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Via Overnight Mail and E-Mail

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RE: Comments on the Draft Environmental Assessment for San Bernardino International Airport Authority's Proposed Eastgate Air Cargo Facility

Dear Mr. McClardy and Mr. Gibbs:

The California Attorney General's Office has reviewed the Draft Environmental Assessment (EA) for the proposed Eastgate Air Cargo Facility (Project) at the San Bernardino International Airport. The airport is located near the San Bernardino-Muscoy community in San Bernardino County, a community selected by the California Air Resources Board (CARB) for the development of an emissions reduction plan because of the disproportionate pollution burden that community already bears. In an evaluation of the Project during the California Environmental Quality Act (CEQA) review process last year, the San Bernardino International Airport Authority found the Project would generate significant and unavoidable air quality, climate change, and noise impacts. But the Draft EA mentions neither the significant impacts the airport authority identified during its CEQA review, nor the nearby environmental justice community.

We respectfully submit these comments, which are made by the Attorney General in his independent capacity and not on behalf of any other state entity or agency, to raise three issues regarding the obligation of the airport authority and the Federal Aviation Administration (FAA) to comply with the National Environmental Policy Act (NEPA). First, the agencies must perform further environmental analysis and prepare an environmental impact statement (EIS)

because the airport authority's own CEQA review determined that the Project would cause significant air quality, climate change, and noise impacts. Second, the agencies underestimate mobile source emissions and their calculations are inconsistent with the estimates used for CEQA review of the Project. Third, the agencies must consider whether the Project would interfere with the AB 617 community emissions reduction plan for the nearby San Bernardino-Muscoy community.

I. BACKGROUND

The Project is located just over a mile east of a low-income community and community of color that already is disproportionately burdened by pollution, the San Bernardino-Muscoy community. *See* Exhibit A, attached. An environmental health screening tool created by the California Office of Environmental Health Hazard Assessment (OEHHA), called CalEnviroScreen 3.0, ranks this community in the top 5 percent, indicating residents in that community are exposed to more pollution overall than the vast majority of Californians and are more vulnerable to that pollution.¹ Ambient air in the Project's surrounding area contains among the highest background levels in the South Coast air basin of ozone, which causes lung inflammation and increased asthma-related emergency room visits; particulate matter (PM) 2.5, fine particles that cause heart and lung diseases; and diesel particulate matter, a toxic air contaminant causing increased cancer risk.²

The San Bernardino-Muscoy community is also especially vulnerable to the effects of pollution. A significant majority of the community identify as Latinx (73 percent) or African American (13 percent), and nearly 20 percent of the population are children under the age of 10, a group particularly sensitive to the health effects of air pollution.³ The community's asthma rates are among the worst in the state,⁴ which both is caused by exposure to air pollution and can make the community more vulnerable to air pollution. More than 95 percent of the community

¹ CalEnviroScreen is a tool that considers environmental, health, and socioeconomic information to produce scores and rank every census tract in the state.

² OEHHA, CalEnviroScreen 3.0, <https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-30> (last visited Nov. 20, 2019); *id.*, Air Quality: Ozone, <https://oehha.ca.gov/calenviroscreen/indicator/air-quality-ozone> (last visited Nov. 20, 2019); *id.*, Air Quality: PM2.5, <https://oehha.ca.gov/calenviroscreen/indicator/air-quality-pm25> (last visited Nov. 20, 2019); *id.*, Diesel Particulate Matter, <https://oehha.ca.gov/calenviroscreen/indicator/diesel-particulate-matter> (last visited Nov. 20, 2019).

³ AB 617 Community Emissions Reduction Plan (CERP) for San Bernardino, Muscoy at 9-10, 33 (Sept. 2019), <http://www.aqmd.gov/docs/default-source/Agendas/Governing-Board/2019/2019-sep6-025a.pdf>.

⁴ The community has asthma-related emergency room visit rates ranging from the top 2 to 16 percent in California. *Id.*

live below the poverty level⁵ and more than 75 percent are unemployed,⁶ thus limiting the community's access to healthcare.

As a result of the community's disproportionate exposure to pollution and their vulnerability, in 2018, CARB selected San Bernardino-Muscoy for the development of a community emissions reduction plan under AB 617.⁷ AB 617 requires local air districts to developing air emissions reduction programs in communities selected by CARB for these plans.⁸ Thus, the South Coast Air Quality Management District (SCAQMD) has developed and approved a community emissions reduction plan, which is now before CARB for final approval.⁹ The proposed plan identifies neighborhood truck traffic and warehouses as priority areas for emissions reduction and proposes several strategies mitigating the pollution from these sources.¹⁰

This Project would involve constructing a 658,500 square-foot air cargo warehouse within the boundaries of the airport and generate at least an additional 500 truck trips and 26 flights daily at the airport. The airport authority began an environmental review of the Project under CEQA in 2018, publishing an Initial Study in July 2018 and a draft environmental impact report (EIR) in August 2018 for public comment. The Draft EIR comment period concluded on October 11, 2018, after the airport authority received only three comments. The airport authority then published a Final EIR on October 26, 2018, determining that the Project will have significant air quality, climate change, and noise impacts on the surrounding environment.

II. THE AGENCIES MUST PREPARE AN EIS BECAUSE, AS THE CEQA ANALYSIS FOUND, THE PROJECT WILL HAVE SIGNIFICANT ENVIRONMENTAL EFFECTS.

NEPA is a "basic national charter for protection of the environment." *Ctr. For Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008) (quoting 40 C.F.R. § 1500.1). It does not impose substantive requirements on federal agencies but does impose procedural requirements. *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008). These procedural requirements are intended to enforce NEPA's mandate that agencies will avail themselves of, and will carefully consider, detailed information

⁵ CalEnviroScreen 3.0 defines poverty level as twice the federal poverty threshold because California's cost of living is higher than other states, and federal poverty thresholds have not changed since the 1980s. *Id.*; CalEPA, CalEnviroScreen 3.0 at 138, <https://oehha.ca.gov/media/downloads/calenviroscreen/report/ces3report.pdf#page=145> (last visited Nov. 20, 2019).

⁶ OEHHA, CalEnviroScreen 3.0, *supra* note 2

⁷ AB 617 CERP for San Bernardino, Muscoy, *supra* note 3 at 486.

⁸ *Id.*

⁹ *Id.* at 6, 487.

¹⁰ *Id.* at 9-10.

on significant environmental impacts, and that the relevant information will be made available to the public. *See id.*

NEPA requires federal agencies to analyze the potential environmental impacts of any “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). The threshold for determining whether an EIS is required is a low one—the agency must prepare an EIS whenever “there are substantial questions about whether a project may cause significant degradation of the human environment.” *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1239 (9th Cir. 2005). To determine whether an EIS is necessary for a project, the agency may prepare an EA, which should provide sufficient evidence and analysis to justify the agency’s determination whether to prepare an EIS or make a finding of no significant impact (FONSI). 40 C.F.R. §§ 1501.4, 1508.9; *see also Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1225 (9th Cir. 1988). An EIS’s primary purpose is to be an “action-forcing tool” to ensure federal government programs and actions meet NEPA’s goals and policies. 40 C.F.R. § 1502.1; FAA Order 5050.4B § 900.

Environmental review under CEQA is analogous to the process required by NEPA. Similar to NEPA, the “basic purposes of CEQA [is] to [i]nform governmental decision makers and the public about the potential, significant environmental effects of proposed activities.” CEQA Guidelines, § 15002(a)(1). An EA under NEPA is functionally equivalent to an initial study under CEQA. *See id.* § 15063. Likewise, a FONSI under NEPA is the approximate equivalent of a negative declaration under CEQA. *See id.* § 15070. Preparing a negative declaration is appropriate under CEQA only if, based on the whole record before the responsible agency, there is no substantial evidence the project may have significant environmental effects. CEQA Guidelines, § 15070(a). Similarly, issuing a FONSI is appropriate under NEPA only if there is no substantial question on whether the project may have significant environmental effects. *California v. U.S. Dept. of Transp.*, 260 F. Supp. 2d 969, 972 (N.D. Cal. 2003).

During its CEQA review in 2018, the airport authority prepared an EIR, CEQA’s analog to the EIS, rather than a negative declaration. The airport authority’s Final EIR found that the Project would have significant and unavoidable air quality, climate change, and noise impacts.¹¹ That finding alone—in an environmental review process closely approximating NEPA—raises “substantial questions” in the NEPA review about whether this Project may cause significant environmental effects, and thus triggers the agencies’ NEPA obligation to prepare an EIS. *See Native Ecosystems Council*, 428 F.3d at 1239.

Perplexingly, the agencies’ Draft EA failed even to mention the CEQA process. Without explanation, the EA disregarded the airport authority’s determination of significant impacts on

¹¹ Final EIR, San Bernardino International Airport Eastgate Building 1 Project at 6 (Oct. 2018), <http://www.sbiaa.org/wp-content/uploads/2019/03/SBIA-Eastgate-Bldg-1-Focused-FEIR-complete.pdf>.

air quality, climate change, and noise in the Final EIR.¹² Given the airport authority's determination of significant and unavoidable impacts in its CEQA review, the agencies' failure to prepare an EIS would violate NEPA.

In addition to fulfilling the agencies' obligation under NEPA to fully evaluate Project impacts, preparation of an EIS will afford the agencies an extended opportunity to work with the local community to jointly develop mitigation measures to improve the Project and reduce its effects on the community. The agencies' decision to prepare an EIS will itself trigger a public participation process in which the community can help determine the scope of issues that should be addressed. *See* 40 C.F.R. § 1501.7. Furthermore, the EIS drafting process requires the agencies to request and incorporate additional comments from the public. *See* 40 C.F.R. § 1503.1(a)(4). Thus, the EIS process will enable the agencies to solicit input from the community and tailor improvements to the Project based on community needs, thus promoting the environmental justice goal of involving an already over-burdened community in decisions affecting their environment and health.

III. THE DRAFT EA'S FLAWED MOBILE SOURCE EMISSIONS MODELING UNDERESTIMATES THE PROJECT'S AIR QUALITY IMPACTS.

The Draft EA appears to underestimate mobile source emissions in two ways and as a result, it underestimates the Project's air quality and climate change impacts. First, without explanation, the EA uses an estimate for truck trips that is 23 percent lower than the estimate used for the Project's CEQA analysis. The EA estimates that the Project would generate 192 truck trips in its initial year of operation and 500 truck trips in full operation.¹³ However, according to the Final EIR, the Project will generate significantly more truck trips—248 round trip truck trips in the initial year of operation and 652 round trip truck trips in full operation.¹⁴ By using lower projections of the Project's operational truck trips to estimate mobile source emissions, the EA significantly underestimates the emissions generated by the Project. Even if the agencies concluded that 192 and 500 truck trips are the correct estimates, the Draft EA fails to offer any explanation for the discrepancies in estimates between the Final EIR and the Draft EA. The agencies' failure to explain these inconsistencies violates their obligation under NEPA to provide sufficient evidence and analysis to justify their final determinations. 40 C.F.R. §§ 1501.4, 1508.9; *see also Bob Marshall All.*, 852 F.2d at 1225.

¹² *See* Letter from Adriano L. Martinez & Yasmine Agelidis, Earthjustice, to Mark Gibbs, San Bernardino International Airport Authority at 2-5 (Aug. 19, 2019); Letter from Adriano L. Martinez & Yasmine Agelidis, Earthjustice, to Mark Gibbs, San Bernardino International Airport Authority, Supplemental Comments on Draft EA at 2-3 (Nov. 1, 2019).

¹³ *See* Draft EA Eastgate Air Cargo Facility at 4-7 (July 2019).

¹⁴ Final EIR Errata, San Bernardino International Airport Eastgate Building 1 Project at 153 (Oct. 2018), <http://www.sbiaa.org/wp-content/uploads/2019/03/SBIA-Eastgate-Bldg-1-Focused-FEIR-complete.pdf>.

In addition, the Draft EA appears to model mobile source emissions using only half of the number of projected truck trips because it assumes those trip numbers to be one-way trips rather than roundtrips. The EA estimated emissions using CalEEMod, a program that estimates vehicle emissions based solely on one-way trips together with their one-way travel distances. The Final EIR indicates that the estimated trips generated are roundtrip and not one-way trip numbers.¹⁵ Thus, to accurately model emissions from the 192 or 500 roundtrips predicted by the Draft EA, 384 or 1000 one-way trips must be entered into the model. And if the Draft EA modeled the number of roundtrips projected in the Final EIR of 248 and 652, then 496 and 1,304 one-way trips must be entered into the model. However, the Draft EA modeled only 192 and 500 one-way truck trips.¹⁶

Under NEPA, the agencies must provide sufficient evidence and analysis for their determinations. *See* 40 C.F.R. §§ 1501.4, 1508.9. Thus, the agencies must either correct their mobile source emissions modeling by using the truck trip estimates from the Final EIR or explain why the Draft EA uses a different estimate. They must also correct the mobile source emissions modeling using the accurate number of one-way truck trips for the modeling input. The agencies' failure to correct these calculations or explain their analysis violates NEPA. Furthermore, underrepresenting the total daily truck trips and using only one-way trips could underestimate the Project's mobile source emissions by more than 60 percent, rendering flawed any determination of significant impacts based on those emissions estimates, such as air quality and climate change impacts.¹⁷

IV. THE AGENCIES MUST EVALUATE WHETHER THE PROJECT WILL UNDERMINE THE SAN BERNARDINO-MUSCOY COMMUNITY EMISSIONS REDUCTION PLAN UNDER AB 617.

During the EA review process, the agency has the affirmative duty to consider whether the action "threatens a violation" of federal, state, or local law or requirement "imposed for the protection of the environment." 40 C.F.R. § 1508.27(b)(10). This consideration contributes to the agency's determination of whether the agency action may have significant impacts on the environment. *Id.* The Ninth Circuit has held unreasonable an agency's failure to consider these environmental laws in an EA and has required the agency to prepare an EIS to redress this type of oversight. *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988). Furthermore, FAA's own NEPA guidance requires the agency to identify and address any "state and/or local air quality requirements that are applicable to a project." FAA Order 1015.1F § 1.1.2. As described above, AB 617 is a California law that requires the reduction of air

¹⁵ *See id.*

¹⁶ Draft EA Appendix B, Air Quality and Climate Change Technical Studies and Supporting Data at tbl. 4.2.

¹⁷ See further discussions of these inconsistencies in Letter from Greg Gilbert, Autumn Wind Associates, to Mark Gibbs, San Bernardino International Airport Authority at 19-21 (Aug. 14, 2019).

emissions in designated communities and qualifies as a state law “imposed for the protection of the environment.” 40 C.F.R. § 1508.27(b)(10). The agencies failed in their EA to consider or even mention AB 617 and therefore violated their obligation under NEPA.

Furthermore, the agencies must consider potential Project conflicts with the San Bernardino-Muscoy community emissions reduction plan, which is slated for approval by CARB early in 2020.¹⁸ Once approved, the plan would become a requirement “imposed for the protection of the environment” contemplated by NEPA. 40 C.F.R. § 1508.27(b)(10). This Project, however, may “threaten a violation” of the emissions reduction plan. For example, the proposed community emissions reduction plan for San Bernardino-Muscoy cites truck traffic through neighborhoods to and from nearby warehouses as a top air pollution concern that the plan seeks to address.¹⁹ The plan identifies six strategies aiming to reduce community exposure to emissions from truck traffic and warehouses, including “reduc[ing] emissions from heavy-duty trucks transiting the community” through incentives or rerouting truck routes.²⁰ In likely conflict with this strategy, the Project is expected to generate at least several hundred additional daily truck trips to and from the new airport facility, about a mile from the San Bernardino-Muscoy community. But the EA failed to analyze whether truck traffic generated by this Project is likely to traverse the nearby San Bernardino-Muscoy community. The agencies must perform this analysis in an EIS.

The agencies’ failure to evaluate the Project’s conformity with the San Bernardino-Muscoy’s community emissions reduction plan violates the agencies’ obligation under NEPA to consider whether the Project “threatens a violation” of local requirements. 40 C.F.R. § 1508.27(b)(10). We recommend the agencies thoroughly consider mitigation measures rerouting Project trucks away from the community as well as other measures that support community strategies to reduce emissions from truck traffic and warehouses.

V. CONCLUSION

Thank you for the opportunity to provide these comments. We urge the San Bernardino International Airport Authority and the Federal Aviation Administration to prepare an EIS to comply with their obligations under NEPA. The EIS should contain comprehensive analyses of alternatives and mitigation measures for the significant impacts of the Project; reevaluate the Project’s mobile source emissions and revise analyses relying on those data; and reconcile the proposed Project with the AB 617 requirements pertaining to the nearby community.

Finally, should the agencies propose a FONSI on this Project, we request that the agencies make the proposed FONSI and its underlying EA available for a public review period of no less than 30 days. Public review of a proposed FONSI and its underlying EA is mandatory

¹⁸ See AB 617 CERP for San Bernardino, Muscoy, *supra* note 3 at 6.

¹⁹ See *id.* at 9-10.

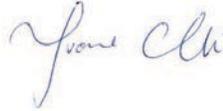
²⁰ *Id.* at 10.

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under FAA's NEPA Implementing Instructions where, as here, the project's airport sponsor—the San Bernardino International Airport Authority—held a public hearing to prepare the EA.²¹ *See* FAA Order 5050.4B § 804(b)(2). Although we believe the agencies are obligated to prepare an EIS for this Project, we request the agencies to make time for further public input in accordance with FAA rules should a FONSI be proposed.

Sincerely,



YUTING YVONNE CHI
Deputy Attorney General
Bureau of Environmental Justice

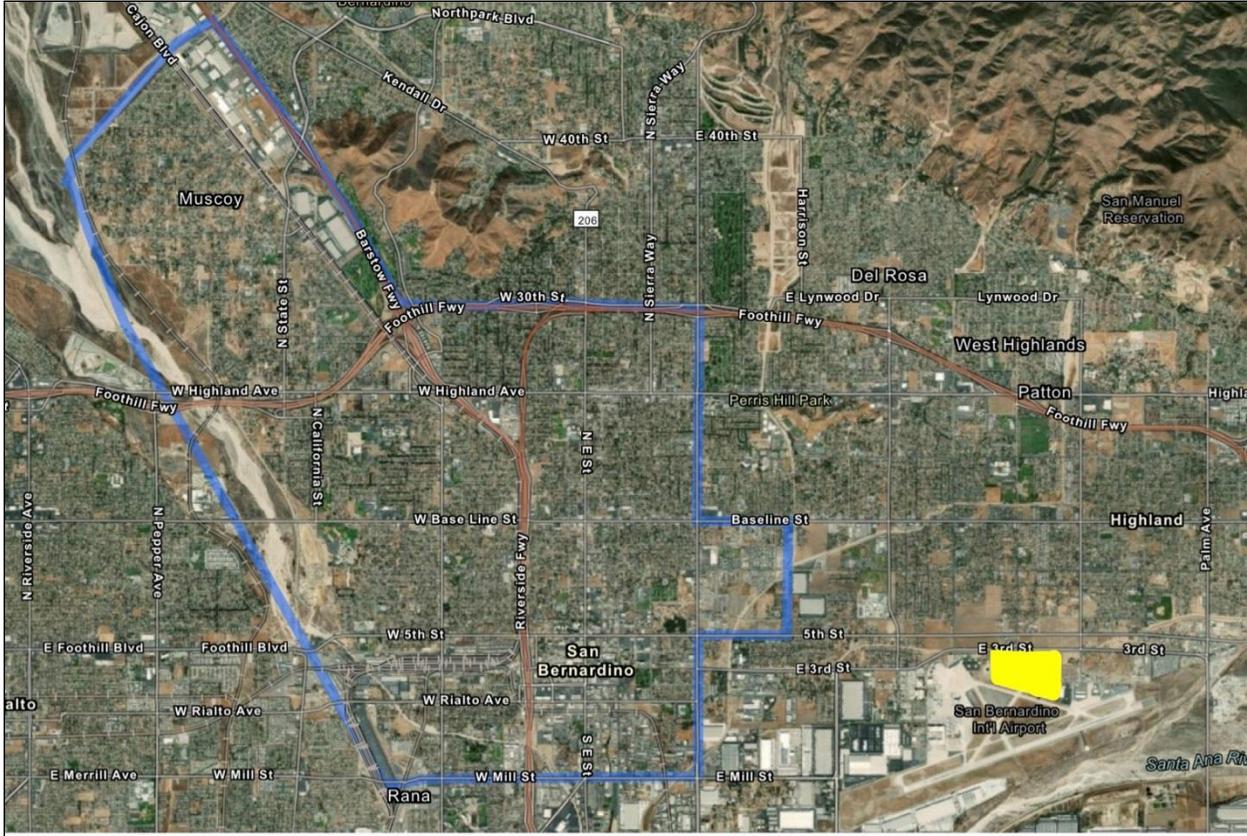
For XAVIER BECERRA
Attorney General

Encl.: Exhibit A

cc: Dave Kessler, Environmental Protection Specialist, Federal Aviation Administration
Mike Burrows, Executive Director, San Bernardino International Airport Authority
Morgan Capilla, NEPA Reviewer, U.S. Environmental Protection Agency Region 9
Richard Corey, Executive Officer, California Air Resources Board
Wayne Nastri, Executive Officer, South Coast Air Quality Management District

²¹ SBD International Airport, Public Information Workshop/Public Hearing for the Draft EA and the Draft General Conformity Determination, Eastgate Air Cargo Facility (Aug. 8, 2019), http://www.sbiaa.org/wp-content/uploads/2019/08/EastGate-Air-Cargo-Public-Workshop-Presentation_080819.pdf.

EXHIBIT A



The San Bernardino-Muscogee AB 617 Community (blue) and the Project (yellow)¹

¹ SBM Final Boundary Map, <https://scaqmd-online.maps.arcgis.com/apps/View/index.html?appid=c1c170ab526d462199b86c1cbe5a9ac5&extent=-117.4450,34.0601,-117.1155,34.1933> (last visited Nov. 20, 2019).