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

ALBERT THOMAS PAULEK, et al., Plaintiffs and Respondents, **v.** **MORENO VALLEY COMMUNITY SERVICES DISTRICT,** et al., Defendants and Appellants. **HF PROPERTIES, et al.,** Real Parties in Interest and Appellants.	Case No. E071184 (Riverside Cty. Super. Ct. No. RIC1510967 MF, RIC1511279, RIC1511327, RIC1511421, & RIC1511195)
LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1184, et al., Plaintiffs and Appellants, **v.** **MORENO VALLEY COMMUNITY SERVICES DISTRICT, et al.**, Defendants and Respondents. **HF PROPERTIES, et al.,** Real Parties in Interest and Respondents.	(Riverside Cty. Super. Ct. No. RIC 1511279 & RIC1511327)

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

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

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INTRODUCTION

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

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

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

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

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

Respondents rely on the Cap-and-Trade Program to excuse their obligation to make better land use decisions. Cap-and-Trade is not intended as a stand-alone climate policy; instead, it assumes steady efforts to reduce emissions across the state. While Cap-and-Trade has an important role to play in limiting emissions from entities like power plants and refineries, the Program does not cover a host of other sources, including warehouses. Although the Program creates financial and legal obligations on fuel suppliers and electricity generators that may ultimately supply this Project, the Project experiences neither the direct legal requirements of the Program nor the full economic costs associated with its additional emissions. If projects were allowed to evade responsibility in this way, they would steadily increase Cap-and-Trade Program costs upstream, while locking the state into ever-more expensive and inappropriate high-emitting development patterns. This is a recipe for failure in achieving the state's climate goals. To avoid this scenario, the state relies on local governments to limit emissions from new development projects. Emissions from such projects are the responsibility of local governments and should be mitigated through the proper application of CEQA. Eliminating this crucial piece of the state's portfolio approach undermines the state's climate goals.

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

STATEMENT OF INTERESTS

I. INTEREST OF THE ATTORNEY GENERAL

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

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

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

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[1] The Attorney General opposed this methodology in a comment letter it submitted on the revised sections of the Final EIR for this Project (Revised Final EIR or RFEIR). (Letter re: Revised Sections of the Final Environmental Impact Report for the World Logistics Center Project, Sept. 7, 2018, at: <https://oag.ca.gov/sites/all/files/agweb/pdfs/environment/comments-revised-sections-feir.pdf?>.) The Revised Final EIR is not at issue in this litigation, but it includes the original EIR's same flawed GHG analysis.

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

II. INTEREST OF THE CALIFORNIA AIR RESOURCES BOARD

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

BACKGROUND

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

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

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

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

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

The Scoping Plan includes a suite of regulations, measures, and policies designed to operate together to reduce GHG emissions. The Cap-and-Trade Program is one such policy. Entities that are directly subject to the Cap-and-Trade Program—like power plants, factories, refineries, and electricity generators and importers—must purchase and surrender compliance instruments (e.g., allowances) for their emissions. (See Cal. Code Regs., tit. 17, § 95812.) Downstream emitters such as cars and trucks, much less warehouses that such cars and trucks drive to, are not covered entities under Cap-and-Trade and have no such obligation to purchase or surrender allowances. The existence of the Program, in other words, does not obviate the need for action at other levels of the economy. On the contrary: If sources like the long-lasting development project in this case build without regard to their emissions, they will increase overall state emissions and hence increase pressure and costs within the Cap-and-Trade Program.

To address the wide range of GHG emissions sources that are not directly controlled through the Cap-and-Trade Program, the state relies on other policies[4]—many of which require collaboration between the state and local governments. Agencies large and small across the state (including, crucially, cities and counties) are responsible for ensuring that proposed new land use plans, transportation projects, and development projects are consistent with evolving scientific knowledge and state regulatory schemes; CEQA is a critical tool for implementing these obligations.[5] (See *SANDAG*, *supra*, 3 Cal.5th at p. 519; see also CEQA Guidelines, § 15064.4, subd. (b).)

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

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

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

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

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

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

II. Overview of the GHG Analysis in Respondents' EIR

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

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

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

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

ARGUMENT

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

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

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

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

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

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

Warehouse and logistics complexes are not regulated by Cap-and-Trade. The Cap-and-Trade Program thus provides no legal or policy basis for Respondents to avoid their obligation to evaluate and mitigate GHG emissions. Cap-and-Trade applies “an aggregate greenhouse gas allowance budget [to] *covered entities* and provides a trading mechanism for” such allowances. (Cal. Code Regs., tit. 17, § 95801 (emphasis added).) Respondents seek to use Cap-and-Trade to zero-out and excuse the application of feasible mitigation measures to over 95% of all GHG emissions from the Project. Cap-and-Trade applies only to expressly identified entities (“covered entities”) such as cement producers, petroleum refiners, electricity generators, natural gas suppliers, fuel importers, and liquid petroleum gas suppliers. (Cal. Code Regs., tit. 17, § 95811.) Warehouse and logistics complexes are *not* covered entities. Cap-and-Trade compliance instruments do not factor in *whatsoever* because this Project is not covered by Cap-and-Trade.

The mere fact that warehouse and logistics complexes are in the chain of commerce with covered entities does not transform them into covered entities themselves. As an example, although the operator of a refinery that produces gasoline in California is subject to Cap-and-Trade, (Cal. Code Regs., tit. 17, § 95811, subd. (e)(1)), entities downstream from that refinery in the chain of commerce are not. The refinery itself may have compliance obligations under the Cap-and-Trade Program, which can be met by reducing the refinery’s own GHG emissions or surrendering allowances, but the gas station that resells the gas, the truck drivers who purchase it, and the warehouses to which the trucks drive do not have compliance obligations. Under the state's portfolio approach, while the refinery may have met some or all of its climate obligations via Cap-and-Trade, the downstream entities have not. Because warehouses receive no set price or regulatory signals from Cap-and-Trade, they are not being directly incentivized to reduce emissions. Instead, other components of the state's portfolio address those emissions. Nothing in Cap-and-Trade explicitly or impliedly repealed the use of other measures to address climate change; they were designed to work together. (See, e.g., 2017 Scoping Plan at p. 28.) Local governments must responsibly plan new development to further the state's climate goals.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. RESPONDENTS' EIR VIOLATES CEQA

As explained above, the EIR's approach to GHG analysis misrepresents the Cap-and-Trade Program and the Project's place in that scheme. As a result, the EIR takes an unsupportable approach to evaluating the significance of GHG emissions from the Project. Contrary to CEQA's focus on information disclosure and local responsibility for mitigation, the EIR ignores the vast majority of the Project's emissions, and, in a misleading analysis, compares only a small fraction of the Project's emissions to the applicable significance threshold. This flawed analysis leads the EIR to conclude that the impact from GHG emissions would be mitigated to a less-than-significant level, misleading the public and shirking mitigation responsibilities. Even if the Cap-and-Trade Program directly applied to the Project's emissions (it does not since, as explained above, this Project is not a covered entity under the Program), this method of evaluating a project's significance *after* taking into account purported "mitigation" or impact-reducing components is not allowed by CEQA. As a result of its flawed analysis, the EIR fails to adopt all feasible mitigation measures and subverts CEQA's important political function of ensuring informed decision making and informed public participation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(*Id.* at p. 658.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: January 10, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

Dated: January 10, 2020

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DECLARATION OF ELECTRONIC SERVICE VIA TRUEFILING

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No.: **E071184**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically.

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PAULA CORRAL	/s/ Paula Corral
Declarant	Signature

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