Saf. Code, § 38500, et seq.) AB 32 mandates that, by 2020, California must reduce its total statewide annual GHG emissions to the level they were in 1990, and to 40 percent below that level by 2030. (Health & Saf. Code, §§ 38550, 38566.) This mandate puts the state on a trajectory of significant and continuous GHG emissions reductions through 2050, in order to stabilize the atmospheric levels of GHGs and reduce the risk of dangerous climate change.

Under AB 32, the Legislature tasked CARB with preparing a guidance planning document, known as the Scoping Plan that, while not binding, set out the state's views based on extensive environmental and economic analyses on how policies may be effectively implemented so that California will meet its ambitious GHG reduction goals. (See Health & Saf. Code, §§ 38561 et seq.) The Scoping Plan emphasizes the need for a multi-pronged emissions reduction approach that can be carried out by many entities and reflects the state's position that it is necessary to reduce emissions at the source and through reductions in demand for energy. (2017 Scoping Plan, pp. 12, 19, 28).

The Scoping Plan includes a suite of regulations, measures, and policies designed to operate together to reduce GHG emissions. The Cap-and-Trade Program is one such policy. Entities that are directly subject to the Cap-and-Trade Program—like power plants, factories, refineries, and electricity generators and importers—must purchase and surrender compliance instruments (e.g., allowances) for their emissions. (See Cal. Code Regs., tit. 17, § 95812.) Downstream emitters such as cars and trucks, much less warehouses that such cars and trucks drive to, are not covered entities under Cap-and-Trade and have no such obligation to purchase or surrender allowances. The existence of the Program, in other words, does not obviate the need for action at other levels of the economy. On the contrary: If sources like the long-lasting development project in this

case build without regard to their emissions, they will increase overall state emissions and hence increase pressure and costs within the Cap-and-Trade Program.

To address the wide range of GHG emissions sources that are not directly controlled through the Cap-and-Trade Program, the state relies on other policies⁴—many of which require collaboration between the state and local governments. Agencies large and small across the state (including, crucially, cities and counties) are responsible for ensuring that proposed new land use plans, transportation projects, and development projects are consistent with evolving scientific knowledge and state regulatory schemes; CEQA is a critical tool for implementing these obligations.⁵ (See *SANDAG*, *supra*, 3 Cal.5th at p. 519; see also CEQA Guidelines, § 15064.4, subd. (b).)

The Scoping Plan makes clear that the Cap-and-Trade Program was *not* designed to replace local governments’ long-term planning obligations, but rather designed to work in concert with those policies to achieve the

⁴ See, e.g., Health & Saf. Code, §§ 38561, subd. (e) (requiring CARB to consider “the relative contribution of each source or source category to statewide greenhouse gas emissions”), 43018.5, subd. (a) (requiring CARB to “adopt regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles”).

⁵ For example, CARB provides regional emission reduction targets for local jurisdictions’ land use and transportation planning obligations under Senate Bill (SB) 375. (See Health & Saf. Code, § 65080, subd. (b)(2)(A) [known as “The Sustainable Communities and Climate Protection Act”].) CARB also works with regional air pollution control districts and air quality management districts to address emission sources that have both local and global effect, including methane from landfills and hydrofluorocarbons (HFCs), as well as to support state- and federally-mandated permitting of certain industrial sources of GHG emissions. (See California Air Resources Board, California’s 2017 Climate Change Scoping Plan (Nov. 2017) pp. 3, 104 <https://ww3.arb.ca.gov/cc/scopingplan/scoping_plan_2017.pdf >.)

state’s goals. (2017 Scoping Plan at p. 102 [“California’s future climate strategy will require increased focus on integrated land use planning”].)

Recent state reports have shown that California’s vehicular GHG emissions continue to increase year after year, and CARB has emphasized the need for local action. (See California Air Resources Board, 2018 Progress Report: California’s Sustainable Communities and Climate Protection Act (November 2018) at 4.) These increasing emissions demonstrate the crucial need for *more* complementary local action—not less—to ensure the state meets its GHG targets in cost-effective ways.

In light of the state’s GHG reduction policies, and CEQA’s focus on embedding environmental considerations in local decision-making, the Supreme Court has emphasized that careful CEQA analysis of GHG impacts will be required going forward, as lead agencies must “stay in step” with the evolving science and law related to the state’s long-term climate objectives in order to carry out their duties under CEQA. (*SANDAG*, *supra*, 3 Cal.5th at p. 519.)

II. OVERVIEW OF THE GHG ANALYSIS IN RESPONDENTS’ EIR

Mischaracterizing the collaborative efforts required to combat climate change and the role of the Cap-and-Trade Program, Respondents’ EIR takes a very unusual and troubling approach to addressing the Project’s GHG-related impacts.⁶ Respondents divide the Project’s GHG emissions into two categories, which the EIR terms “capped” and “uncapped.” (AR 002719.) What the EIR deems “uncapped” emissions constitute only about 4.6% of the Project’s emissions. (*Ibid.*) The “uncapped” category includes comparatively minor landfill emissions caused by waste generated at the

⁶ The Attorney General and CARB only address Respondents’ inappropriate use of the Cap-and-Trade Program in the GHG analysis of the EIR. This amicus brief is not intended to and should not be construed as an exhaustive discussion of the EIR’s compliance with CEQA.

Project and the use of refrigerants at the Project. (*Ibid.*) For these emissions, the EIR follows the approach that would be expected under CEQA: the City of Moreno Valley, in its discretion, designated a significance threshold (in this case, 10,000 metric tons of GHG emissions as recommended by the South Coast Air Quality Management District), compared the “uncapped” emissions to that threshold, and required feasible mitigation measures to ensure those emissions fall below that threshold. (AR 002719, AR 002729.)

What the EIR terms “capped” emissions, however, constitute the remaining 95.4% of the Project’s predicted emissions. (AR 002719.) Those include emissions caused by mobile sources (namely, diesel trucks), as well as natural gas and electricity use at the Project. (*Ibid.*) For these emissions, the EIR deviates dramatically from standard CEQA methodology. The EIR asserts these emissions are “covered” by Cap-and-Trade and therefore wholly exempt from any further CEQA analysis or mitigation. (AR 002723.) The EIR does *not* compare the Project’s “capped” emissions to the 10,000 metric ton threshold. (AR 002725.) Indeed, after mitigation measures are applied to the Project, the “capped” emissions remain nearly 40 times greater than the significance threshold. (AR 002729.) In forgoing any attempt to decrease the Project’s true total emissions to a less-than-significant level, Respondents fail to consider further mitigation measures that could have made this Project more compatible with the state’s climate goals. As described below, this approach is unlawful.

ARGUMENT

Respondents avoid disclosing and addressing mitigation for thousands of tons of GHG emissions each year pursuant to the misguided theory that those emissions are addressed by Cap-and-Trade. This argument is founded on misunderstandings of both the Cap-and-Trade Program and

CEQA—both of which require different industries and projects to take responsibility for their own impacts, rather than rely on others for mitigation. Most fundamentally, warehouse projects like the Project are not subject to Cap-and-Trade. Respondents therefore cannot accurately assert that “compliance” with Cap-and-Trade provides any legal basis to avoid analyzing and adequately mitigating the majority of the Project’s emissions.

The CEQA Guidelines allow projects to consider regulations “[with] which the project complies” for purposes of considering significance of GHG emissions. (See CEQA Guidelines, § 15064.4, subd. (b)(3).) However, that consideration does not apply here and Respondents’ approach, which in effect relies on other entities to undertake Respondents’ CEQA mitigation, not only violates both CEQA’s legal requirements and public disclosure and mitigation purposes, but also undermines the state climate objectives Cap-and-Trade is intended to further. Cap-and-Trade is designed to act in tandem with—not in spite of—critical tools like local land use planning to reduce GHG emissions. If allowed for Respondents and adopted by other local jurisdictions, such abdication by local governments would dramatically hinder the state’s ability to achieve its legislatively mandated long-term climate stabilization objectives and forgo pollution reduction co-benefits from GHG mitigation measures that are vital for environmental justice communities.

The Resources Agency agrees with CARB that “to demonstrate consistency with an existing GHG reduction plan, a lead agency would have to show that the plan actually addresses the emissions that would result from the project.” (See California Natural Resources Agency, Final Statement of Reasons for Regulatory Action: Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB 97 (2009),

<http://resources.ca.gov/ceqa/docs/Final_Statement_of_Reasons.pdf>, at p. 27.)

I. WAREHOUSE AND LOGISTICS PROJECTS ARE NOT REGULATED BY CAP-AND-TRADE AND THEIR EMISSIONS MUST STILL BE MITIGATED BY LOCAL GOVERNMENTS

Warehouse and logistics complexes are not regulated by Cap-and-Trade. The Cap-and-Trade Program thus provides no legal or policy basis for Respondents to avoid their obligation to evaluate and mitigate GHG emissions. Cap-and-Trade applies “an aggregate greenhouse gas allowance budget [to] *covered entities* and provides a trading mechanism for” such allowances. (Cal. Code Regs., tit. 17, § 95801 (emphasis added).)

Respondents seek to use Cap-and-Trade to zero-out and excuse the application of feasible mitigation measures to over 95% of all GHG emissions from the Project. Cap-and-Trade applies only to expressly identified entities (“covered entities”) such as cement producers, petroleum refiners, electricity generators, natural gas suppliers, fuel importers, and liquid petroleum gas suppliers. (Cal. Code Regs., tit. 17, § 95811.)

Warehouse and logistics complexes are *not* covered entities. Cap-and-Trade compliance instruments do not factor in *whatsoever* because this Project is not covered by Cap-and-Trade.

The mere fact that warehouse and logistics complexes are in the chain of commerce with covered entities does not transform them into covered entities themselves. As an example, although the operator of a refinery that produces gasoline in California is subject to Cap-and-Trade, (Cal. Code Regs., tit. 17, § 95811, subd. (e)(1)), entities downstream from that refinery in the chain of commerce are not. The refinery itself may have compliance obligations under the Cap-and-Trade Program, which can be met by reducing the refinery’s own GHG emissions or surrendering allowances, but the gas station that resells the gas, the truck drivers who purchase it, and

the warehouses to which the trucks drive do not have compliance obligations. Under the state's portfolio approach, while the refinery may have met some or all of its climate obligations via Cap-and-Trade, the downstream entities have not. Because warehouses receive no set price or regulatory signals from Cap-and-Trade, they are not being directly incentivized to reduce emissions. Instead, other components of the state's portfolio address those emissions. Nothing in Cap-and-Trade explicitly or impliedly repealed the use of other measures to address climate change; they were designed to work together. (See, e.g., 2017 Scoping Plan at p. 28.) Local governments must responsibly plan new development to further the state's climate goals.

II. ALLOWING RESPONDENTS' UNTENABLE APPROACH TO GHG ANALYSIS WOULD HAVE SIGNIFICANT, NEGATIVE STATEWIDE CONSEQUENCES

If Respondents' approach to GHG analysis is endorsed, other lead agencies will undoubtedly follow this approach, and emissions from the transportation and land use sectors will be largely omitted from analysis and mitigation under CEQA. Widespread adoption of this approach would: (1) place the entire burden of California's well-established, long-term land-use related GHG reduction goals on Cap-and-Trade, thereby straining the program beyond its intended purpose and (2) expose already burdened communities in the state to greater amounts of GHG emissions and co-pollutants that accompany GHG emissions, such as diesel particulate matter and nitrogen oxides.

A. Respondents' GHG analysis undermines California's GHG reduction goals

As explained above, the Cap-and-Trade Program is just one part of a suite of complementary measures designed to achieve California's ambitious GHG reduction and climate stabilization objectives. Cap-and-

Trade provides no legal basis for Respondents to avoid local governments' obligations as lead agencies under CEQA to evaluate and mitigate GHG emissions from a project that the Cap-and-Trade Program does not even cover.

While any one policy may be insufficient or at risk of circumvention, the suite of policies work in concert toward the state's goals.^{7,8} This overlap is by design, and makes the suite of policies more resilient to changed circumstances, enforcement problems, and legal challenges. The upstream Cap-and-Trade Program thus works in tandem with downstream choices, including planning choices, to ensure both that total emissions decline and that projects throughout the state are designed to avoid putting undue upstream pressure on emissions or control costs. Weakening one policy because another policy might address it runs contrary to this approach.

⁷ See 2017 Scoping Plan, *supra*, pp. ES7–8, 10, 22, 97; cf. Elinor Ostrom, A Polycentric Approach for Coping with Climate Change (2014) 15 *Annals Econ. & Fin.* 97, 123 <<https://perma.cc/YSF4-B7N8>> (Nobel laureate describing an ideal policy approach to climate change as “Complex, Multi-Level Systems to Cope with a Complex, Multi-Level Problem”); Amir Bazaz, et al., Global Covenant of Mayors, Summary for Urban Policymakers: What the IPCC Special Report on Global Warming of 1.5.°C Means for Cities (Dec. 2018) pp. 22–23 <<https://perma.cc/R37B-3WDD>> (identifying interaction between sources of governance and importance of incentives beyond financial consequences at the community level).

⁸ Complementary measures are also important in light of the risk to any one measure posed by litigation. Private parties and the federal government have challenged California's GHG reduction policies, including aspects of the Cap-and-Trade Program. California's GHG vehicle emissions regulatory authority is currently also under challenge. The wisdom of the portfolio approach endorsed by the Scoping Plan is to ensure that the state's efforts continue via many channels, rather than relying on any one potentially challenged measure.

If other lead agencies adopt Respondents' approach to GHG analysis under CEQA, their development projects would produce millions of metric tons of GHG emissions that would go unmitigated through what amounts to an unauthorized categorical exemption from CEQA. The economic analyses and feasibility of achieving the state's legislatively mandated goals in the Scoping Plan account for all policies working in tandem. If any one policy fails to deliver reductions, this would put strain on the Cap-and-Trade Program to deliver more reductions than anticipated and at higher costs.

Respondents' failure to account for the significance of the Project's GHG emissions from transportation is particularly troubling in light of the fact that the transportation sector accounts for over 35% of the state's total GHG emissions and these emissions continue to rise. (2017 Scoping Plan, *supra*, pp. ES1, 11 [charts of emissions by source]; see also California Air Resources Board, 2018 Progress Report: California's Sustainable Communities and Climate Protection Act (November 2018) at 4.) As the California Supreme Court noted, "transportation emissions are affected by the location and density of residential and commercial development, the Scoping Plan does not propose statewide regulation of land use planning but *relies instead on local governments.*" (*Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 62 Cal.4th 204, 230; emphasis added.) Local governments thus play a unique role in decreasing GHG emissions from the transportation sector.

Respondents contend that because statewide emissions are capped under the Cap-and-Trade Program, the amount of emissions from "capped" sources will be the same with or without their Project, but this claim ignores both their obligations under CEQA to disclose and mitigate their emissions and the intended design of the Cap-and-Trade Program. (See

Combined Respondents’ and Cross-Appellants’ Opening Brief at pp. 48–49.)

Cap-and-Trade is not a program designed to reduce emissions from local government actions, or land use; instead, it was designed on the assumption that local actors would simultaneously work to reduce emissions within their spheres. Cap-and-Trade alone was designed to account for less than 40% of the total emissions reductions needed to achieve California’s 2030 climate goals, and on the explicit assumption that local design choices would continue to reduce overall emissions (and hence economy-wide costs in the Cap-and-Trade Program). (2017 Scoping Plan at p. 28.) Indeed, relying entirely on the Cap-and-Trade Program to address land use would produce a mismatch that would strain the Program by functionally increasing demand for emissions reductions as unregulated entities displace their obligations onto the Program rather than taking action themselves, raising compliance costs for covered entities across all sectors and all consumers across the state at all income levels. California’s portfolio approach was designed to meet AB 32’s requirement that “greenhouse gas emissions reduction activities . . . adopted and implemented by [CARB] are complementary, nonduplicative, and can be implemented in an efficient and cost-effective manner.” (Cal. Health & Saf. Code, § 38561.) By taking a portfolio approach, the state has recognized that taking GHG action in specific sectors ensures that we achieve our broader climate and energy demand reduction goals. (See 2017 Scoping Plan at pp. 2, 24, 100 [describing Governor Brown’s five key climate change strategy “pillars”].) Ultimately, cost increases could make the Cap-and-Trade Program less effective as a key part of the suite of California’s climate policies.

In sum, Respondents’ position is fundamentally inconsistent with the state’s approach to climate change, and so disregards significant emissions

that should properly be addressed under CEQA, not an unrelated emissions program like Cap-and-Trade. Moreover, Respondents' approach would allow similar emissions from other projects that would follow its lead. (See Part III(A), *infra.*) The majority of land use projects are, like this Project, not covered by the Cap-and-Trade Program. Freight alone is an enormous industry; over 1.5 billion tons of freight were moved in California during 2015. (*Id.* at p. 73.) And other types of projects such as residential developments or agricultural enterprises may seek to invoke precedent created by this case. Thus, even if the Project standing alone does not excessively strain the Cap-and-Trade system, the collective weight of new projects failing to address GHG emissions in the CEQA process would.

B. Respondents' GHG analysis prevents co-pollutant reduction measures necessary to protect California's environmental justice communities

Permitting massive land development projects without requiring the necessary mitigation measures to decrease project emissions will also harm California's environmental justice communities—those already suffering from the worst environmental pollution in the state. The census tract the Project will be built in is ranked in the 75th to 80th percentile of census tracts in California in terms of greatest pollution burden indicators and health and vulnerability factors for population characteristic indicators. (CalEnviroScreen 3.0 for Census Tract 6065042624, Office of Environmental Health Hazard Assessment, last visited November 27, 2019 <<https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-30>>.) Even without the Project, residents of this census tract already experience ozone, the main ingredient of smog, at a rate higher than 98% of the rest of California. (*Ibid.*) Relatedly, these residents also experience cardiovascular disease, which can result from exposure to air pollution, at a rate higher than 95% of the state. (*Ibid.*)

Considering additional mitigation properly may have resulted in additional zero-emissions technologies used for the Project, including, perhaps, from its trucks, as many commenters recommended. If such measures are not considered from this Project and other future projects like it are not mitigated, Moreno Valley and communities throughout the state will likely continue to suffer from worse air pollution. (See Nicky Sheats, *Achieving Emissions Reductions for Environmental Justice Communities Through Climate Change Mitigation Policy* (2017) 41 WM. & MARY ENVTL. L. & POL’Y REV. 377, 387 [“[E]ven without the intentional maximization of co-pollutant reduction, there should be incidental co-pollutant reductions as GHGs are being reduced [which] should improve the health of local communities.”]; see also Scoping Plan at p. 74 [“Air pollution from tailpipe emissions contributes to respiratory ailments, cardiovascular disease, and early death, with disproportionate impacts on vulnerable populations such as children, the elderly, those with existing health conditions . . . , low income communities, and communities of color.”].)

III. RESPONDENTS’ EIR VIOLATES CEQA

As explained above, the EIR’s approach to GHG analysis misrepresents the Cap-and-Trade Program and the Project’s place in that scheme. As a result, the EIR takes an unsupportable approach to evaluating the significance of GHG emissions from the Project. Contrary to CEQA’s focus on information disclosure and local responsibility for mitigation, the EIR ignores the vast majority of the Project’s emissions, and, in a misleading analysis, compares only a small fraction of the Project’s emissions to the applicable significance threshold. This flawed analysis leads the EIR to conclude that the impact from GHG emissions would be mitigated to a less-than-significant level, misleading the public and shirking mitigation responsibilities. Even if the Cap-and-Trade Program directly

applied to the Project’s emissions (it does not since, as explained above, this Project is not a covered entity under the Program), this method of evaluating a project’s significance *after* taking into account purported “mitigation” or impact-reducing components is not allowed by CEQA. As a result of its flawed analysis, the EIR fails to adopt all feasible mitigation measures and subverts CEQA’s important political function of ensuring informed decision making and informed public participation.

The EIR’s approach to GHG analysis fails on multiple levels. Perhaps most critically, in addition to pointing to “compliance” with a regulation that simply does not cover the Project to excuse mitigation, the EIR focuses on a single significance consideration while ignoring other evidence showing potentially significant impacts. CEQA does not allow clearly significant GHG impacts to be overlooked, even if a lead agency believes those impacts are considered less than significant under one particular metric. (See, e.g., *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 274 [citizens’ personal observations about the significance of noise impacts on their community constituted substantial evidence that the impact may be significant and should be assessed in an EIR, even though the noise levels did not exceed general planning standards]; accord *SANDAG*, *supra*, 3 Cal.5th at p. 515 [“An adequate description of adverse environmental effects is necessary to inform the critical discussion of mitigation measures and project alternatives at the core of the EIR”].) This failure to address potentially significant impacts not only minimizes the Project’s significant impacts, but also warps the evaluation of whether the Project’s contribution to GHG emissions is a cumulatively considerable impact. (CEQA Guidelines, § 15064.) The cumulative effect of dozens of similar warehouse projects in the Moreno Valley area could—and almost certainly will—be significant.

A. The EIR improperly applies CEQA Guidelines Section 15064.4 to determine the significance of the Project's GHG emissions.

The Resources Agency, the state's expert on CEQA, has rejected the approach of using purported "compliance" with an inapplicable program to mitigate emissions. (Final Statement of Reasons for the CEQA Guidelines Amendments (2018) at p. 27 ["a subdivision project could not demonstrate 'consistency' with [CARB's] Early Action Measures because those measures do not address emissions resulting from a typical housing subdivision"].)

The EIR misapplies CEQA Guidelines section 15064.4, which offers multiple factors a lead agency should consider in assessing the significance of impacts from GHG emissions. That Guideline provides, in pertinent part:

- (b) A lead agency should consider the following factors, *among others*, when assessing the significance of impacts from greenhouse gas emissions on the environment:
 - (1) The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting;
 - (2) Whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project.
 - (3) The extent to which *the project complies* with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions. Such requirements must be adopted by the relevant public agency through a public review process and must reduce or mitigate the project's incremental contribution of greenhouse gas emissions. If there is substantial evidence that the possible effects of a *particular project* are still cumulatively considerable notwithstanding compliance with the adopted

regulations or requirements, an EIR must be prepared for the project.⁹

(CEQA Guidelines, § 15064.4, subd. (b), *italics added.*)

As reflected in subdivision (b)(3), compliance with “regulations or requirements adopted to implement a statewide, regional, or local plan” can factor into the assessment of GHG significance, but only when *the project complies* with those regulations or requirements. Yet, the EIR relies upon subsection (b)(3) to claim that emissions for which upstream suppliers surrendered allowances need not be analyzed and mitigated under CEQA. This approach excuses all of the Project’s transportation- and electricity-related emissions, thus requiring analysis and mitigation of only a tiny fraction of the Project’s emissions.

⁹ The 2018 update to the CEQA Guidelines added the following language:

(b) In determining the significance of a project’s greenhouse gas emissions, the lead agency should focus its analysis on the reasonably foreseeable incremental contribution of the project’s emissions to the effects of climate change. The agency’s analysis should consider a timeframe that is appropriate for the project. The agency’s analysis also must reasonably reflect evolving scientific knowledge and state regulatory schemes.

(b)(3) . . . In determining the significance of impacts, the lead agency may consider a project’s consistency with the State’s long-term climate goals or strategies, provided that substantial evidence supports the agency’s analysis of how those goals or strategies address the project’s incremental contribution to climate change.

(c) A lead agency may use a model or methodology to estimate greenhouse gas emissions resulting from a project. The lead agency has discretion to select the model or methodology it considers most appropriate to enable decision makers to intelligently take into account the project’s incremental contribution to climate change. The lead agency must support its selection of a model or methodology with substantial evidence. The lead agency should explain the limitations of the particular model or methodology selected for use.

Respondents' application of subdivision (b)(3) to this Project is wrong. Because the Project is not a covered entity under the Cap-and-Trade Program, subsection (b)(3) is inapplicable, as the project cannot "comply" with Cap-and-Trade at all. Moreover, as discussed above, such "compliance" would undermine Cap-and-Trade's purposes if adopted as a CEQA approach, not serve the environmental goals both AB 32 and CEQA set out to deliver.

B. The EIR failed to apply the SCAQMD's GHG emissions threshold to *all* of the Projects' GHG emissions.

The EIR takes an impermissible approach of applying the Cap-and-Trade Program to ostensibly reduce the Project's emissions significantly, then comparing only that reduced quantity to the bright-line significance threshold. This approach is not supported in law.¹⁰

CEQA requires lead agencies to "make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project." (CEQA Guidelines, § 15064.4.) CEQA then provides that the lead agency must consider "whether *the project emissions* exceed a threshold of significance the lead agency determines applies to the project." (*Id.* at subd. (b)(2).) As explained in the EIR, a potentially appropriate

¹⁰ The EIR also attempts to justify excluding "capped emissions" from its significance analysis by referencing two seemingly cherry-picked 2013 mitigated negative declarations from other lead agencies, and one 2014 guidance document from the San Joaquin Valley Air Pollution Control District (SJVAPCD). (EIR 4.7-33.) The EIR does not explain why it chose to follow the methodology allegedly used in two obscure mitigated negative declarations and in a policy document from an air district in a different air basin, rather than following traditional CEQA GHG analysis and mitigation principles. These irrelevant, project-specific documents do not constitute substantial evidence supporting Respondents' argument.

significance threshold in this case is the South Coast Air Quality Management District's (SCAQMD) SCAQMD's 10,000 metric ton limit.¹¹ (EIR at p. 4.7-32.)

The problem here is that the EIR does not compare the Project's total GHG emissions against this 10,000 metric ton threshold, and then mitigate those emissions to below that threshold to the extent feasible. Instead, the EIR simply subtracts from the total any GHG emissions it deems to be "capped," and compares only the few "non-capped" emissions to the bright-line threshold. Because the EIR only compares a small fraction of the Project's GHG emissions to the applicable bright-line significance threshold, it only requires relatively minor mitigation measures to reduce the Project's emissions to what the EIR considers "less than significant." (EIR at pp. 1-55–57.)

Respondents' approach improperly applies so-called "mitigation" (the Cap-and-Trade Program) *before* comparing GHG emissions to the significance threshold. By combining impacts and mitigation analyses, it is unclear how the purported mitigation reduces impacts. This approach was rejected in *Lotus v. Dept. of Transportation* (2014) 223 Cal.App.4th 645, where the court stated:

The failure of the EIR to separately identify and analyze the significance of the impacts . . . before proposing mitigation measures is not merely a harmless procedural failing. . . . [T]his shortcutting of CEQA requirements subverts the purposes of CEQA by omitting material necessary to informed decisionmaking and informed public participation. It precludes both identification of potential

¹¹ It is worth noting that the Scoping Plans are not binding as to any particular CEQA methodology, or as to land use planning generally, and do not require use of any particular significance threshold. They are guidance documents; individual land use authorities can and do depart from particular suggestions in them if they have appropriate reasons to do so. The issue in this case, however, is that the Cap-and-Trade program does *not* provide such an appropriate reason.

environmental consequences arising from the project and also thoughtful analysis of the sufficiency of measures to mitigate those consequences. The deficiency cannot be considered harmless.

(*Id.* at p. 658.)

Furthermore, if the full scope of the GHG emissions attributable to the Project were compared to the applicable bright line threshold, the emissions, as mitigated, would still be substantially over the threshold—and would therefore require consideration of additional mitigation measures. (See EIR, pp. 4.7-35–36.)

Applying appropriate mitigation measures to reduce the so-called “capped” emissions would not “result in double counting and double mitigating emissions that are already mitigated through cap-and-trade” as Respondents assert. (Combined Respondents’ and Cross-Appellants’ Opening Brief at p. 57.) Gesturing towards Cap-and-Trade regulated entities is not proper mitigation because Cap-and-Trade does not apply to this Project in any way, and the Project itself has ample mitigation opportunities onsite. To mitigate this Project’s GHG emissions, Respondents would have to address emissions from mobile sources, which account for over 70% of the Project’s total emissions (which again are nearly 40 times greater than the significance threshold). (AR002729.) To reduce these emissions, fewer trucks could drive from the Project to the Ports of Long Beach and Los Angeles every day, the Project could be built closer to the ports, the Project could require more zero emission vehicles be used or provide charging equipment or incentives to encourage their use, or any number of other meaningful mitigation measures. But Cap-and-Trade does not require any of this. Such measures are instead included by local governments in local land use projects to ensure approved project impacts fall below significance thresholds. By never counting the “capped” emissions toward the significance threshold, there is *no* counting and *no*

project-level mitigation of hundreds of thousands of tons of yearly GHG emissions from this Project.

C. Respondents fail to consider the long-term GHG impacts of the Project.

The Supreme Court has made clear that an EIR should consider a project’s long-term GHG impacts, and should address whether the project as a whole is in accord with the state’s climate goals. (*Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 3 Cal.5th 497 (*SANDAG*) at p. 515.)¹² The state’s climate change goals extend beyond 2030. (See, e.g., Executive Order S-03-05 [established a statewide target of reducing GHG emissions to 80 percent below 1990 levels by 2050].) Because the Project is expected to operate for decades into the future, Respondents must account for emissions beyond 2030. But Respondents fail to account for emissions beyond that point—despite the fact that the Project’s full operation will not start until *five years later*, in 2035. (EIR at p. 4.3-61.) Respondents present no substantial evidence that any of the Project’s post-buildout operational emissions are mitigated by the Cap-and-Trade Program. (See, e.g., EIR, pp. 4.7-36–37 [stating, without citation, that “[s]ome of the project’s GHG emissions are subject to the requirements of the AB 32 Cap and Trade Program and will have a GHG allocation based on current GHG emissions levels”].) This is not an adequate CEQA analysis. (See *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 904 [EIR must contain substantial evidence that mitigation measures will reduce associated impacts to less-

¹² The parties in *AIR v. Kern* did not have the opportunity to brief the significance of *SANDAG* because the California Supreme Court filed its opinion in *SANDAG* over a month after the close of briefing in *AIR v. Kern*. It appears to amici that this is the first case at the California Court of Appeal where parties have had the opportunity to address both *SANDAG* and *AIR v. Kern* in their briefs.

than-significant-levels, such as by requiring compliance with applicable regulatory standards and preparation of site-specific studies]; Cal. Code Regs. tit. 14, § 15370, subd. (d) [“mitigation” includes “[r]educing or eliminating the impact over time by preservation and maintenance operations during the life of the action”].)

D. Reliance on *AIR v. Kern County* is improper.

Respondents incorrectly claim the Fifth Appellate District’s decision in *Association of Irrigated Residents v. Kern County Bd. of Supervisors* (2017) 17 Cal.App.5th 708 (*AIR*) upheld the use of the same GHG methodology as Respondents attempt to use here. (Combined Respondents’ and Cross-Appellants’ Opening Brief at p. 53.) Respondents’ use of the Cap-and-Trade Program here goes far beyond what was sanctioned in *AIR*. In *AIR*, the project being evaluated under CEQA was a refinery, a *covered entity* under Cap-and-Trade. The court held a lead agency was authorized “to determine that a project’s greenhouse gas emissions will have a less than significant effect on the environment based on *the project’s* compliance with the cap-and-trade program.” (*Id.* at p. 718; italics added.) Regardless of whether or not *AIR* was rightly decided, *here*, the question is much simpler and different from the question before the court in *AIR*. Here, it is undisputed that the Project is *not* a covered entity required to comply with the Cap-and-Trade Program. (Cal. Code Regs., tit. 17, § 95811.) Accordingly, this Court need only decide if projects that are *not* covered entities under Cap-and-Trade are nonetheless allowed to use the program to ignore significant GHG emissions they cause. The answer to that question is no.

Respondents argue the distinction between covered and non-covered entities is “a distinction without a difference.” (Combined Respondents’ and Cross-Appellants’ Opening Brief at p. 63.) Respondents are incorrect.

This distinction is crucial under CEQA and vital to the success of California's ambitious climate policies.

From a CEQA perspective, the distinction is important because CEQA Guidelines section 15064.4, subdivision (b)(3) instructs lead agencies to consider the extent to which *a project* complies with GHG regulations or requirements. It is thus inappropriate for entities downstream in the chain of commerce from a covered entity to rely upon compliance with the Cap-and-Trade Program as a basis for avoiding analysis of project-related emissions.

From a policy perspective, as described above, the distinction is crucial because projects that are not subject to the Cap-and-Trade Program do not have the same direct incentives to reduce their GHG emissions as covered facilities, and Cap-and-Trade alone is not designed to achieve California's ambitious climate goals. The distinction between covered and not-covered entities is thus crucial to the portfolio of climate change measures the state is relying on to protect our citizens going forward.

E. Respondents' GHG analysis obfuscates the climate change impacts of this Project, undermining CEQA's public disclosure purpose.

By failing to comply with CEQA Guidelines Section 15064.4, failing to compare all of the Project's emissions to the GHG emissions threshold, and failing to consider the long-term GHG impacts of the Project, Respondents' analysis undermines the informational purpose of CEQA. The purpose of an EIR "is to inform the public generally of the environmental impact of a proposed project." (Cal. Code Regs. tit. 14, § 15003, subd. (c).)

CEQA prohibits public agencies from approving or carrying out a project that will have significant effects on the environment unless the agency makes "findings" demonstrating either that it made changes to the

project to avoid or mitigate those significant impacts, or that certain overriding considerations outweigh the impact. (Pub. Resources Code, § 21081.) Without a full and accurate disclosure of the Project's impacts, Respondents erroneously concluded that the GHG impact would be less-than-significant, and thereby avoided making the subsequent findings that would inform the public whether the Project's significant impacts are unavoidable and/or justified. Additionally, Respondents' approach hinders the public's ability to submit informed comments during the EIR's public comment period—aside from addressing the *lack* of analysis—because the public is not provided with, and thus cannot evaluate, complete information or proper CEQA analysis.

CONCLUSION

California is striving on all fronts to meet its ambitious, long-term GHG reduction objectives; the health of its citizens and the environment depend on it. But this Court's approval of Respondents' approach to GHG analysis and mitigation would treat the Cap-and-Trade Program as the sole remedy to limit GHG emissions from land-use projects, placing unnecessary strain on Cap-and-Trade's cost-effectiveness and seriously undermining the state's critical climate change efforts. Amici respectfully request this Court reject the trial court's holding and find in favor of Appellants as to GHG analysis.

Dated: January 10, 2020

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CERTIFICATE OF COMPLIANCE

I certify that the attached Brief of Amici Curiae the Attorney General and the California Air Resources Board in Support of Plaintiffs and Respondents Albert Thomas Paulek, *et al.* and Plaintiffs and Appellants Laborers International Union of North America, Local 1184, *et al.* uses a 13 point Times New Roman font and contains 7,647 words.

Dated: January 10, 2020

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DECLARATION OF ELECTRONIC SERVICE VIA TRUEFILING

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(Amicus Brief)**

No.: **E071184**

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. I am familiar with the business practice at the Office of the Attorney General. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically.

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PLAINTIFFS AND RESPONDENTS ALBERT THOMAS PAULEK,
ET AL. AND PLAINTIFFS AND APPELLANTS LABORERS
INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1184,
ET AL.**

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PAULA CORRAL

Declarant

/s/ Paula Corral

Signature

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