

2) Response to Follow-up to Questions from Golden Gate University Environmental Law and Justice Clinic

From: [Nina Robertson](#)
To: [Cole, Doug](#)
Cc: mwald@oaklandcityattorney.org
Subject: RE: Response to Follow-Up Questions on Coal's Public Health and/or Safety Impacts
Date: Tuesday, October 06, 2015 4:22:44 PM
Attachments: [Oakland-Coal-Letter-DRAFT-10-6-15-final-with Exhibits.pdf](#)

Mr. Cole,

Please see attached our letter with the indicated exhibits.

From: Nina Robertson
Sent: Tuesday, October 06, 2015 4:04 PM
To: dcole@oaklandnet.com
Cc: mwald@oaklandcityattorney.org
Subject: Response to Follow-Up Questions on Coal's Public Health and/or Safety Impacts

Dear Mr. Cole,

Please see our response letter attached. We will send the exhibits shortly.

Nina C. Robertson
Assistant Professor of Law (Visiting)
Environmental Law and Justice Clinic
Golden Gate University School of Law
536 Mission Street
San Francisco, CA 94105-2968
Phone: 415.442.6549
Fax: 415.896.2450

From: [Cappio, Claudia](#)
To: [Nina Robertson](#); [Cole, Doug](#)
Cc: mwald@oaklandcityattorney.org; [Landreth, Sabrina](#); [Daniel, Christine](#)
Subject: RE: Request for 24-hour extension of time to file response to follow-up questions on coal
Date: Friday, October 02, 2015 3:38:42 PM

Hi Professor Robinson – we are in the midst of sending out a notice to all interested parties pertaining to a time extension to submit comments. This extension will be equivalent to the time the City’s website was inaccessible, or approximately 24 hours (4:00 pm on October 6, 2015). Please let me know if you have further questions. Regards, Claudia Cappio

From: Nina Robertson [mailto:nrobertson@ggu.edu]
Sent: Friday, October 02, 2015 3:26 PM
To: Cole, Doug
Cc: Cappio, Claudia; mwald@oaklandcityattorney.org
Subject: Request for 24-hour extension of time to file response to follow-up questions on coal

Dear Mr. Cole:

Please find attached a letter on behalf of Greenaction for Health and Environmental Justice requesting an additional 24 hours to respond to your September 28 follow-up questions on coal’s public health and/or safety impacts. We make this request in light of the fact that the Oakland City Council website has been down since yesterday afternoon. We are working diligently to respond to some of your important and complex questions.

We look forward to your response.

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From: [Nina Robertson](#)
To: [Cole, Doug](#)
Cc: [Cappio, Claudia](#); mwald@oaklandcityattorney.org
Subject: Request for 24-hour extension of time to file response to follow-up questions on coal
Date: Friday, October 02, 2015 3:32:40 PM
Attachments: [Signed ltr to Cole-extension request 02-Oct-2015 15-12-15.pdf](#)

Dear Mr. Cole:

Please find attached a letter on behalf of Greenaction for Health and Environmental Justice requesting an additional 24 hours to respond to your September 28 follow-up questions on coal's public health and/or safety impacts. We make this request in light of the fact that the Oakland City Council website has been down since yesterday afternoon. We are working diligently to respond to some of your important and complex questions.

We look forward to your response.

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Environmental Law and Justice Clinic

October 6, 2015

Douglas Cole
Office of the City Administrator, City of Oakland
City Hall, 1 Frank H. Ogawa Plaza
Oakland, CA 94612

Dear Mr. Cole:

In response to the City of Oakland's memorandum to interested parties dated September 28, 2015, the Environmental Law and Justice Clinic at Golden Gate University School of Law and the Environmental Law Clinic at Stanford Law School submit this brief response on behalf of Greenaction for Health and Environmental Justice ("Greenaction"). Specifically, we address part of your question 18(a), which we interpret to ask whether the Interstate Commerce Commission Termination Act ("ICCTA") preempts analysis under the California Environmental Quality Act ("CEQA") of the environmental impacts of the transportation, transloading, handling and/or export of coal products in or through the City of Oakland ("coal-related activities in Oakland").¹ The answer to this question is no.

In addition, if the City concludes that additional mitigation measures are warranted as a result of supplemental CEQA review, the City can require such measures under the market participant doctrine as well as caselaw that has developed relating to voluntary commitment made by rail carriers.

1. The ICCTA does not preempt environmental review of the contemplated coal-related activities in Oakland under CEQA because such review does not target rail transportation for regulation.

CEQA is a law of general application that informs public agency decisionmaking. As many courts have held, CEQA is a critical tool for "alert[ing] the public and its responsible officials to environmental changes before they have reached ecological points of no return," and "demonstrat[ing] to an apprehensive citizenry that the agency ... considered the ecological implications of its actions." *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 392 (1998) (quotations omitted). The CEQA process thus allows an informed public to "respond accordingly to action with which it disagrees." *Id.*; see also *People v. County of Kern*, 39 Cal. App. 3d 830, 842 (1974). CEQA's target is distinct from the purpose and effect of the narrow, railroad-specific regulations that the ICCTA preempts. In contrast to those laws, CEQA does

¹ These comments do not address the question of whether recent information that has come to light should trigger a supplemental environmental review. We adopt the analysis evident in the Verified Petition for a Writ of Mandate under the California Environmental Quality Act filed on October 2, 2015, in Alameda County Superior Court, by Communities for a Better Environment *et al.*, attached as Exhibit A.

not target railroads or require any specific outcomes. It provides information and analysis that the City can use when making important decisions about land management, transportation, and economic development. Therefore, the ICCTA does not preempt the City from requiring additional CEQA analysis to inform its planning decisions.

Critically, in circumstances similar to this, in *Fast Lane Transportation, Inc. v. City of Los Angeles*, et al. (Contra Costa Superior Court), the California Attorney General (“AG”) has reached the same conclusion. Petitioners in that case challenged the decisions of the City of Los Angeles and its Harbor Department, approving a project for the construction, operation, and leasing of a new, near-dock railyard located primarily on port property. See People’s Petition for Writ of Mandate, *Fast Lane Transportation, Inc. v. City of Los Angeles*, et al. The project proposes to allow thousands of trucks to bring containers from the Ports of Los Angeles and Long Beach to the railyard and load them onto railcars for transport. The lease between the port and BNSF Railway Company allows the latter to operate the railyard.

Petitioners challenged, among other things, the sufficiency of the port’s environmental review of the project, alleging violations of CEQA. In response, BNSF has argued that the ICCTA preempts these CEQA claims. The California Attorney General has sided with Petitioners and argued that the CEQA claims are not preempted. As the AG stated in its reply to BNSF, “CEQA claims neither regulate rail transportation nor ‘force’ restrictions on [rail carrier] operations; rather, they seek to require the [public agency] – which is not a rail carrier or rail operator, but instead a public agency landowner – to comply with its obligations under CEQA before signing a lease with [the rail carrier.]” Reply Brief in Support of the People’s Petition for Writ of Mandate in Intervention, *Fast Lane Transportation, Inc. v. City of Los Angeles*, et al. (attached as Exhibit B), 3.

By this same logic, the ICCTA does not preempt the City’s ability to require additional CEQA review. And although the Port of Los Angeles case deals with the question of whether CEQA *claims* are preempted rather than CEQA *review* in the first stance, the underlying principle is the same: The ICCTA does not preempt application of CEQA because CEQA review is not a targeted regulation of rail transportation. *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015); see also *People ex rel. Harris v. Pac Anchor Transportation, Inc.*, 59 Cal. 4th 783-84 (2014) (upholding California’s generally applicable unfair competition law that did not directly regulate matters covered by the FAAAA, a deregulatory scheme similar to the ICCTA). Thus, consistent with the AG’s position in that case, the City of Oakland is not preempted from requiring additional CEQA review of the contemplated coal transport and export.

2. The market participant doctrine and voluntary commitment caselaw provide a basis for requiring mitigation measures.

Separate from the preemption principles discussed above, if the City concludes that additional mitigation measures are warranted as a result of supplemental CEQA review, the City can require such measures under the market participant doctrine as well as caselaw that has developed relating to voluntary commitment made by rail carriers.

When, as here, public agencies act as lessors or proprietors, they are market participants (*i.e.*, not regulators) and, as such, are not preempted from considering the environmental effects of capital investments they make and can require environmental review or mitigation of environmental impacts a condition of doing business. This doctrine, known as the “market participant doctrine,” recognizes that public entities, like private entities, engage markets in numerous ways to pursue their unique interests. *See Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 227 (1993); *Town of Atherton v. High-Speed Rail Authority*, 228 Cal. App. 4th 314, 322 (2014) (applying the market participant doctrine to find no preemption even after the Surface Transportation Board exercised jurisdiction over California’s the high speed rail project).

Here, the City, as a proprietor of parts of the Old Army Base, may act as any party in the market to protect public health. As noted by the California AG in the aforementioned Port of Los Angeles case, “[t]he ICCTA does not preempt proprietary actions” and the market participant exception applies “to require local government to apply CEQA when making propriety decisions.” Exh. B at 3-4. Indeed, nothing in the ICCTA forecloses either private or state proprietors from setting their own criteria governing their proprietary decisions. *Cf. Tocher v. City of Santa Ana*, 219 F.3d 1040, 1048-50 (9th Cir. 2000) (upholding market participation despite the FAAAA preemption clause intended to set national standards for conducting towing business), *abrogated on other grounds in City of Columbus v. Ours Garage & Wrecker Service*, 536 U.S. 424, 432 (2002); *Mason & Dixon Lines Inc. v. Steudle*, 683 F.3d 289, 296 (6th Cir. 2012) n.3 (dictum finding lack of ICCTA preemption based on application of the market participant doctrine to state closure of ramps pursuant to contract provision).

Moreover, in addition to the market participation doctrine, the City should consider caselaw that has developed in the rail context when rail carriers make “voluntary” but otherwise valid commitments. These commitments are not preempted. *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 221 (4th Cir. 2009) (“agreements reflect a market calculation that the benefits of operating the rail line for many years would be worth” the bargain struck, even relocating a line in the future); *Township of Woodbridge, N.J. v. Consolidated R. Corp.*, 2000 WL 1771044 (STB Nov. 28, 2000), *2 & n.11, *clarified*, 2001 WL 283507 (STB Mar. 22, 2001) (rejecting argument that township is enforcing a local public nuisance law where railroad entered into a contract dealing with otherwise preempted subjects such as limiting idling trains and switching railcars).

Notably, BNSF’s submissions to the City ignore these central tenets of ICCTA preemption law. Neither the memorandum on preemption authored by Venable LLP nor BNSF testimony on September 21, 2015 so much as mention these applicable principles. Instead, those representations overstate the reach of federal preemption and erroneously cabin the City’s ability to require mitigation of the impacts of coal transport through Oakland. Here, applying CEQA to require additional analysis and mitigation of coal export impacts properly furthers the City’s proprietary interest in ensuring that agencies consider environmental impacts when spending public resources on publicly-pursued projects. *See Engine Mfrs. Assn. v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1046-47 (9th Cir. 2007).

Finally, even where the City is not a lessor or proprietor, it may impose certain conditions on coal transport. Due to the limited time we had to respond to your questions, we do not elaborate here on the City's powers in the non-proprietary context. For now, we note that the market participant doctrine and voluntary commitment caselaw are two of many important reasons why the City may impose mitigation measures and conditions on the contemplated coal-related activities in Oakland without risking ICCTA preemption.

Thank you for this opportunity.

A handwritten signature in black ink, appearing to read "Helen H. Kang". The signature is fluid and cursive, with the first name "Helen" being the most prominent part.

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EXHIBIT A
to Greenaction Letter

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ENDORSED
FILED
ALAMEDA COUNTY

OCT 02 2015

CLERK OF THE SUPERIOR COURT
By *Jayana Turner* Deputy

10
11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 IN AND FOR THE COUNTY OF ALAMEDA

13 COMMUNITIES FOR A BETTER
14 ENVIRONMENT, SIERRA CLUB, SAN
FRANCISCO BAYKEEPER, and ASIAN
15 PACIFIC ENVIRONMENTAL NETWORK,

16 Petitioners,

17 v.

18 CITY OF OAKLAND, and DOES 1 through
19 100, inclusive,

20 Respondents.

21 PROLOGIS CCIG OAKLAND GLOBAL, LLC;
22 TERMINAL LOGISTICS SOLUTIONS;
OAKLAND BULK AND OVERSIZED
23 TERMINAL, LLC and DOES 101 through 199,
inclusive,

24 Real Parties In Interest.

RG15 788084

VERIFIED PETITION FOR WRIT OF
MANDATE UNDER THE
CALIFORNIA ENVIRONMENTAL
QUALITY ACT

INTRODUCTION

1
2 1. Once a thriving industrial and military town, the City of Oakland (“City”) is emerging
3 from the nationwide recession with renewed economic vigor. In recent years, Oakland has become a
4 magnet for forward-looking enterprises like young technology companies and renewable energy
5 businesses. Long known for its progressive politics, the City has made various commitments to
6 fighting climate change by reducing the greenhouse gas emissions generated by the City. Most
7 recently, in 2014, the City Council passed a resolution to “Oppose Transportation of Hazardous
8 Fossil Fuel Materials” through the City, including coal.

9 2. One development project – the former Oakland Army Base, located where the Bay
10 Bridge touches down in Oakland – has recently become a flash point for testing the City’s
11 commitments to both economic development and its environmental policies, due to the recent
12 revelation that the project developers plan to establish a coal export terminal at the site.

13 3. The U.S. Army turned over its former base to local redevelopment agencies in 1999.
14 Given the base’s proximity to key highways and rail and marine transportation corridors, early
15 planning documents for the project envisioned that the Army Base redevelopment would enhance
16 the freight transportation infrastructure along the Oakland waterfront, while balancing economic
17 development with public benefits, such as remediating contamination at the site, creating sustainable
18 jobs and affordable housing, and preserving environmental resources.

19 4. Part of the redevelopment involves the renovation of an existing marine terminal, the
20 Oakland Bulk and Oversize Terminal, located at the foot of the San Francisco Bay Bridge. In 2012,
21 the City contracted with Prologis CCIG Oakland Global, LLC to handle development of several
22 areas of the base, including an existing marine terminal. Redevelopment project documents stated
23 that the renovation would allow the terminal to export bulk goods like iron ore and corn, and import
24 oversized goods like windmills and large mechanical parts. Coal was never discussed as a potential
25 commodity that would be shipped through the terminal, and none of the environmental review for
26 the Army Base redevelopment project has evaluated the environmental and health effects of coal
27 transportation. Indeed, the developers assured the public on multiple occasions, including in face-to-
28 face meetings, that coal would not be shipped through the terminal.

1 5. Years after environmental review for the Army Base development concluded, on or
2 after April 7, 2015, community members, including Petitioners Communities for a Better
3 Environment, Sierra Club, San Francisco Baykeeper, and Asian Pacific Environmental Network
4 (“Petitioners”) learned for the first time that the terminal would be converted into a coal export
5 terminal capable of shipping up to ten million tons of coal per year. This capacity would make the
6 terminal the largest coal terminal in California and the U.S. West Coast.

7 6. Community members learned through a news article that the project developer had
8 cut a secret funding deal with four Utah counties which would bring coal into Oakland. In exchange
9 for \$53 million in project funding, the developer promised Utah shipping rights to 49 percent of the
10 terminal’s nine to ten million ton capacity. Utah officials have stated that they intend to use this
11 capacity to export coal to overseas markets.

12 7. Coal transportation has serious impacts on local air and environmental quality, and
13 creates numerous safety risks for workers and communities along the rail lines. Allowing coal
14 combustion overseas fosters climate change, which has both global and local effects. The
15 environmental review for the Army Base did not study any of these effects of transporting coal
16 through Oakland. Further, since these effects have never been studied as part of the environmental
17 review for the redevelopment, there are no enforceable mitigation measures in place to protect the
18 community from the many harmful effects of coal transportation, and there has been no study of
19 potential alternatives to a coal export project.

20 8. The California Environmental Quality Act (“CEQA”) requires the City to conduct
21 additional environmental review on the effects of the proposed coal export terminal, since it
22 represents a substantial change in the nature of the redevelopment project, and community members
23 and City officials only recently learned of this change.

24 9. Petitioners support the continued revitalization of the City of Oakland, including the
25 larger Oakland Army Base redevelopment, and the numerous benefits that such development will
26 bring. Nevertheless, the City’s legal duties under CEQA require it to conduct further environmental
27 review of the proposed coal export terminal. Petitioners bring this lawsuit to compel the additional
28 environmental review required by law.

1 **PARTIES**

2 10. Petitioner COMMUNITIES FOR A BETTER ENVIRONMENT (“CBE”) is a
3 California non-profit environmental health and environmental justice organization with offices in
4 Oakland and Huntington Park. CBE is dedicated to protecting the environment and public health by
5 reducing air, water, and toxics pollution and equipping residents of California’s urban areas with the
6 tools to monitor and transform their immediate environment. CBE has thousands of members in
7 California, many of whom live, work, and recreate near the former Army Base. CBE and its
8 members have worked to reduce the environmental and health risks in Oakland for many years and
9 will be affected by the development of a coal terminal on the Oakland waterfront.

10 11. Petitioner SIERRA CLUB is a national nonprofit organization of nearly 650,000
11 members, including over 148,000 members in California. Sierra Club has members residing in
12 Oakland who live, work, and recreate near the former Army Base, and who have an interest in
13 ensuring that their community remains a safe and healthy place. Sierra Club is dedicated to
14 exploring, enjoying, and protecting the wild places of the earth; to promoting the responsible use of
15 the earth’s ecosystems and resources; to educating and encouraging humanity to protect and restore
16 the quality of the natural and human environment; and to using all lawful means to carry out these
17 objectives. Sierra Club’s particular interest in this case stems from the organization’s commitment
18 to stopping the many environmental and human health impacts associated with mining, transporting,
19 and burning coal and other fossil fuels, and ensuring that the City of Oakland conducts
20 environmental review of coal transportation through Oakland.

21 12. Petitioner SAN FRANCISCO BAYKEEPER (“BAYKEEPER”) is a regional non-
22 profit organization with over 3,000 members who reside in the San Francisco Bay Area, the vast
23 majority of whom have longstanding and ongoing personal interests in the mission of the
24 organization, because they live, work, and recreate in or around the San Francisco Bay. Baykeeper’s
25 mission is to protect and enhance the water quality of the San Francisco Bay-Delta estuary and its
26 watershed for the benefit of its ecosystems and communities. As part of this goal, Baykeeper works
27 to ensure that state and federal environmental laws are properly implemented and enforced.
28 Baykeeper’s particular interest in this case stems from the organization’s commitment to protecting

1 local communities and the local environment, and to ensuring that the City of Oakland complies with
2 its environmental duties.

3 13. Petitioner ASIAN PACIFIC ENVIRONMENTAL NETWORK (“APEN”) is a non-
4 profit organization incorporated in California that works to create a world where all people have a
5 right to a clean and healthy environment. With offices in Richmond and Oakland, APEN organizes
6 and develops the leadership of low-income Asian immigrants and refugees to achieve environmental
7 and social justice. It has a membership base of over 350 families in the Bay Area, and many
8 members in Oakland, California. APEN’s members have an interest in their health and well-being,
9 as well as conservation, environmental, aesthetic, and economic pursuits in Oakland and the greater
10 Bay Area. APEN’s members who live and work in or near the proposed terminal have a beneficial
11 interest in the City of Oakland’s compliance with CEQA. These interests have been, and continue to
12 be, threatened by the City of Oakland’s failure to conduct environmental review for a coal terminal
13 on the Oakland waterfront.

14 14. By this action, Petitioners seek to protect the health, welfare, and economic interests
15 of their members and the general public and to enforce the City of Oakland’s duties under CEQA.
16 Petitioners’ members and staff have an interest in their personal health and well-being, as well as in
17 ensuring their continued enjoyment of environmental, aesthetic, and economic activities in and
18 around the proposed terminal site. Petitioners’ members and staff who live and work in or near
19 Oakland, California have a right to and a beneficial interest in the City of Oakland’s compliance
20 with CEQA. These interests have been, and continue to be, threatened by the City of Oakland’s
21 failure to comply with CEQA. Unless the relief requested in this case is granted, Petitioners’
22 members and staff will continue to be adversely affected and irreparably injured by the City of
23 Oakland’s failure to comply with CEQA.

24 15. Respondent CITY OF OAKLAND (“CITY”) is located in Alameda County, and is
25 home to over 400,000 people. Under CEQA, the City serves as the lead agency responsible for
26 environmental review of the Oakland Army Base redevelopment project and the Oakland Bulk and
27 Oversize Terminal project.

28 16. Real Party in Interest PROLOGIS CCIG OAKLAND GLOBAL, LLC (“PROLOGIS

1 CCIG”), a Delaware corporation registered to do business in California, has entered into
2 development agreements with the City for the purposes of developing the former Oakland Army
3 Base and the Oakland Bulk and Oversize Terminal. On information and belief, Prologis CCIG is a
4 joint venture between California Capital Investment Group (“CCIG”), a full service commercial real
5 estate company, and Prologis, a company handling freight logistics and distribution.

6 17. Real Party in Interest TERMINAL LOGISTICS SOLUTIONS (“TLS”) is a
7 California corporation. On information and belief, TLS has an option agreement with CCIG to
8 develop the Oakland Bulk and Oversize Terminal, and to provide stevedoring services at the
9 terminal.

10 18. Real Party in Interest OAKLAND BULK AND OVERSIZED TERMINAL LLC
11 (“OBOT LLC”) is a California corporation. On information and belief, OBOT shares
12 responsibilities with Prologis CCIG and TLS in the development of the terminal.

13 19. The true names and capacities, whether individual, corporate, or otherwise, of DOES
14 1 through 199 are unknown to Petitioners. Petitioners allege that each of said Does is either a
15 Respondent, or a Real Party in Interest, and they will amend this Petition to set forth the true names
16 and capacities of said Doe parties when they have been ascertained.

17 **JURISDICTION AND VENUE**

18 20. This Court has jurisdiction over this action pursuant to Code of Civil Procedure
19 section 1085, or, in the alternative, section 1094.5; and pursuant to Public Resources Code section
20 21168.5, or, in the alternative, section 21168.

21 21. Venue is proper in this court pursuant to Code of Civil Procedure sections 393(b),
22 394, and 395 because the Respondent City of Oakland is located in Alameda County, the Oakland
23 Army Base redevelopment project and Oakland Bulk and Oversize Terminal are located in Alameda
24 County, and many of the harmful impacts of the recent developments relating to those projects will
25 occur in this County.

26 22. This action was timely filed within 180 days of the time that Petitioners first learned,
27 or could have learned, that the Oakland Bulk and Oversized Terminal would be developed for use as
28 a coal export terminal.

1 especially susceptible to these ailments. When compared to the outcomes for residents in the hillside
2 neighborhoods of Oakland, residents living near the redevelopment area are more likely to give birth
3 to premature or low birth weight children, and to suffer from diabetes, heart disease, stroke, and
4 cancer. Individuals born in West Oakland can expect to die 15 years earlier than individuals born in
5 the Oakland Hills.

6 30. Transporting coal to Oakland by rail, storing the coal in the community, and shipping
7 coal on diesel-fueled tankers will all have immediate and long-term health impacts. These activities
8 will only add to the already significant health burdens of the community and create unacceptable
9 risks to the community.

10 **The Oakland Army Base Redevelopment**

11 31. The Oakland Army Base redevelopment area occupies some 1,800 acres on the
12 Oakland waterfront in West Oakland. Following the Army Base's closure in 1999, the U.S. Army
13 transferred the land to a local redevelopment agency, the Oakland Base Reuse Authority ("OBRA")
14 to administer the redevelopment of the base. In or around 2006, the City acquired part of the
15 redevelopment agency's interest in the Army Base, including its interest in the Gateway
16 Development area.

17 32. The former base is located at the intersection of a number of key transportation
18 corridors. It is adjacent to the Port of Oakland, one of the nation's busiest maritime shipping ports.
19 The base is also adjacent to rail lines and interstate highways 80, 580 and 880, which provide easy
20 access routes for goods transiting through the Port.

21 33. Early project documents describing redevelopment plans for the area, such as the
22 2002 environmental impact report for the redevelopment project, showed that the City and
23 developers aimed to leverage proximity to these corridors to provide additional transportation and
24 logistics infrastructure for freight shipping, as well as to provide additional space for various
25 commercial, industrial, residential and retail enterprises. Redevelopment plans also were intended to
26 ensure that the surrounding community benefitted from the redevelopment through the creation of
27 sustainable jobs and job training programs, the enhancement of transportation infrastructure, the
28 protection and preservation of environmental resources, and the development of affordable housing.

1 34. In 2012, the City of Oakland entered into a Lease Disposition and Development
2 Agreement (“LDDA”) with Prologis CCIG Oakland Global, LLC, a joint venture consisting of
3 Prologis and CCIG, to lease portions of the Army Base redevelopment area to Prologis CCIG to
4 carry forward the development plans. In 2013, the City entered into a Development Agreement with
5 Prologis CCIG to set forth additional rights and obligations of the City and developers with respect
6 to the Army Base redevelopment.

7 35. The Army Base redevelopment area includes several sub-districts: (a) the Oakland
8 Army Base sub-district, consisting of 470 acres along the Oakland waterfront and adjacent to the
9 Bay Bridge, including the Gateway redevelopment area and the Port development area; (b) the
10 Maritime sub-district, of some 1,290 acres, including existing marine and rail terminals at the Port of
11 Oakland; and (c) the 16th/Wood sub-district, consisting of 41 acres located between Wood Street
12 and Interstate 880, and between 26th and 9th streets, and including rail and industrial sites.

13 36. On information and belief, Prologis CCIG entered into agreements with TLS and
14 OBOT LLC to develop the marine terminal located at Berth 7 in the Gateway redevelopment sub-
15 district. (Prologis CCIG, TLS and OBOT LLC are collectively referenced as “the developers”).

16 37. None of the CEQA documents prepared by the City of Oakland for the
17 redevelopment project, including the 2002 environmental impact report (“EIR”) and 2012 Initial
18 Study/Addendum (“Initial Study”), mention the possibility of coal transportation through any part of
19 the redevelopment project.

20 38. According to the 2002 EIR, redevelopment in the Gateway Redevelopment Area was
21 intended to include “light industrial, research and development (R&D), and flex-office space uses,
22 with business-serving retail space.” Development would also include “some warehousing and
23 distribution facilities and ancillary maritime support facilities,” and commitments to public benefits,
24 such as a park, job training and homeless assistance programs. The 2002 EIR does not mention the
25 possibility of coal transportation through the development.

26 39. The 2012 Initial Study describes the work in the Gateway Redevelopment Area as
27 including development of a new Trade and Logistics Center, known as the Oakland Global Trade
28 and Logistics Center. One of the projects planned for the trade and logistics center was enhancing

1 the cargo-handling and storage capacity of an existing marine terminal, located at Berth 7, in the
2 West Gateway portion of the sub-area, so that it could serve as a break bulk terminal.

3 40. The terminal, also called the Oakland Bulk and Oversized Terminal in the Initial
4 Study, was designed to transport cargo between railroad and ships. Its “[e]xport cargo would consist
5 of non-containerized bulk goods, and inbound cargo would consist primarily of oversized or
6 overweight cargo unable to be handled on trucks, and thus transferred directly from ships to rail.”
7 The Initial Study does not mention, consider, or study the possibility that coal might be shipped out
8 of the terminal.

9 41. There is no mention of coal in any of the other documents formalizing the
10 relationship between the developers and the City or setting up the funding structure for the
11 redevelopment. The LDDA between the City of Oakland and the developer states that the bulk
12 terminal will serve as “[a] ship-to-rail terminal designed for the export of non-containerized bulk
13 goods and import of oversized or overweight cargo.” The Development Agreement states the same.
14 The City and Port’s funding application for federal “TIGER III” funds states that “Berth 7 would be
15 converted to a modern break-bulk terminal for movement of commodities such as iron ore, corn and
16 other products brought into the terminal by rail. The terminal would also accommodate project
17 cargo such as windmills, steel coils and oversized goods.” The potential for coal transportation is
18 not mentioned. Likewise the City’s application to the California Transportation Commission for
19 Proposition 1B Trade Corridor Improvement Funds –intended to “improve trade corridor mobility
20 while reducing emissions of diesel particulate and other pollutant emissions” – makes no mention of
21 the terminal being used for the transportation of coal.

22 42. Local officials who were at the negotiating table while the redevelopment plans were
23 being formalized confirm that coal transportation was never discussed as an aspect of the
24 redevelopment program. Former Oakland Mayor Jean Quan stated that coal was never discussed as
25 one of the commodities that could be transported, and that the developer affirmatively “made open
26 and public promises to us” that coal would not be part of the project. During a September 21, 2015
27 public hearing on the health and safety implications of coal transportation, Mayor Quan also stated:
28

1 “[t]he approval process would have been very, very different if Phil Tagami would have said, ‘We’re
2 going to do coal.’”

3 43. Phil Tagami, the President and Chief Executive Officer of CCIG, has been closely
4 involved with the redevelopment process, and prior to 2015, made several public statements that coal
5 transportation would not be a part of the redevelopment. In a December 2013 Oakland Global
6 newsletter published by the developers, Phil Tagami expressly stated that “CCIG is publicly on
7 record as having no interest or involvement in the pursuit of coal-related operations at the former
8 Oakland Army Base.”

9 **New Information Surfaces Regarding Coal Transportation At the Army Base**

10 44. On or after April 7, 2015, Oakland community members, including Petitioners,
11 learned for the first time that the bulk terminal located at the foot of the Bay Bridge would be
12 dedicated to shipping Utah coal.

13 45. According to an April 7, 2015 article in the Richfield Reaper, a local Utah newspaper,
14 the Utah Permanent Community Impact Fund Board had approved a \$53 million loan to four Utah
15 counties – the coal-producing counties of Sevier, Sanpete, Carbon, and Emery – to allow them to
16 purchase an interest in the Oakland bulk terminal. According to Malcolm Nash, the economic
17 development director of Sevier County, this shipping capacity would be used to “find[] a new home
18 for Utah’s products – and in our neighborhood, that means coal.”

19 46. In exchange for providing the bulk terminal’s developer with \$53 million in project
20 funds, the Utah counties would have the guaranteed right to use at least 49 percent of the bulk
21 terminal’s capacity of approximately 9 million metric tons per year. Nash noted that the Utah coal
22 companies are interested in using that capacity to ship coal to overseas markets, given that “there is a
23 cliff” in domestic coal markets.

24 **Past Representations By the Developers That the Army Base Would Not Be Used to Ship Coal**

25 47. Community members, including Petitioners, and Oakland city officials were surprised
26 and outraged by the breaking news that the former Army Base development would suddenly be used
27 to ship coal. Prior to 2015, community members received multiple reassurances from City officials
28 and the developer that the Army Base redevelopment would not be used for coal transportation.

1 48. As part of its regular tracking of developments at West Coast ports, the Sierra Club
2 sent a Public Records Act (“PRA”) request to the City on February 20, 2013, inquiring about
3 whether the City had any information about potential coal projects. On February 25, 2013, the City
4 responded that it “has no record of any proposal, communications, or notes from meetings that relate
5 to the export, storage, or use of coal in the [Oakland Army Base redevelopment]. Nor have we
6 received any applications for coal export terminals or multicommodity terminals that include coal
7 exports at the [Army Base].” The City further noted that in discussions with the Port to prepare the
8 CEQA analysis for the redevelopment, the Port had no information on coal projects, and the City
9 concluded: “to our knowledge that commodity is not part of the Army Base project.”

10 49. Sierra Club also sent a PRA request to the Port of Oakland on February 20, 2013.
11 Some of the documents produced by the Port indicated that CCIG was considering bringing coal
12 through the Army Base redevelopment. Port officials expressed skepticism about the viability of a
13 coal project at the redevelopment, given state policies against coal exports and the likelihood of local
14 political opposition. One Port officer noted that coal “may not be the right target commodity for
15 Oakland due to dust and global warming issues.”

16 50. To follow-up on the information learned through the PRA, local groups include the
17 Sierra Club, San Francisco Baykeeper, Communities for a Better Environment and Earthjustice
18 scheduled a meeting with CCIG and Phil Tagami on or around January 23, 2014 to discuss whether
19 coal would be shipped through the Army Base redevelopment. During the meeting, Tagami
20 reassured community members that coal would not be a part of the Army Base redevelopment. He
21 stated that he did not want to ship coal, and instead was focused on commodities like iron ore,
22 copper concentrate, potash and distilled grain. He also stated that he was willing to explore avenues
23 for preventing coal exports from coming through the redevelopment, such as statewide legislation
24 banning coal transportation in the state or a further agreement with the developers promising not to
25 ship coal through the development. Community members were unable to schedule a follow up
26 meeting to discuss these alternative avenues.

27 51. On or around January 24, 2014, Phil Tagami posted on Facebook that: “[i]n addition
28 to a number of other measures The Oakland Bulk and Oversized Terminal (OBOT) a CCIG

1 controlled company, is saying NO to coal as a export product. We are committed to emission
2 reductions here and abroad. We share this one planet and the only path to clean the air is to at some
3 point stop polluting it.”

4 52. After learning about the Utah funding to ship coal through the Army Base in April
5 2015, Petitioners sent public records requests to the City, Port and to the Utah counties in an attempt
6 to learn more about the plans to ship coal through the redevelopment.

7 53. As Petitioners later learned through public records requests sent to the Utah
8 Community Impact Board and Utah counties, Utah officials had hoped to keep news of the coal
9 funding deal secret. In an April 8, 2015 email, Jeff Holt, the chairman of the Utah Transportation
10 Commission and advisor to the four Utah counties wrote county representatives, stating: “We’ve had
11 an unfortunate article appear on the terminal project . . . If anything needs to be said, the script was
12 to downplay coal and discuss bulk products and a bulk terminal. The terminal operator is TLS, not
13 Bowie. Bowie is known for coal . . . Phil Tagami had been pleased at the low profile that was
14 bumping along to date on the terminal and it looked for a few days like it would just roll into
15 production with no serious discussion.”

16 54. On May 11, 2015, Mayor Libby Schaaf wrote to Phil Tagami, reminding him of the
17 City Council resolution passed in 2014 to “Oppose Transportation of Hazardous Fossil Fuel
18 Materials” like coal through the City, and urging Tagami to reconsider the Utah deal:

19 Dear Phil,

20 I was extremely disappointed to once again hear Jerry Bridges mention the possibility
21 of shipping coal into Oakland at the Oakland Dialogue breakfast. Stop it
22 immediately. You have been awarded the privilege and opportunity of a lifetime to
23 develop this unique piece of land. You must respect the owner and public’s decree
24 that we will not have coal shipped through our city. I cannot believe this restriction
25 will ruin the viability of your project. Please declare definitively that you will respect
26 the policy of the City of Oakland and you will not allow coal to come through
27 Oakland. If you don’t do that soon, we will all have to expend time and energy in a
28 public battle that no one needs and will distract us all from the important work at
hand of moving Oakland towards a brighter future.

Best,
Libby

1 55. On May 14, 2015, Oakland City Council President Lynette Gibson McElhaney, who
2 serves West Oakland where the former Army Base is located, told the Post News Group that she
3 opposed coal exports in her neighborhood, stating that “West Oakland cannot be subjected to
4 another dirty industry in its backyard.” She also highlighted the fact that to date, there had been no
5 opportunity for lawmakers or the public to consider the effects of a coal terminal in the
6 neighborhood: “[s]ince coal was not contemplated to be exported when the Army Base Development
7 project was approved, the community has not yet had the chance to make their voices heard on this
8 subject. This is unacceptable.”

9 56. Other City councilmembers including Dan Kalb and Rebecca Kaplan have also
10 publicly opposed the transportation of coal and called for a stop to the coal terminal.

11 57. Phil Tagami has now taken the position that the Army Base developer can ship any
12 commodity through facility under the terms of the development agreements. In April, he told the
13 San Jose Mercury News that the terminal is entitled to export any type of commodity, except for
14 “nuclear waste, illegal immigrants, weapons and drugs.”

15 **September 21, 2015 City Council Hearing on Health and Safety Implications of Transporting**
16 **Coal Through Army Base Redevelopment**

17 58. Given the complete absence of environmental review for a coal terminal on
18 Oakland’s waterfront, community members, including members of Communities for a Better
19 Environment, Sierra Club, APEN, and San Francisco Baykeeper, called for the City to take action to
20 oppose development of the terminal, and at the very least, to conduct environmental review on the
21 effects of the proposed coal terminal.

22 59. On July 16, 2015, Councilmembers Dan Kalb, Rebecca Kaplan, and Laurence E.
23 Reid moved for the City Council to hold a hearing for the purposes of taking testimony and
24 receiving information on the public health and safety impacts of transporting coal through the City,
25 and to evaluate whether the City has the authority under the development agreements to regulate the
26 transportation and handling of coal products. The hearing also was intended as a follow-up to an
27 ordinance passed by the City of Oakland on June 17, 2014, Opposing the Transportation of
28 Hazardous Fossil Fuel Materials, including crude oil, coal, and petroleum coke.

1 60. In order to provide the City with information about the health and safety concerns
2 associated with coal exports, Petitioners submitted comment letters to the City on September 1,
3 2015, September 14, 2015, and September 21, 2015, which included expert reports and other data
4 about the harms of coal transportation. These organizations had also submitted earlier comment
5 letters to the Bay Area Transportation Authority and City Council on their concerns about the
6 proposed coal terminal, and calling for further environmental review of any coal terminal.

7 61. The hearing was held on September 21, 2015. Council chambers were packed with
8 hundreds of community members and interested parties attending to present testimony on the public
9 health and safety implications of coal transportation through the bulk terminal. Dozens of speakers
10 spoke out in opposition to the proposed coal terminal, including: concerned federal and state agency
11 officials; experts presenting on topics such as the health and safety harms of coal transportation,
12 particular concerns about the preliminary facility design, the climate-change implications of
13 perpetuating coal combustion, and the economic risks of a project involving a declining commodity;
14 members of the labor and faith communities in West Oakland; representatives of various
15 environmental and environmental justice organizations; and other concerned community members.

16 62. During the hearing, several councilmembers requested further information about
17 matters such as the baseline levels of pollution from truck and rail sources and their relative impacts
18 on community health, the potential impacts of a local terminal on community and worker health, the
19 economic viability of a coal terminal, the feasibility of mitigation measures proposed by the
20 developers at the hearing, and the impacts of comparably-sized coal terminals. Ordinarily, much of
21 this information would be provided through environmental review of the proposed coal terminal.

22 63. The City Council took testimony for over six hours, and the hearing ended after 10:00
23 p.m. At the close of the hearing, City councilmembers voted to keep the public hearing open until
24 October 5, 2015, and evaluate various potential options for further regulation related to health and
25 safety concerns, including an ordinance prohibiting coal, temporary or interim controls regulating
26 coal, and other measures to protect health and safety.

27 64. The City retains discretionary regulatory authority over the transportation and
28 handling of coal products pursuant to the development agreements, its inherent police and zoning

1 powers, and other regulatory oversight authority. The City plans to vote on potential regulatory
2 options by December 8, 2015.

3 **Preliminary Terminal Design Plans**

4 65. On or about September 10, 2015, less than two weeks prior to the public health and
5 safety hearing, one of the developers, TLS, posted preliminary design plans for the proposed coal
6 terminal. These plans were the first time members of the public had seen an outline for the facility
7 design. These plans are only preliminary engineering plans, and the facility design represented in
8 these plans is still subject to change.

9 66. These plans show a two-commodity facility, equipped to receive commodities by rail
10 and export it through a marine terminal. The facility capacity could range from 9.5 to 10.5 million
11 tons per year, depending on the various capacity estimates posted by the developer. Supplying this
12 size of facility at its maximum capacity would require two to three unit trains of 104 rail cars each
13 travelling to the facility every day of the year.

14 67. The preliminary basis design plans show that the material handling equipment –
15 storage domes and sheds, conveyors and loading machinery – will not be located in a fully enclosed
16 structure. Therefore, handling activity will result in emissions of particulate matter. Without more
17 specific design plans and more precise information about the amounts of coal that will be handled at
18 the facility, the amounts of particulate matter emissions, associated transportation pollution
19 emissions, work safety risks, and other environmental and health risks cannot be precisely
20 quantified. However, studies on comparably-sized facilities in the Pacific Northwest, as well as
21 studies done on coal transportation, storage, and handling risks, raise serious concerns about the
22 health, safety and environmental consequences of developing California’s largest coal terminal in
23 Oakland.

24 **Environmental and Health Consequences of Coal Exports From Oakland**

25 68. As many speakers pointed out to the City Council during the hearing, transporting
26 coal through West Oakland will generate large quantities of coal dust emissions and create additional
27 health, safety, and environmental risks, which the community is ill-equipped to bear.

28

1 *Localized Effects of Coal Transportation, Storage and Handling*

2 69. Dr. Muntu Davis, the director of the Alameda County Public Health Department
3 expressed concerns about coal transportation through the bulk terminal, stating that it would add
4 “another source of air pollution to an area that is already disproportionately burdened by pollution
5 sources that exist already.”

6 70. The preliminary nature of the design plans for the facility make it difficult to calculate
7 the precise quantity of particulate matter and other emissions that will be produced by the facility. In
8 her comments submitted at the September 21, 2015 public health hearing, Dr. Deb Niemeier of UC-
9 Davis estimated that the just the coal trains unloading at the bulk terminal could generate up to 646
10 tons of coal dust emissions per year.

11 71. Exposure to coal dust from coal trains, coal storage piles, and loading and unloading
12 practices raises serious health concerns. Coal dust contains many harmful components, including
13 particulate matter, lead, and arsenic. Coal dust increases the likelihood of pneumonia and
14 exacerbates inflammatory responses such as bronchitis and emphysema. Coal dust exposure has also
15 been linked to increased cancer risks. The Utah coal that will be exported through Oakland carries
16 additional risks, because it has elevated levels of silica, which can result in silicosis, pulmonary
17 tuberculosis, and lung cancer.

18 72. Long-term exposure to the type of particulate matter contained in coal dust has been
19 implicated in increased incidence of respiratory illness, cardiopulmonary mortality and decreased
20 lung function. Short-term exposure has been associated with higher stroke mortality, myocardial
21 infarction, and pollutant-related inflammatory responses.

22 73. Diesel combustion by the coal trains carrying coal to the terminal, as well as the ships
23 ferrying coal away from the terminal will also contribute to the negative health effects associated
24 with coal transportation. Coal trains will be powered by up to five diesel-fueled locomotives, which
25 emit diesel particulate matter, as well as air pollutants like nitrogen oxides, carbon monoxide and
26 sulfur dioxide. Ships also emit diesel particulate matter and other air pollutants. Exposure to diesel
27 particulate matter has been linked to acute short-term symptoms such as headache, dizziness, light-
28 headedness, nausea, and irritation of the eyes and respiratory systems. Long-term exposures can

1 result in cardiovascular disease, cardiopulmonary disease, increased probability of heart attacks, lung
2 cancer, and asthma. Health risk assessments from rail yards and ports have found significant cancer
3 risks from diesel particulate matter in individuals up to two miles away from rail and port terminals.

4 74. Children, the elderly, and those with existing health conditions are particularly
5 vulnerable to these pollution impacts. In vulnerable communities like West Oakland, there is a
6 higher risk of susceptibility and ability to recover as a result of cumulative environmental stress.

7 75. Even if enclosed loading facilities and other controls are put in place, serious
8 concerns about pollution remain. For example, air modeling for a supposed “state of the art”
9 covered coal export facility at the Port of Morrow in Oregon showed that the facility would greatly
10 exceed particulate matter and nitrogen oxide national ambient air quality standards. Both of these
11 pollutants have significant human health effects. Nitrogen oxides are highly reactive gasses that can
12 cause respiratory problems such as asthma attacks, respiratory tract syndrome, bronchitis, and
13 decreased lung function. Nitrogen oxides also contribute to visibility impairment, global warming,
14 acid rain, formation of ground-level ozone and formation of toxic chemicals.

15 76. Pollution controls also create serious concerns about water resources strained by the
16 ongoing drought. Water will be used to control dust during rail car unloading, at storage piles and
17 any other drop points, and during ship loading. If the full capacity of the facility is used to contain
18 coal – over nine million tons per year – 79.2 million gallons of water would be required every year
19 to control coal dust. This amount of water could supply over 3,000 Oakland residents per year.

20 77. Coal transportation has visible effects on the lives of residents living near coal
21 terminals. In Parchester Village, a largely black and Latino neighborhood in Richmond, California,
22 which has a private coal terminal of approximately 1 million tons per year, many residents have
23 complained about particulate matter emissions from the coal trains and coal piles at the terminals.
24 Residents report that the coal dust blows off the piles, covering the grass on their lawns and coating
25 their screen doors. One resident of Parchester Village stated that coal dust is everywhere and “[i]f
26 your truck sits here for two, three days without moving you can write your name on the front.” If the
27 bulk terminal exports nine to ten million tons of coal per year, the amount of emissions from an
28 Oakland facility could be nine to ten times that of the Richmond facility.

1 ***Worker Health and Safety Concerns Associated With Coal Terminal***

2 78. An Oakland coal terminal will create significant health and safety risks for the
3 workers handling the coal.

4 79. At the public health and safety hearing on September 21, 2015, International
5 Longshore and Warehouse Union Local 10 member and former nurse Katrina Booker testified that
6 her prior work handling coal at the Port of Stockton had made her sick. “At the end of the day my
7 eyes were burning,” and “I went home and had nose bleeds. It was actually hard to breathe. It feels
8 like you have weights on your chest.” She refuses to work the Stockton coal piles now.

9 80. Last year, the Port of Stockton exported around 2 million tons of coal. The
10 throughput at the proposed Oakland terminal will likely be many times that if the terminal is built.

11 81. Long-term exposure to coal dust creates serious health problems for workers exposed
12 to coal dust in enclosed conditions. There has been little to no scientific study of worker health in
13 coal terminals. However, coal miners, who also work with coal in enclosed conditions, suffer from a
14 range of ailments from prolonged direct exposure to coal dust, including chronic bronchitis,
15 decreased lung function, emphysema, heart disease, cancer and increased risk of premature death.

16 82. Concerns about the adverse effects of coal dust exposure prompted the U.S.
17 Department of Labor to pass regulations protecting coal miners from coal dust exposures. However,
18 no such regulations are in place to protect facility workers in Oakland from coal dust exposures.

19 83. Terminals that ship bulk goods like coal produce far fewer jobs than terminals
20 shipping other goods like large machines or goods transported on pallets. Coal is also an industry in
21 deterioration – domestic and international demand for coal is declining, and in recent months several
22 large coal companies have declared bankruptcy.

23 ***Species and Ecosystem Effects Associated With Coal Terminal***

24 84. An Oakland coal terminal will also have adverse consequences for marine and
25 terrestrial ecosystems in the San Francisco Bay Area, which include endangered and threatened
26 species like green sturgeon, Chinook salmon, steelhead and longfin smelt.

27 85. At the terminal, coal dust can enter the aquatic environment through stormwater
28 discharge, coal pile drainage run-off, and when coal dust from storage piles, transfer conveyor belts

1 and rail cars becomes deposited in the surrounding environment. Coal spillage can also occur during
2 the loading onto shipping tankers and barges, which sit directly on San Francisco Bay.

3 86. Coal contains numerous pollutants that are toxic at low concentrations in water such
4 as mercury, lead, arsenic, uranium, thorium, and polycyclic aromatic hydrocarbons (“PAHs”).
5 Exposure to coal dust has been found to interfere with the normal development of aquatic species
6 like salmon and steelhead. Coal particulates can find their way into the breathing apparatus of
7 aquatic species, affecting their ability to survive. Suspended coal sediments can reduce water
8 clarity, which negatively impacts predator fish species from finding food. Oxidizing coal particles
9 also reduce dissolved oxygen levels, which create adverse living conditions for bottom dwelling
10 species and can have reverberating impacts up the food chain.

11 87. Coal dust released along the train routes to Oakland can also have negative effects on
12 the surrounding environment. Coal particles can be carried long distances, settling in lakes and
13 streams, where they can increase acidity and change nutrient balances. Coal dust contamination can
14 also deplete soil nutrients, damage sensitive forests and farm crops, and affect the diversity of
15 ecosystems. An Oregon study correlated coal dust deposition with significantly higher soil
16 temperatures, decreased soil pH, increased soil moisture, and elevated heavy metal concentrations.

17 *Transportation Effects*

18 88. Coal trains are frequently 120 cars long, and can stretch over a mile in length. To cut
19 shipping costs, coal is most commonly transported in open rail cars, and the coal shipped from Utah
20 to the bulk terminal will likely be transported in open train cars. Coal trains shed large quantities of
21 dust as they travel, and the trains bound for Oakland are expected to shed up to 685,000 tons of coal
22 dust per year as they travel along the rail lines.

23 89. The shortest rail route from Utah to Oakland is through a northern route running train
24 cars through mountain areas, coming down into the Bay through Reno, Nevada, Auburn,
25 Sacramento, Parchester Village, then Richmond, before arriving in Oakland. Along the way, these
26 trains will travel through some of the state’s most densely populated areas, as well as through areas
27 adjacent to rivers and other sensitive waterways and important water sources. The longer southern
28

1 route from Utah to Oakland runs through Las Vegas, and the Central Valley cities of Fresno and
2 Stockton.

3 90. These routes travel through areas designated as “high hazard areas” by the State of
4 California’s Interagency Rail Safety Working Group, and accidents in these areas are likely due to
5 poor track conditions, steep grades, and poor bridge crossings. In December 2014, a dozen train cars
6 derailed on the northern stretch of rail near Sacramento, spilling their cargo of corn into the Feather
7 River. While no lasting damage was done, state officials expressed concerns about the safety risks
8 of transporting hazardous substances like crude oil through the same mountain passes, where they
9 pose serious risks to key drinking water sources. Coal trains bound for Oakland will travel through
10 these same mountain passes, and coal train derailments also risk contaminating water sources and
11 the environment around the accident site.

12 91. The Surface Transportation Board responsible for regulating interstate rail lines has
13 found that coal dust is “pernicious ballast foulant,” contributing to poor railroad safety conditions, as
14 it accumulates along the train tracks, contributing to track instability and increasing the risks of train
15 derailments.

16 *Climate Change and Other Effects of Exporting Coal Overseas*

17 92. Exporting coal from Oakland also enables the continued use of coal as a fuel source,
18 driving the continued production of climate change inducing greenhouse gas emissions, which have
19 both local and global effects.

20 93. As set forth by the United Nations’ Intergovernmental Panel on Climate Change,
21 unrestrained greenhouse gas emissions like carbon dioxide are responsible for increasing global
22 warming, and “[l]imiting climate change will require substantial and sustained reductions of
23 greenhouse gas emissions.”

24 94. Coal-fired power plants are a leading source of carbon dioxide emissions. In her
25 comments to the public health hearing, Dr. Niemeier estimated that if the maximum capacity of 10.5
26 million tons per year are exported through the Oakland bulk terminal, combusting that amount of
27 coal would generate 30 million tons per year of carbon dioxide. This amount is equivalent to the
28 carbon dioxide emissions of seven average power plants.

1 95. Continued coal combustion overseas will have tangible and harmful effects on the
2 local community. The byproducts of coal burned overseas do not remain in the region where the
3 coal was burned – soot, mercury, ozone, and other byproducts of coal combustion can travel across
4 the Pacific Ocean and affect the health of western states’ ecosystems and residents. In fact, the
5 National Oceanic and Atmospheric Administration recently found that air pollution in Asia
6 contributes to ozone pollution in the western United States. Coal combustion also drives climate
7 change effects contributing to sea-level rise and ocean acidification. Given the extensive amounts of
8 shoreline development, the Bay Area is particularly vulnerable to sea level rise, and rising sea levels
9 could flood residential areas and affect key commercial and industrial areas, like local airports,
10 highways and waste treatment plants.

11 96. Permitting a development that contributes to climate pollution frustrates the
12 commitments made by local and state officials to reducing climate change. The City has previously
13 committed to fighting climate change. In 2012, the City adopted an Energy and Climate Action Plan
14 setting forth actions to reduce the City’s energy consumption and “greenhouse gas emissions
15 associated with Oakland.” Most recently, on June 17, 2014, the Oakland City Council approved a
16 resolution opposing the transportation of hazardous fossil fuels like coal through the City, expressing
17 concern about the effects of coal exports and stressing the need for a transparent process and full
18 environmental review. In rejecting a proposed coal terminal near Jack London Square, the Port of
19 Oakland referenced these commitments and reaffirmed that a coal terminal would run counter to
20 California’s greenhouse gas reductions goals.

21 97. Lawmakers in the State of California have also recognized the urgent need to reduce
22 the production of greenhouse gas emissions, and over the years have passed landmark legislation
23 like AB 32 and issued executive orders to enable reductions goals. Most recently, in April 2015,
24 Governor Jerry Brown issued an executive order mandating that the state reduce its greenhouse gas
25 emissions to 40 percent below 1990 levels by 2030. Further, Joint Assembly Resolution 35 urged
26 Governor Brown to inform neighboring governors in Washington and Oregon of the health and
27 climate risks associated with exporting coal to countries with air quality regulations less stringent
28 than our own.

1 **CEQA LEGAL BACKGROUND**

2 98. The California Environmental Quality Act (“CEQA”), Public Resources Code §§
3 21000 *et. seq.*, is a comprehensive statute designed to “to prevent[] environmental damage, while
4 providing a decent home and satisfying living environment for every Californian.” (Pub. Res.
5 § 21000(g).) Given its broad goals, the California Supreme Court has held that CEQA must be
6 interpreted “to afford the fullest possible protection to the environment within the reasonable scope
7 of the statutory language.” (*Friends of Mammoth v. Board of Supervisors* (1972) 3 Cal.3d 247, 259.)

8 99. At its core, CEQA’s policies are designed to inform decision-makers and the public
9 about the potential significant environmental effects of a project. (Cal. Code Regs., tit. 14,
10 § 15002(a)(1) [the regulations at tit. 14, §§ 15000 *et seq.* are hereinafter cited as “Guidelines”].)
11 Such disclosure ensures that “long term protection of the environment . . . shall be the guiding
12 criterion in public decisions.” (Pub. Res. Code § 21001(d).)

13 100. An agency must prepare an environmental impact report (“EIR”) where it proposes to
14 carry out or approve a “project that may have a significant effect on the environment.” (Pub. Res. §
15 21151.) “Significant effect” means a “substantial, or potentially substantial, adverse change in the
16 environment.” (Pub. Res. § 21068; Guidelines § 15002(g).) The EIR is the “heart of CEQA” and
17 serves as “an environmental alarm bell whose purpose it is to alert the public and its responsible
18 officials to environmental changes before they have reached ecological points of no return.” (*Laurel*
19 *Heights Improvement Ass’n. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.)

20 101. An agency shall prepare a subsequent or supplemental EIR where substantial changes
21 are proposed in a project, where substantial changes occur with respect to the circumstances under
22 which a project is being undertaken, or where new information which was not known and could not
23 have been known at the time the environmental impact report was certified becomes available. (Pub.
24 Res. §21166; Guidelines §15162.)

25 102. A lawsuit compelling performance of an agency’s duty to conduct further
26 environmental review may be filed within 180 days of the time the “plaintiff knows or should have
27 known that the project underway differs substantially from the one described in the initial EIR.”
28 (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agric. Assn.* (1986) 42 Cal.3d 929, 933; Pub.

1 Res. § 21167.)

2 **FIRST CAUSE OF ACTION**
3 **(Violation of CEQA – Failure to Prepare Supplemental or Subsequent EIR Because of**
4 **Substantial Changes in Project)**

4 103. Petitioners incorporate herein by reference the allegations contained in the foregoing
5 paragraphs.

6 104. Under CEQA, an agency has a duty to prepare a subsequent or supplemental EIR
7 when “substantial changes are proposed in the project which will require major revisions of the
8 environmental impact report.” (Pub. Res. §21166(a); Guidelines §15162(a)(1).)

9 105. Coal transportation is a dirty and dangerous business, and has the potential to cause
10 significant, adverse effects to the community and environment around the Army Base
11 redevelopment.

12 106. The specific effects of coal transportation through the Army Base redevelopment
13 were never studied as part of the 2002, 2012, or other environmental review done on the
14 redevelopment.

15 107. The possibility of coal exports through the redevelopment property was never
16 discussed during contract negotiations between the City and developers. On multiple occasions, the
17 developer reassured the City and the Public that coal exports would not be part of the
18 redevelopment. The recent commitment on the part of the developer to ship Utah coal is a
19 “substantial change” in the project, which will require major revisions of the EIR, to properly
20 account for the additional risks of coal transportation. The City and the public did not know, and
21 could not have known, of this change in the project until April 7, 2015 at the earliest.

22 108. By failing to revise the EIR or Initial Study for the former Oakland Army Base to
23 reflect this recent substantial change in the project, the City of Oakland has committed a prejudicial
24 abuse of discretion, failed to proceed in the manner required by law, and acted without substantial
25 evidentiary support in violation of CEQA.

26 **SECOND CAUSE OF ACTION**
27 **(Violation of CEQA – Failure to Prepare Supplemental or Subsequent EIR Because of**
28 **Substantial Changes in Circumstances Under Which Project Is Being Undertaken)**

109. Petitioners incorporate herein by reference the allegations contained in the foregoing

1 paragraphs.

2 110. Under CEQA, an agency has a duty to prepare a subsequent or supplemental EIR
3 when “substantial changes occur with respect to the circumstances under which the project is being
4 undertaken which will require major revisions of the environmental impact report.” (Pub. Res.
5 §21166(b); Guidelines §15162(a)(2).)

6 111. Coal transportation is a dirty and dangerous business, and has the potential to cause
7 significant, adverse effects to the community and environment around the Army Base
8 redevelopment.

9 112. The specific effects of coal transportation through the Army Base redevelopment
10 were never studied as part of the 2002, 2012, or other environmental review done on the
11 redevelopment.

12 113. The possibility of coal exports through the redevelopment property was never
13 discussed during contract negotiations between the City and developers. On multiple occasions, the
14 developer reassured the City and the Public that coal exports would not be part of the
15 redevelopment. The recent commitment on the part of the developer to ship Utah coal is a
16 “substantial change” in the circumstances under which the project is being undertaken, which will
17 require major revisions of the EIR, to properly account for the additional risks of coal transportation.
18 The City and the public did not know, and could not have known, of this change in the project until
19 April 7, 2015 at the earliest.

20 114. By failing to revise the EIR or Initial Study for the former Oakland Army Base to
21 reflect this recent substantial change in the circumstances under which the project is being
22 undertaken, the City of Oakland has committed a prejudicial abuse of discretion, failed to proceed in
23 the manner required by law, and acted without substantial evidentiary support in violation of CEQA.

24 **THIRD CAUSE OF ACTION**
25 **(Violation of CEQA – Failure to Prepare Supplemental or Subsequent EIR Because of New**
26 **Information)**

27 115. Petitioners incorporate herein by reference the allegations contained in the foregoing
28 paragraphs.

116. Under CEQA, an agency has a duty to prepare a subsequent or supplemental EIR

1 when “new information, which was not known and could not have been known at the time the
2 environmental impact report was certified as complete, becomes available.” (Pub. Res. §21166(c);
3 Guidelines §15162(a)(3).)

4 117. Coal transportation is a dirty and dangerous business, and has the potential to cause
5 significant, adverse effects to the community and environment around the Army Base
6 redevelopment.

7 118. The specific effects of coal transportation through the Army Base redevelopment
8 were never studied as part of the 2002, 2012, or other environmental review done on the
9 redevelopment.

10 119. The possibility of coal exports through the redevelopment property was never
11 discussed during contract negotiations between the City and developers. On multiple occasions, the
12 developer reassured the City and the Public that coal exports would not be part of the
13 redevelopment. The recent commitment on the part of the developer to ship Utah coal constitutes
14 “new information” about the project, which was not known at the time the 2002 and 2012
15 environmental documents were completed, and which will require major revisions of the EIR, to
16 properly account for the additional risks of coal transportation. The City and the public did not
17 know, and could not have known, of this change in the project until April 7, 2015 at the earliest.

18 120. By failing to revise the EIR or Initial Study for the former Oakland Army Base to
19 reflect this new information, the City of Oakland has committed a prejudicial abuse of discretion,
20 failed to proceed in the manner required by law, and acted without substantial evidentiary support in
21 violation of CEQA.

22 **FOURTH CAUSE OF ACTION**
23 **(Violation of CEQA – Failure to Prepare Addendum)**

24 121. Petitioners incorporate herein by reference the allegations contained in the foregoing
25 paragraphs.

26 122. Under CEQA, an agency has a duty to prepare an addendum to a previously certified
27 EIR if “some changes or additions are necessary but none of the conditions described in Section
28 15162 calling for the preparation of a subsequent EIR have occurred.” (Guidelines §15164(a).)

Oakland fully complies with the requirements of CEQA.

B. For Petitioners' fees and costs, including reasonable attorneys' fees and expert witness costs, as authorized by Code of Civil Procedure § 1021.5 and any other applicable provisions of law.

C. For such other legal and equitable relief as this Court deems appropriate and just.

DATED: October 2, 2015

Respectfully submitted,



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Stacey P. Geis, CA Bar No. 181444
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VERIFICATION

I, Michelle Myers, hereby declare:

I am San Francisco Bay Chapter Director at Sierra Club, a non-profit corporation with offices in San Francisco, California and elsewhere in the United States. The facts alleged in the above Petition are true to my personal knowledge and belief.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this verification is executed on this 2nd day of October 2015 at San Francisco, California.



EXHIBIT A



October 2, 2015

VIA EMAIL and U.S. MAIL

Ms. Barbara Parker
City Attorney
Oakland City Attorney
1 Frank Ogawa Plaza, 6th Floor
Oakland, CA 94612
c/o jsmith@oaklandcityattorney.org

Oakland City Clerk
1 Frank Ogawa Plaza, 1st and 2nd Floors
Oakland, CA 94612
cityclerk@oaklandnet.com

Re: Notice of Intent to File California Environmental Quality Act Petition

Dear Ms. Parker:

PLEASE TAKE NOTICE, under Public Resources Code section 21167.5, that Communities for a Better Environment, the Sierra Club, San Francisco Baykeeper, and Asian Pacific Environmental Network (“Petitioners”) intend to file a verified petition for writ of mandate against the City of Oakland (“City”), challenging the City’s failure to complete the subsequent or supplemental environmental impact report (“EIR”) required by the California Environmental Quality Act (“CEQA”) regarding the proposal to develop a coal export terminal at the Oakland Army Base redevelopment.

The petition seeks a writ of mandate directing the City to refrain from issuing additional approvals for the Army Base redevelopment and to complete the additional environmental review required by CEQA. The petition will be filed in Alameda County Superior Court on October 2, 2015. Please find attached a courtesy copy of the Petition.

Sincerely,

Irene V. Gutierrez
Stacey P. Geis
Counsel for Petitioners

PROOF OF SERVICE

I am a citizen of the United States of America and a resident of the City and County of San Francisco; I am over the age of 18 years and not a party to the within entitled action; my business address is 50 California Street, Suite 500, San Francisco, California.

I hereby certify that on October 2, 2015, I served via electronic mail and U.S. first class mail one true copy of the **Notice of Intent to File California Environmental Quality Act**

Petition on the parties listed below:

Ms. Barbara Parker
City Attorney
Oakland City Attorney
1 Frank Ogawa Plaza, 6th Floor
Oakland, CA 94612
c/o jsmith@oaklandcityattorney.org

Oakland City Clerk
1 Frank Ogawa Plaza, 1st and 2nd Floors
Oakland, CA 94612
cityclerk@oaklandnet.com

I certify under penalty of perjury that the foregoing is true and correct. Executed on October 2, 2015 in San Francisco, California.

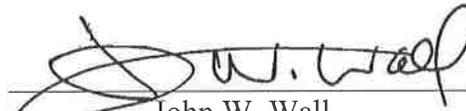

John W. Wall

EXHIBIT B

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9 *Attorney for Sierra Club*

10
11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 IN AND FOR THE COUNTY OF ALAMEDA

13 COMMUNITIES FOR A BETTER
14 ENVIRONMENT, SIERRA CLUB, SAN
FRANCISCO BAYKEEPER, and ASIAN
15 PACIFIC ENVIRONMENTAL NETWORK,

16 Petitioners,

17 v.

18 CITY OF OAKLAND, and DOES 1 through
19 100, inclusive,

20 Respondents.

21 PROLOGIS CCIG OAKLAND GLOBAL, LLC;
22 TERMINAL LOGISTICS SOLUTIONS;
OAKLAND BULK AND OVERSIZED
23 TERMINAL, LLC and DOES 101 through 199,
inclusive,

24 Real Parties In Interest.

**NOTICE TO THE ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA OF
PETITION FOR WRIT OF MANDATE**

25 To the Attorney General of the State of California:

26 PLEASE TAKE NOTICE, under Public Resources Code § 21167.7 and Code of Civil
27 Procedure § 388, that on October 2, 2015, Communities for a Better Environment, Sierra Club, San
28 Francisco Baykeeper, and Asian Pacific Environmental Network (“Petitioners”), filed a verified

1 petition for writ of mandate against the City of Oakland (“City”), challenging the City’s failure to
2 complete the subsequent or supplemental environmental impact report (“EIR”) required by the
3 California Environmental Quality Act (“CEQA”) regarding the proposal to develop a coal export
4 terminal at the Oakland Army Base redevelopment. The petition seeks a writ of mandate directing
5 the City to refrain from issuing additional approvals for the Army Base redevelopment and to
6 complete the additional environmental review required by CEQA. A copy of the petition is provided
7 along with this notice.

8
9 Sincerely,

10 DATED: October 2, 2015



11 IRENE GUTIERREZ
12 STACEY GEIS
13 Earthjustice
14 *Attorneys for Petitioners*

15 JESSICA YARNALL LOARIE
16 Sierra Club
17 *Attorney for Sierra Club*

1 **PROOF OF SERVICE**

2 I am a citizen of the United States of America and a resident of the City and County of San
3 Francisco; I am over the age of 18 years and not a party to the within entitled action; my business
4 address is 50 California Street, Suite 500, San Francisco, California.

5 I hereby certify that on October 2, 2015, I served via U.S. first class mail one true copy of the
6 document herein on the party listed below:

7 Office of the Attorney General
8 1515 Clay Street
9 Oakland, CA 94612-1499

10 I certify under penalty of perjury that the foregoing is true and correct. Executed on
11 October 2, 2015 in San Francisco, California.

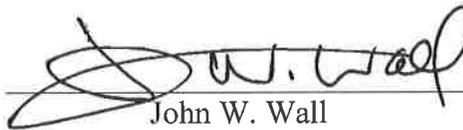
12 
13 John W. Wall

EXHIBIT B
to Greenaction Letter

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**Exempt from Filing Fees pursuant to
Government Code section 6103**

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

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF CONTRA COSTA

13
14 **FAST LANE TRANSPORTATION, INC., a
California corporation,**
15
16 **Petitioner,**
17
18 **v.**
19 **CITY OF LOS ANGELES; CITY
COUNCIL OF THE CITY OF LOS
ANGELES; PORT OF LOS ANGELES;
20 LOS ANGELES BOARD OF HARBOR
COMMISSIONERS; and DOES 1 through
50, inclusive,**
21
22 **Respondents.**

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

**REPLY BRIEF IN SUPPORT OF THE
PEOPLE'S PETITION FOR WRIT OF
MANDATE IN INTERVENTION**
(California Environmental Quality Act)

Judge: Honorable Barry Goode
Dept.: 17

Actions Filed: June 5 and 7, 2013

Trial Date: November 16-17, 2015

23
24 **BNSF RAILWAY COMPANY, a Delaware
corporation,**
25 **Real Party in Interest.**
26 **AND RELATED CONSOLIDATED
CASES.**
27
28

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1 **I. PRELIMINARY STATEMENT.**

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

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

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

25
26 ¹ Parties may join in the Attorney General’s CEQA arguments even when that party may
27 not have exhausted its administrative remedies as to that issue. (See *Maintain Our Desert*
28 *Environment v. Town of Apple Valley* (2004) 124 Cal.App.4th 430 (“*MODE*”).) In *MODE*, the
Court considered both *MODE*’s and the Attorney General’s arguments regarding the disputed
issue as though *MODE* had properly exhausted its administrative remedies. (*Id.* at 443.)

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

6 **II. CEQA CLAIMS ARE NOT PREEMPTED BY ICCTA.**

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

18 **A. CEQA Controls the Port’s Decisionmaking Process, Not BNSF’s Rail
19 Operations.**

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

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

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

1 the People and Petitioners seek to apply CEQA's mandates *to the Port's decision to lease its*
2 *property*. Moreover, relief under CEQA would not "force" or "impose" restrictions on the
3 Project. Rather, "upon a finding of the agency's noncompliance with CEQA, the court must enter
4 an order mandating that the agency set aside its decision and take any necessary actions to
5 achieve compliance." (*City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398,
6 414-415 [citing Pub. Resources Code, §21168.9].) The court may order an agency to undertake
7 further environmental review, but must leave it to the agency to determine the appropriate means
8 for correcting the EIR's deficiencies. (*POET, LLC v. California Air Resources Board* (2013) 218
9 Cal.App.4th 681, 758 [citing Pub. Resources Code § 21168.9, subd. (c)].) The CEQA claims are
10 directed at the Port's decisionmaking process, and the Court has jurisdiction to hear these claims.

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

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

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

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

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

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

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

(continued...)

1 in enacting ICCTA, intended to preempt the ability of parties that contract with rail carriers and
2 operators in the marketplace to seek environmental improvements and other efficiencies.

3 Therefore, the Court has jurisdiction over the CEQA claims.

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

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

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

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

26 (...continued)

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

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

4 The Port justifies the EIR’s unsupported conclusion by contending that Guidelines section
5 15064.4, subdivision (b), only requires analysis of consistency with *regulations or requirements*
6 adopted to implement a GHG reduction plan, not consistency with general policy objectives such
7 as those included in EO S-3-05. (RB at 95.) However, the EIR itself adopts a significance
8 threshold that is not so limited. Rather, the EIR asks whether the Project would “conflict with
9 State and local *plans and policies* adopted for the purpose of reducing GHG emissions.” (AR
10 12600.) As the Port emphasizes, it has some discretion to select appropriate significance
11 thresholds. (RB at 99 [citing Guidelines § 15064, subd. (b)].) It may not now disavow its chosen
12 threshold. (*See, e.g., Protect the Historic Amador Waterways v. Amador Water Agency* (2004)
13 116 Cal.App.4th 1099, 1108-1111.) Given that the EIR identifies EO S-3-05, AB 32, the Scoping
14 Plan, and the Port’s Climate Action Plan among the State’s climate change regulatory setting, the
15 Port should have analyzed the Project’s consistency with each of these policies and plans.

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

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

⁷ The People do not assert that the Port must engage in an excessively strict “consistency”
analysis, under which any failure of its Project to follow in lockstep with the statewide reductions

(continued...)

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

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

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

25
26 _____
27 (...continued)
28 discussed above would render the Project’s GHG impacts necessarily significant. But *some*
 meaningful analysis is necessary. The Port could comply with CEQA by, for example, discussing
 whether the Project’s projected increases in GHG emissions may interfere with statewide
 reductions required to meet the State’s longer-term climate objectives.

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

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

4 The EIR's climate analysis does not mention the Port's Climate Action Plan, let alone
5 analyze whether the Project is consistent with that plan. (Intervenor's Opening Brief ("IOB") at
6 17; AR 183449-183482.) This oversight is both telling and fatal to the EIR. The Climate Action
7 Plan was adopted to help the City of Los Angeles, through the Los Angeles Harbor Department,
8 achieve its goal to reduce GHG emissions to 35% below 1990 levels by 2030. (AR 183453.) The
9 Port does not explain the EIR's failure to analyze the Project's consistency with this relevant
10 policy goal.

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

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

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

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

1 requires analysis of a project’s impacts on existing, physical conditions. (RB at 94.) Here, EO S-
2 3-05’s 2050 target is intended to stabilize existing climactic conditions; thus, comparing the
3 Project’s GHG trajectory against this target would inform the public of SCIG’s physical impacts.
4 Moreover, and contrary to the Port’s assertion, analysis of consistency with EO S-3-05’s
5 emissions reduction trajectory is feasible, as demonstrated by the fact that other agencies are
6 conducting the analysis. (See *Sierra Club, supra*, 231 Cal.App.4th at 1157 [noting that agencies
7 have been able to analyze long-term GHG impacts].)

8 **3. The EIR’s Perfunctory Analysis of Consistency with AB 32 Is Legally
9 Inadequate.**

10 The Port admits that the EIR contains only “a brief statement of the reasons for [its]
11 conclusion” that the Project is consistent with AB 32. (RB at 92.) The Port further states that,
12 while lead agencies in other cases may have analyzed consistency with AB 32 differently, the
13 Port has discretion to choose its own analysis. (*Id.*) The Port relies on *CREED v. Chula Vista*
14 (2011) 197 Cal.App.4th 327, 335-336 in support of this argument. (RB at 99.) However,
15 *CREED* does not state that the Port has discretion to approve a fundamentally misleading EIR
16 devoid of any substantive analysis of consistency with AB 32’s GHG reduction objectives. (See,
17 e.g., *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 841, 844.)

18 The Port also argues that AB 32’s targets will be achieved primarily through technological
19 changes and state legislative measures, not by local agencies. (RB at 98.) This effort to disclaim
20 responsibility for addressing climate change is unavailing. The Scoping Plan emphasizes the
21 important role that local agencies must play in meeting state climate targets, and CEQA demands
22 that *every* agency adopt all feasible climate mitigation.⁹ (AR 85117-85118; Guidelines §
23 15126.4, subd. (c).) The EIR’s unsupported conclusion that the Project does not conflict with
24 objectives to reduce GHG emissions is not supported by substantial evidence and violates CEQA.

25 The EIR misleadingly portrays the Project as helping achieve the state’s climate objectives,
26 when in reality a meaningful analysis might reveal that the Project will interfere with
27

28 ⁹ The Port’s own Climate Action Plan acknowledges this role. (AR 183449-183482.)

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

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

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

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

13 The People agree with Petitioners that the EIR violates CEQA by failing to analyze the
14 direct and growth-inducing impacts of the Project on BNSF's Hobart operations. (PRB, at 6-12.)
15 For the same reasons, the Port is incorrect that the EIR need not consider *indirect* impacts of the
16 Project related to the Hobart railyard. (RB at 69.) If SCIG is built, BNSF will operate two huge
17 railyards in the Port region with combined cargo-handling capacity nearly double that of Hobart's
18 existing capacity. (AR 3964, 12319.) In fact, BNSF has represented that it plans to operate
19 Hobart at full capacity, and that Hobart will operate at an expanded capacity in the future. (AR
20 6186-87, 12960.) Moreover, there is substantial evidence in the record that during the life of the
21 Project, demand for cargo handling in the Port region will increase significantly for all types of
22 goods movement (including international, transloaded, and domestic cargo).¹⁰ (AR 6186-6817,
23 80739, 80744, 81669, 12341.) Therefore, it is reasonably foreseeable that BNSF's cargo
24 handling operations in the region will expand, increasing the number of train and truck trips and
25 generating additional air quality, noise, and traffic impacts. However, the EIR does not disclose
26 the effects of changes in BNSF's cargo-handling operations at Hobart that will occur because of
27 SCIG. (Guidelines § 15126.2; *California Clean Energy Committee v. City of Woodland* (2014)
28 225 Cal.App.4th 173, 188-89 ["when a fair argument can be made that the proposed project will

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

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

7 **B. The EIR Improperly Omits Sheila Yard Impacts.**

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

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

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

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

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

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

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

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

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

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

8 Moreover, the initial Draft EIR included a detailed combined analysis of the SCIG/ICTF
9 impacts, but that analysis was deleted from the Recirculated Draft EIR (“RDEIR”). (IOB at 22.)
10 The Port asserts “progress on environmental review of the ICTF expansion project had slowed
11 and fallen behind the SCIG Project, creating a circumstance that rendered quantified cumulative
12 SCIG/ICTF expansion analysis impracticable for the RDEIR.” (RB at 102, fn.29.) This assertion
13 lacks credibility. The Port is a member of the joint powers authority that governs the ICTF
14 facility, and therefore has access to information on the ICTF project. (AR 80779, 5085, 119031.)
15 The EIR also utilized ICTF data to determine the Project’s traffic impacts. (AR 9231, 12784,
16 12884, 12886.) The Port clearly has access to data regarding the proposed ICTF project, and
17 therefore it was reasonable and practical for the Port to prepare a meaningful discussion of the
18 combined effects of the ICTF and SCIG projects.¹² The Final EIR did not include this analysis,
19 and therefore fails to satisfy CEQA as an informational document.

20 **B. Hobart Railyard Impacts Should Be Included in the EIR’S Cumulative**
21 **Impact Analysis.**

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

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

1 First, the Port claims that Hobart is “outside the geographic scope of cumulative impacts”
2 analyzed in the EIR. (RB at 104-105.) The CEQA Guidelines require the lead agency to consider
3 “the nature of each environmental resource being examined, the location of the project and its
4 type” when determining whether to include a related project. (Guidelines § 15130, subd. (b)(2).)
5 Here, the EIR analyzes the Project’s air quality and traffic impacts relating to truck trips on the I-
6 710 freeway and other nearby freeways. (AR 12879-12900, 12475.) In fact, the EIR’s
7 cumulative project list includes the “I-710 (Long Beach Freeway) Major Corridor Study (project
8 # 111).” (AR 12833.) Therefore, the EIR’s cumulative impact analysis should include air quality
9 impacts on the I-710 freeway and other nearby freeways, which would encompass trucks that
10 access the Hobart railyard. (*Long Beach v. Los Angeles Unified School District* (2009) 176
11 Cal.App.4th 889, 907.) In addition, the EIR selectively discusses the favorable air quality and
12 traffic impacts related to truck trips traveling to and from Hobart itself. (AR 12377, 12474,
13 12476, 12782, 12787, 12804, 12880, 12960.) It is reasonable and practical for the Port to fully
14 analyze cumulative air quality, noise, and health impacts associated with Hobart operations,
15 including trucks utilizing local freeways.

16 Second, the Port asserts “there are no ‘reasonably foreseeable potential future projects’ at
17 Hobart that would qualify for inclusion in the EIR’s cumulative impact analysis.” (RB at 105.)
18 As stated above, it is reasonably foreseeable that BNSF’s cargo handling operations in the Port
19 region will increase, including operations at the Hobart railyard. (See Section IV.A, above; AR
20 12959-60, 3964.) Therefore, the EIR should have analyzed the impacts of BNSF’s expanded
21 cargo handling operations at the Hobart railyard, including air quality, noise and health impacts
22 from trains and trucks accessing Hobart.¹³ The EIR’s data regarding Hobart’s future operations
23 constitutes sufficient evidence of a reasonably foreseeable future project under the *City of*
24 *Maywood* case cited by the Port. (RB at 106; *City of Maywood v. Los Angeles Unified School*
25 *Dist.* (2012) 208 Cal.App.4th 362, 397.)

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

1 **C. The EIR Obscures Cumulative Health Risks.**

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

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

23 **VI. THE EIR’S MITIGATION AND ALTERNATIVES ANALYSES APPLY**
24 **INCORRECT STANDARDS AND EVADE CEQA’S REQUIREMENTS.**

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

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

3 **A. The EIR Improperly Rejects Mitigation Based on an Incorrect Standard
4 and Instead Adopts Misleading and Illusory “Project Conditions.”**

5 The Port does not meaningfully respond to the People’s argument that the EIR improperly
6 rejects proposed performance standards for zero- and low-emission technologies by applying an
7 improper feasibility standard. (IOB at 27.) The Port asserts that “the inclusion of new zero-
8 emission technology was determined, based on substantial evidence, not to be feasible *at the time*
9 *of project approval.*” (RB at 50 (emphasis added).) That is the wrong standard for determining
10 feasibility. A mitigation measure is “feasible” if it is “capable of being accomplished in a
11 successful manner *within a reasonable period of time.*” (IOB at 24 and 27 [quoting Guidelines, §
12 15364, emphasis added].) The Port acknowledges this. (RB at 42.) However, it cites to no
13 regulation, statute, or case – and there is none – that supports its application of an instantaneous
14 standard requiring demonstration of feasibility “at the time of project approval.” (RB at 50.)

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

23 **B. The EIR’S Selection of Alternatives Was Improper.**

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

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

13 **C. Substantial Evidence Does Not Support the Port’s Rejection of Measures**
14 **to Reduce Impacts.**

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

17 **1. The EIR’s Analysis of the Access Ramp Violates CEQA.**

18 The Port acknowledges that the potential reconfiguration of the access ramp to the SCIG
19 facility would serve “to increase the distance between the designated truck routes and the existing
20 community.” (RB at 53.) However, the EIR cursorily dismisses this measure, concluding that
21 “[because] the SCIG Project would not result in any significant *traffic* impacts, the proposal to
22 reconfigure the Terminal Island Freeway would not serve to lessen any significant traffic
23 impacts.” (*Id.* (quoting AR 004753) (emphasis added).) This conclusion entirely ignores the air
24 quality and health benefits that would derive from distancing diesel particulate matter and other
25 dangerous pollutants from the sensitive receptors immediately adjacent to the facility. (IOB at
26 33-34 [quoting multiple commenters noting that a reconfigured access ramp would *distance*
27 emissions made by thousands of diesel trucks travelling within feet of sensitive receptors.]
28

1 The Port claims that the People have ignored “extensive evidence in the record supporting
2 the EIR’s conclusions that there are no significant *traffic* impacts justifying this proposed
3 mitigation measure.” (RB at 53, emphasis added.) The Port misconstrues the People’s primary
4 argument: that the EIR relies only on speculation and unsupported conclusions in determining
5 that the reconfigured access ramp would not avoid or reduce *air quality* harms imposed on the
6 surrounding community. Specifically, the Port’s “evidence” with respect to air quality impacts
7 consists of a single sentence within the EIR speculating that the flyover option would “*possibly*
8 [have] greater environmental impacts, as trucks would produce greater emissions climbing the
9 flyover grade than they would on the at grade additional lane.” (RB at 110 [quoting AR 012957]
10 (emphasis added).) Speculative, conclusory statements are not substantial evidence. (Guidelines
11 § 15384.) More critically, there is no analysis of whether such a speculative increase in emissions
12 from the ramp might be an acceptable trade-off for the benefits resulting from the ramp moving
13 those emissions much further from sensitive receptors. (See *Habitat and Watershed Caretakers*,
14 *supra*, 213 Cal.App.4th at 1305 [A potential alternative cannot be rejected “on the *unanalyzed*
15 theory that such an alternative *might* not prove to be environmentally superior to the project.”]
16 [emphasis in original].) Whether the access ramp is analyzed as a mitigation measure or an
17 alternative, the EIR’s rejection of the measure is not supported by substantial evidence.

18 **2. The EIR’s Misstatements Regarding the Location of the Storage**
19 **Tracks Violate CEQA.**

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

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

6 First, the EIR’s rejection of a proposal to move the storage tracks is based on the “fact” that
7 the storage tracks were located within the SCIG project’s boundaries. (AR 4750.) Statements
8 and conclusions that are demonstrably false cannot constitute substantial evidence to support
9 rejection of feasible mitigation. (Guidelines § 15384.) Second, the Port’s dismissal of the error
10 in the Final EIR as essentially a “typo” minimizes the importance of an EIR as an informational
11 document designed to inform both the public and the permitting agency in an accurate and
12 consistent manner that can be relied upon. (See *Preservation Action Council v. City of San Jose*
13 (2006) 141 Cal.App.4th 1336, 1355 [“[A]mbiguity in the FEIR’s analysis of the reduced-size
14 alternative meant that the public and the City Council were not properly informed of the requisite
15 facts that would permit them to evaluate the feasibility of this alternative.”]; *Neighbors for Smart*
16 *Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 455 [“The public
17 and decision makers are entitled to the most accurate information on project impacts practically
18 possible.”].)

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

22 **VII. CONCLUSION**

23 For the reasons outlined above, in the People’s Opening Brief, and in the briefs submitted
24 by Petitioners, the People respectfully request that the Court issue a writ of mandate directing the
25 Port to vacate its decision and conduct a CEQA-compliant analysis of the Project.
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Dated: September 11, 2015

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LA2013509506

DECLARATION OF SERVICE BY E-MAIL and OVERNIGHT COURIER

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

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

I declare:

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

On September 11, 2015, I served the attached

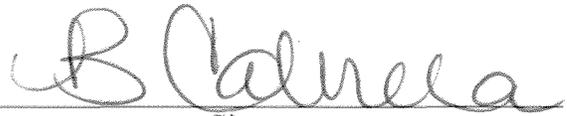
**REPLY BRIEF IN SUPPORT OF THE PEOPLE'S PETITION FOR WRIT OF
MANDATE IN INTERVENTION**

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

PLEASE SEE ATTACHED SERVICE LIST

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

Blanca Cabrera
Declarant



Signature

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