Case No. E071184

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

ALBERT THOMAS PAULEK, et al.,
Plaintiffs and Respondents,

vs.

MORENO VALLEY COMMUNITY SERVICES DISTRICT, et al.;
Defendants and Appellants

HF PROPERTIES, et al.,
Real Parties in Interest and Appellants

LABORERS' INTERNATIONAL UNION NORTH AMERICA
LOCAL 1184,
Plaintiffs and Appellants,

vs.

MORENO VALLEY COMMUNITY SERVICES DISTRICT, et al.;
Defendants and Respondents

HF PROPERTIES, et al.,
Real Parties in Interest and Respondents

Appeal from the Superior Court of California
Hon. Sharon J. Waters, Judge, Case Nos. RIC1510967 MF,
RIC1511279, RIC1511327, RIC1511421 & RIC1511195

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS/APPELLANTS

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APPLICATION TO FILE BRIEF OF AMICI CURIAE

TO THE HONORABLE PRESIDING JUSTICE:

Proposed *amici curiae* Ken Alex, Dallas Burtraw, Ann E. Carlson, Fran Pavley, and Michael Wara ("California CEQA and Climate Policy Experts") make this application to file the accompanying brief in this case pursuant to California Rules of Court, Rule 8.200, subd. (c).[1] Proposed *amici* are among California's leading experts on the state's suite of climate policies, including cap and trade, and on the California Environmental Quality Act ("CEQA"). They include the primary legislative author of the Global Warming Solutions Act, which authorized the cap-and-trade program; the former head of the California Governor's Office of Planning and Research ("OPR"), which serves several key functions with respect to CEQA implementation, including coordinating state-level review of CEQA documents and developing the CEQA Guidelines in conjunction with the Natural Resources Agency; two prominent law professors who study California climate policy and

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[1] UCLA School of Law students Shalaka Phadnis and Emily Warfield contributed to the drafting of this brief through the Frank G. Wells Environmental Law Clinic. No party or counsel for any party in the pending appeal authored the proposed amicus brief in whole or in part, and no one other than *amici*, and their counsel of record, made any monetary contribution intended to fund the preparation or submission of the brief.

environmental law; and one of the leading economists tracking the design and performance of California's cap-and-trade program.

Ken Alex heads Project Climate at the University of California, Berkeley's Center for Law, Energy, and the Environment. Before joining UC Berkeley, Ken served as Senior Policy Advisor to Governor Jerry Brown and as the Director of OPR and the Chair of the Strategic Growth Council from 2011 to 2019 focusing on climate, environment, and land use issues. OPR, along with the California Natural Resources Agency, is responsible for the development of the CEQA Guidelines, administrative regulations that interpret CEQA and published court decisions. During Ken's tenure at OPR, the agency revised and published the CEQA Guidelines sections that relate to greenhouse gas impacts analysis, which are the Guidelines sections most relevant to this case. Prior to joining OPR, Ken headed the Environment Section of the California Attorney General's Office and served as the co-head of the Office's global warming unit. From 2000 to 2006, he led the California Attorney General's energy task force, which investigated price and supply issues related to California's energy crisis.

Dallas Burtraw is the Darius Gaskins Senior Fellow at Resources for the Future, where he researches the distributional and regional consequences of climate policy, the evolution of

electricity markets, and the interaction of climate policy with electricity markets. Resources for the Future is an independent, nonprofit research institution that improves environmental, energy, and natural resource decisions through impartial economic research and policy engagement. Dallas provided technical support in the design of California's cap-and-trade program, as well as emissions trading programs in the Northeast United States and the European Union. He currently serves as Chair of California's Independent Emissions Market Advisory Committee, which is an official state body created by the California Legislature to advise the California Air Resources Board regarding the environmental and economic performance of the cap-and-trade program and other relevant California climate policies.[2]

Ann E. Carlson is the Shirley Shapiro Professor of Environmental Law and Faculty Co-Director of the Emmett Institute on Climate Change and the Environment at UCLA School of Law. She is a leading scholar of climate change and air pollution law and policy and has written extensively on California climate policy and the cap-and-trade program,

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[2] The views expressed in this brief are those of the individual *amici curiae*, including Dallas, and may differ from those of other Resources for the Future experts, its officers, or its directors.

including on the topic of the relationship between California's cap-and-trade program and the state's complementary climate change measures. She currently serves as the Speaker of the California Assembly's representative to the Independent Emissions Market Advisory Committee.

Fran Pavley served two terms in the California State Senate, where she represented the 27th Senate District, and three terms in the California State Assembly, where she represented the 41st Assembly District. She is the principal author of AB 32, the legislation that authorized the creation of California's cap-and-trade program, and of SB 32, the legislation that extended California's greenhouse gas goals to 2030. During her time in the State Senate, she chaired the Senate Natural Resources and Water Committee. She currently serves on the advisory council for the California Council on Science & Technology and as the Environmental Policy Director for USC's Schwarzeneggar Institute.

Michael Wara is a Senior Research Scholar at the Woods Institute for the Environment and Director of the Climate and Energy Policy Program at Stanford Law School. His research and scholarship focuses on carbon pricing, energy innovation, and regulated industries. He has collaborated with economists, engineers, and scientists in research on the design and evaluation of technical and regulatory solutions to climate and

energy challenges. He has testified to the California legislature on climate policy design and has researched and written extensively about California's climate and energy policy, including assessments of the operation of cap and trade in relation to California's many complementary greenhouse gas reduction policies.

Because *amici* focus their policy work, research, and scholarship on California land use and climate policies, they will be affected by this Court's decision, and because they have extensive knowledge of and have been personally involved in shaping the policies at issue in this case, they may assist the Court through their unique perspectives on the design and operation of the cap-and-trade program and its relationship to CEQA and other environmental laws and policies. Accordingly, *amici* respectfully request the permission of the Honorable Presiding Justice to file this brief.

Dated: December 26, 2019

By:_____

Cara A. Horowitz
Julia E. Stein

Counsel for *Amici*
California CEQA and
Climate Policy Experts

PROOF OF SERVICE

ALBERT THOMAS PAULEK, et al.,
Plaintiffs and Respondents,

vs.

MORENO VALLEY COMMUNITY SERVICES DISTRICT, et al.;
Defendants and Appellants;

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Defendants and Appellants;

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and am not a party to the within action; my business address is 385 Charles E. Young Drive, Los Angeles, California 90095. On December 26, 2019, I served true copies of the following document(s) described as:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS/APPELLANTS

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC SERVICE: I caused a copy of the document described above to be sent via TrueFiling's electronic service system to the persons at the email addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

BY U.S. MAIL: I caused a copy of the document described above to be mailed via U.S. postal service to the Superior Court in this case, at the following address: Riverside County Superior Court, 4050 Main Street, Riverside, California 92501.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 26, 2019, at Miami, Florida.

_____

Cara A. Horowitz

SERVICE LIST

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PROPOSED BRIEF OF CALIFORNIA CEQA AND CLIMATE POLICY EXPERTS IN SUPPORT OF PLAINTIFFS/ APPELLANTS

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AMICI CURIAE BRIEF

I. Introduction

The World Logistics Center complex (the "Project"), the 40 million square foot warehouse development at the heart of this dispute, will impact the environment for decades. The resolution of this case may have an even larger footprint, answering important questions about the California Environmental Quality Act ("CEQA") and its relationship to the state's climate laws. The EIR's analysis, if endorsed, would have dire consequences for California's ability to meet its greenhouse gas ("GHG") reduction goals and would upend settled CEQA precedent about the role state-level regulation should play in assessing the significance of project impacts.

The City of Moreno Valley; HF Properties, Inc.; Sunnymead Properties; Theodore Property Partners; 13451 Theodore, LLC; and HL Property Partners (collectively, "Respondents") are asking this Court to endorse a novel approach to assessing the significance of a project's GHG emissions under CEQA. Although the Project is not regulated under California's cap-and-trade program—and, moreover, although nearly all of the emissions at issue in this case will be emitted after 2030, the sunset date of cap and trade—the Project's EIR relies on that program to write off an overwhelming majority of the Project's lifetime GHG emissions. The Project is estimated to draw 70,000 truck trips

per day at full buildout, yet the EIR declines to consider as significant ***any*** mobile source emissions associated with the Project.

Respondents' rationale for this outcome misconstrues the state's climate program, and its relationship to CEQA, by treating cap and trade as California's one-and-done policy for controlling certain greenhouse gas emissions. The EIR's analysis breaks Project emissions into "capped" emissions, which are regulated by cap and trade, and "uncapped" emissions. Because cap and trade requires "upstream" fuel suppliers and electricity generators to surrender compliance instruments while applying a declining emissions cap over time, the EIR takes the position that "downstream" emissions from mobile sources and electricity use associated with the Project are "capped," are already "mitigated" by the program, and need not be considered by the lead agency when assessing significance. (Resp. Br. at 35-36.) Asking the Project to address these emissions itself, according to the Respondents, would be "double counting," (Resp. Br. at 57) because state-level regulation already takes care of them in the most efficacious way. (Resp. Br. at 35.)

But that is not the case. California has never adopted a one-and-done approach to controlling capped emissions; in fact, the opposite is true. The state has ***not*** determined that the cap-and-trade program alone "is the most effective, efficient way to

reduce GHG emissions." (Resp. Br. at 35.) Instead, the program is designed to work together with other, coordinating and overlapping state-level emission reduction regulations and policies—including, *inter alia,* land use policies, transportation fuel policies, and CEQA. Cap and trade was never intended to be the sole, or even the main, driver of California's GHG reductions. Given its design, it cannot bear that load alone, for reasons discussed in this brief. The Project actually burdens the cap-and-trade program, and failing to reduce that burden using the robust tools that CEQA provides would create significant difficulties for California in controlling emissions, especially from the critically important transportation sector.

CEQA does not permit this result. While the CEQA Guidelines allow lead agencies to consider a project's compliance with a GHG-reducing regulation when assessing significance of project emissions, that consideration marks the beginning of the inquiry, not a *de facto* conclusion that emissions are not significant. For "capped" emissions, however, the EIR simply identifies the cap-and-trade program and ends its assessment there. It provides no analysis showing that the Project's own emissions will be reduced or mitigated by cap and trade. (In fact, it could not make that showing; the cap-and-trade program does not mitigate project-specific emissions, particularly at the Project's scale.) It does not explain how the Project would

guarantee compliance with cap and trade, given that it is unregulated by the law. And it fails to assess whether Project GHG emissions are significant even in light of compliance with the cap-and-trade regulation. In other words, the EIR assumes that the existence of a state-level regulation relieves the lead agency of the requirement to assess the significance of an individual project's impacts. This misapprehends the CEQA Guideline, which allows consideration of the state-level regulation, but does not make it dispositive. It is also wholly inconsistent with CEQA's focus on project-level impacts, and its requirement to demonstrate, both from a significance and a mitigation standpoint, that impacts are addressed. Approving such an approach would undermine the objectives of CEQA, not just in this case, but in any case where a state-level regulatory regime intersects with project impacts.

CEQA is, at its core, a public disclosure and mitigation statute. It is designed to ensure that decisionmakers and community members fully understand the significance of a project's environmental impacts in time to reduce those impacts through, among other tools, changes in project design and adoption of project-specific mitigation measures. Instead, the EIR here obscures the Project's GHG impacts by representing that most of the Project's emissions need not even be considered in weighing significance, claiming that they are "mitigated" by a

state-level program without providing any analysis or evidence showing that to be true.

The on-the-ground consequences of the EIR's misguided approach are real and illustrative. If this Project's mobile source emissions were identified as significant, Project proponents and the lead agency would be obligated to consider and adopt Project-specific mitigation measures to reduce mobile source emissions. Local decisionmakers might even decide to reject the proposal altogether once its full significance is understood. These decisions would be made before Project approval, when design changes can be most effectively implemented. By contrast, cap and trade alone cannot effectively mitigate the Project's mobile source emissions. The entities with fuel-related compliance obligations under cap and trade are third-party, distant-in-time fuel suppliers who cannot exercise control over Project design or operations. In other words, the EIR's analysis lays the burden for reducing the Project's mobile source emissions solely at the feet of a program that has very limited tools for carrying it. Writ large, this approach would undercut California's ability to meet its climate targets.

Because cap and trade does not apply to most of the Project's GHG emissions, and because the EIR's assessment of the significance of the Project's GHG emissions contradicts settled CEQA principles and misrepresents the function of the

cap-and-trade program, *amici* urge the Court of Appeal to reverse the trial court's decision.

II. Discussion

At the heart of the EIR's GHG analysis lies Respondents' argument that the cap-and-trade program "mitigates" a majority of the Project's emissions and that, accordingly, those emissions should not be considered against the GHG emission significance threshold. (See Resp. Br. at 35 ["Far from 'brushing aside' or 'ignoring' the emissions…the City accounted for them and mitigated them…"].) Respondents go so far as to suggest that assessing these emissions at the project level would be "double counting." (Resp. Br. at 57). In fact, the cap-and-trade program does not cover the time frame of the vast majority of Project GHG emissions and does not apply to warehouse projects at all. Respondents' characterization additionally misstates the CEQA Guidelines, misapprehends the nature of the cap-and-trade program, and is inconsistent with CEQA's purposes.

A. The EIR's GHG Impact Analysis Fails Because The Project Cannot Demonstrate "Compl[iance] With Regulations Or Requirements Adopted To Implement A Statewide, Regional, Or Local Plan For The Reduction or Mitigation Of Greenhouse Gas Emissions."

The CEQA Guidelines explain that, when determining the significance of a project's GHG emissions impacts, a lead agency may consider:

> 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 (see, e.g., section 15183.5(b)). 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. (CEQA Guidelines, § 15064.4, subd. (b)(3) [emphasis added].)

However, the EIR simply concludes that the Project complies with cap and trade—assuming that is sufficient to mitigate the majority of the Project's emissions for the purposes of assessing the significance of the Project's GHG impacts—without ever evaluating "the extent to which the [P]roject complies" with the program. If the extent of the Project's compliance had been analyzed, it would necessarily have been found wanting. First, the cap-and-trade regulation will sunset long before the bulk of Project emissions occur. Second, cap and

trade does not cover emissions from out-of-state fuels, which may be burned by Project traffic.

1. The cap-and-trade program will expire by operation of statute before most Project emissions occur.

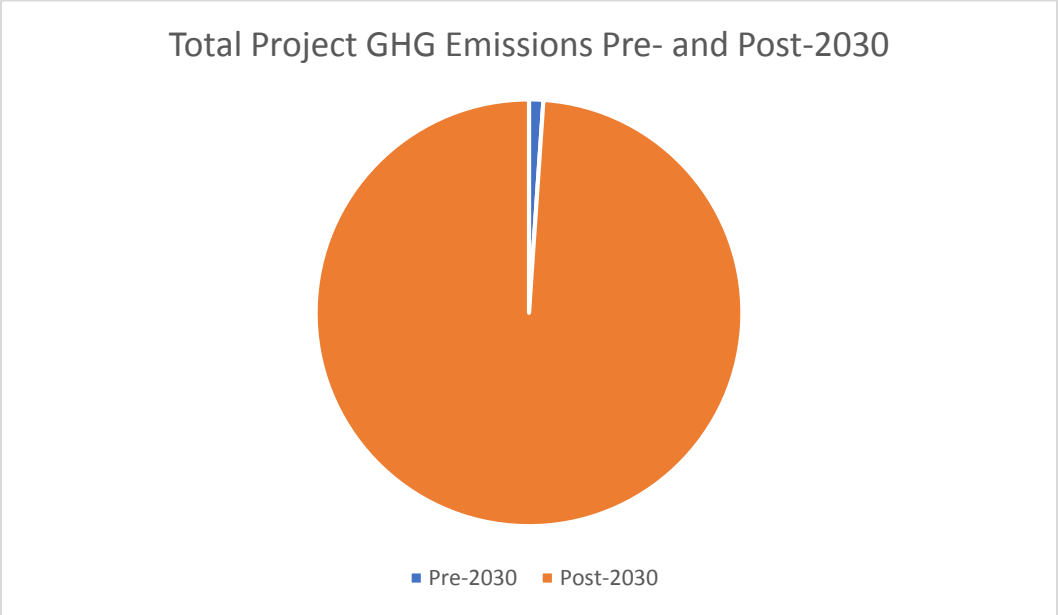
Critically, the cap-and-trade program is set to expire well before the Project is fully built out, and thus before most Project emissions occur. The EIR is clear that the Project will not be operational until 2035, ***five years after*** the cap-and-trade regulation sunsets by automatic operation of statute. (Cal. Health & Safety Code, § 38562, subd. (h).) This means that the majority of the Project's lifetime GHG emissions are not, in fact, capped at all. The cap-and-trade program therefore cannot be used as a reason to disregard those emissions.

In 2017, the California Legislature passed Assembly Bill 398, which reauthorized the cap-and-trade program, initially set to expire in 2020, for an additional decade. (Cal. Health & Safety Code § 38562; see California Legislative Analyst's Office, Cap-and-Trade Extension: Issues for Legislative Oversight ("LAO Cap-and-Trade Extension Report") (Dec. 2017) at 1.) This legislation specifically provides that the law authorizing the cap-and-trade program "shall remain in effect only until January 1, 2031, and as of that date is repealed, unless a later enacted statute which is enacted before that date, deletes or extends that

date." (Cal. Health & Safety Code § 38562, subd. (h).) Thus, unless the Legislature again affirmatively acts to extend the cap-and-trade program, it cannot continue beyond 2030. If the Legislature does nothing, cap and trade will no longer exist in ten years.

The vast majority of the Project's emissions, including nearly all of the emissions that the EIR labels as "capped," will occur after the expiration of cap and trade. Prior to 2035, the EIR estimates that the Project will emit a total of about 222,000 MT CO_2e of construction-related GHGs. Nearly 40 percent of those emissions, or about 86,000 MT CO_2e, will occur after cap and trade expires in 2030. But even total construction emissions are dwarfed by the approximately 412,000 MT CO_2e of ***annual*** emissions the Project will produce at full buildout. As demonstrated by the chart below, pre-2030 emissions represent only about 1 percent of total Project GHG emissions assuming a

30-year life for the Project at buildout.



In fact, just one year of Project GHG emissions after 2035 will exceed all Project GHG emissions before that date—and is more than triple the amount of pre-2030 construction emissions. None of the post-2030 emissions will be covered by the cap-and-trade program, unless the California Legislature enacts a change in state statute.

Respondents have tried to deflect from this fact, arguing that it would be "wrong…not to apply current law because it might change sometime in the future." (Resp. Br. at 68.) But it is Respondents who are asking this Court to assume the law might change. With no change at all, it is clear that cap and trade expires and will not apply to the gross majority of Project GHG emissions. And the Court should be wary of Respondents'

speculative approach: cap and trade reauthorization is by no means a certainty. The process to extend cap and trade beyond 2020 was politically fraught, requiring a two-thirds majority vote of the Legislature for reauthorization and inciting battles over the program's efficacy and role in addressing local sources of pollution. Just as it was prior to the original 2020 sunset date, cap and trade reauthorization to extend the program beyond 2030 may be an arduous political process, with no guarantee that the program will continue at all, or in its current form. (See, e.g., Georgina Gustin, INSIDE CLIMATE NEWS, California's New Cap-and-Trade Plan Heads for a Vote—With Tradeoffs (Jul. 15, 2017); Christopher Cadelago and Taryn Luna, SACRAMENTO BEE, California's climate change vote delayed until Monday (Jul. 12, 2017) [noting that then-Governor Jerry Brown expressed concern that a two-thirds majority would be needed to pass extension legislation and that such a threshold could not be met].)

Simply put, the Project cannot "comply" with cap and trade when cap and trade no longer exists. The EIR contains no analysis to explain why these emissions should not be considered significant in light of cap and trade's expiration, and the Court should reject Respondents' arguments and overturn the District Court's decision for this reason alone.

2. Cap and trade does not cover emissions from out-of-state fuels.

The EIR also fails to assess the extent to which mobile source emissions will necessarily be covered by the cap-and-trade program, instead assuming that all mobile source emissions are "capped". However, the cap-and-trade program is not designed to cover all mobile source emissions in California. Instead, the program requires fuel suppliers to surrender compliance mechanisms equivalent to the amount of CO_2e released from the burning of the fuels they sell ***in California***. (17 Cal. Code Regs. § 95811.) In other words, if a mobile source enters California from another state or country—Nevada, Arizona, New Mexico, Utah, or even Mexico—to travel to the Project, burning fuel that it purchased outside of California, cap and trade does not cover those emissions. A typical 18-wheel diesel truck can travel between 1260 to 2250 miles on a tank of gas, so the Project may very well attract traffic from mobile sources that purchase fuel outside California's borders.

But the EIR does not include these emissions among its assessment of "uncapped" emissions, or make any attempt to quantify the amount of mobile source emissions that will result from the burning of out-of-state fuels. Accordingly, the EIR fails to assess the extent of the Project's compliance with cap and trade and fails to meet its burden to demonstrate that these emissions should be considered insignificant. This lack of

analysis is further evidence of the EIR's misapprehension of the cap-and-trade program. All mobile source emissions are not equal under cap and trade; the EIR improperly failed to take this distinction into account.

B. The EIR's Approach Cannot Satisfy The Purpose Of A GHG Impact Analysis Under CEQA.

Even if cap and trade were not set to expire in 2030, and even if all mobile source emissions caused by the Project were the result of burning fuels purchased in California, the EIR's analysis would still be invalid under CEQA. The EIR is premised on a fundamental mischaracterization of the cap-and-trade program, one that is reiterated numerous times in Respondents' brief. (See, e.g., Resp. Br. at 35 ["The State has made the policy determination that Cap-and-Trade is the most effective, efficient way to reduce GHG emissions…the City accounted for [GHG emissions] and mitigated them in precisely the way that the authoritative California agency has determined to be the optimal way to achieve the State's emission-reduction goals."], 36 ["CARB…made it clear that it intended to have greenhouse gas emissions accounted for, and mitigated, at the producer level…"], 48 ["CARB made perfectly clear its decision that the mitigation of certain greenhouse gas emissions statewide at the production level was the most efficient, cost-effective way to implement AB 32's mandate."], 57 ["Appellants' preferred approach…would

result in double counting and double mitigating emissions that are already mitigated through cap-and-trade."].)

The EIR's misrepresentation of cap and trade is twofold. First, at the core of the analysis is the erroneous assertion that under California law, cap and trade is the primary (even sole) regulation responsible for reducing or avoiding GHG emissions from mobile sources and electricity generation, eliminating the need for overlapping regulation of projects that induce emissions from those sectors. Second, the EIR incorrectly presumes that the cap-and-trade program will mitigate ***project-level*** emissions, without any analysis to support that conclusion. These two missteps result in a GHG analysis that improperly suggests to decisionmakers and the public that the great majority of the Project's GHG emissions—including ***all*** of the mobile source emissions generated by the Project—do not need to be addressed at the project level because they are already reduced or avoided by operation of a state regulation. This is misinformation with serious consequences: it undermines CEQA's role as a transparency and public disclosure tool, and it opens the floodgates for lead agencies to make future land use decisions that will severely compromise California's ability to meet its GHG reduction targets.

1. How cap and trade works: The basics.

To assist the Court in its review of this case, we offer here a brief history of the implementation of the legislation that authorized the California Air Resources Board ("CARB") to create the cap-and-trade program, AB 32, as well as an explanation of how the cap-and-trade program works in practice.

AB 32, passed by the Legislature in 2006, was a broad piece of legislation that codified an ambitious GHG emission reduction mandate: It requires California to reduce its statewide GHG emissions back to 1990 levels by the year 2020. (Cal. Health & Safety Code § 38550.) The legislation directed CARB to develop a scoping plan of state-level policies that would lead to the achievement of that goal, and authorized CARB to enact regulations that would implement the policies set forth in the scoping plan. (Cal. Health & Safety Code § 38561, subd. (a).) CARB's first Scoping Plan set forth "a comprehensive array of emissions reduction approaches and tools" to meet the 2020 goal, which included a number of overlapping, complementary policies such as the state's Renewable Portfolio Standard (aimed at increasing generation of electricity from renewable sources), the Low Carbon Fuel Standard (aimed at reducing greenhouse gas emissions from transportation fuels), land use and transportation policies (aimed at reducing emissions from transportation), the expansion of energy efficiency programs (aimed at reducing

emissions from electricity usage), and cap and trade (aimed at pricing greenhouse gas emissions from certain sectors, ultimately to include both electricity generation and transportation fuels). (California Air Resources Board, Climate Change Scoping Plan: A Framework for Change (Dec. 2008) at ES-3-ES-4.) Notably, many of these policies targeted emissions from the same sectors. No single one of these policies was intended to meet the 2020 goal itself, but, working in concert, they were designed to achieve the target.

Since the adoption of the original Scoping Plan, the Legislature has codified additional GHG reduction mandates, including reaching at least 40 percent below 1990 levels by 2030 and net zero emissions from electricity generation by 2045. (Cal. Health & Safety Code § 38566; Cal. Pub. Util. Code § 454.53, subd. (a).) Before leaving office, Governor Brown signed an executive order directing the state to achieve a carbon neutral economy by 2045. (Executive Order B-55-18 to Achieve Carbon Neutrality [establishing a goal "to achieve carbon neutrality as soon as possible, and no later than 2045, and achieve and maintain net negative emissions thereafter."].) These new targets are designed to make California's emission reduction progress more consistent with evolving science demonstrating that the most severe impacts of climate change could be somewhat alleviated if global temperature rise is contained to

less than 1.5 degrees Celsius. (California Air Resources Board, California's 2017 Climate Change Scoping Plan ("2017 Scoping Plan Update") (Nov. 2017) at ES3; Intergovernmental Panel on Climate Change, Global Warming of 1.5°C: Summary for Policymakers (Oct. 2018) at 7, 9-12.) The Scoping Plan has been updated as well, and continues to rely on a broad range of policies, including land use and transportation policies, fuels-related policies, energy efficiency policies, and renewable energy policies, to achieve newer targets. (See 2017 Scoping Plan Update at ES4, 1.) CARB has consistently indicated in the Scoping Plan and otherwise that achievement of the state's emission reduction goals is not possible without a commitment to this wide range of policies; no one policy or regulation will be enough to achieve the statewide goals. (See, e.g., 2008 Scoping Plan at 15 ["Reducing greenhouse gas emissions from the wide variety of sources can best be accomplished through a cap-and-trade program along with a mix of complementary strategies that combine market-based regulatory approaches, other regulations, voluntary measures, fees, policies, and programs."]; 2017 Scoping Plan Update at ES4 ["The Plan underscores that there is no single solution but rather a balanced mix of strategies to achieve the GHG target."].)

As part of AB 32, CARB was given the authority—but not, as Respondents suggest, the mandate—to establish a market-

based emission credit trading mechanism. (Cal. Health & Safety Code § 38570, subd. (a) ["The state board ***may*** include in the regulations adopted pursuant to Section 38562 the use of market-based compliance mechanisms to comply with the regulations."] [emphasis added].) CARB elected to create the cap-and-trade system alongside the other emission reduction policies set forth in the Scoping Plan. (California Air Resources Board, California's Cap-and-Trade Program Final Statement of Reasons ("2011 FSOR") (Oct. 2011) at 156 ["This market-based program is… designed to work in concert with…standards for cleaner vehicles, low-carbon fuels, renewable electricity, and energy efficiency."].) From the outset, CARB viewed the cap-and-trade program as just one of multiple regulatory efforts aimed at achieving GHG emission reductions from covered sectors. Indeed, other state-level policies—not cap and trade—were intended to do the bulk of heavy lifting on GHG reductions. (See 2008 Scoping Plan at 22.)

The cap-and-trade program was initially set to expire by operation of statute in 2020. As discussed above, extension legislation passed and the program now sunsets in 2030, five years before the Project will reach full buildout. (Cal. Health & Safety Code § 38562, subd. (h).) Under the cap-and-trade program, covered entities, such as electricity generators, industrial sources, and fuel suppliers, are required to surrender

compliance mechanisms to CARB equal to the amount of their in-state emissions in a given compliance period. (See 17 Cal. Code Regs. §§ 95850, 95855, 95856.) Warehouses are not among the covered entities. Covered entities can comply with the program's requirements in three ways: (1) by reducing their emissions; (2) by obtaining allowances, with each allowance essentially serving as a permit to emit one ton of CO_2e; and/or (3) by obtaining offsets, which are generated by certified emission reduction projects from sources that aren't covered by cap and trade, like forestry projects. (See, e.g., 17 Cal. Code Regs. §§ 95820, 95970, 95990, 95991.)

In the context of fuel emissions and electricity generation emissions, as Respondents concede, compliance obligations rest with the fuel supplier or the electricity generator, rather than with the end user of the fuel or electricity. (17 Cal. Code Regs. § 95811.) Where, as here, a project results in increased mobile source emissions, the project itself doesn't bear compliance responsibility when drivers burn fuel to get to the project. Instead, compliance mechanisms for the portion of the fuel that is supplied in-state—as discussed above, out-of-state supply is not covered by the cap—would be surrendered by the suppliers of the fuels those drivers have put in their cars or trucks.

Under the program, the number of total allowances available is capped, and the aggregate statewide cap declines

over time. Emissions from any given project or any covered sector, however, need not decline—and may even rise year over year. This is in part because entities that hold excess allowances may sell those allowances to entities that need them to come into compliance. (See 17 Cal. Code Regs. §§ 95920, 95921.) A significant portion of allowances are allocated for free to certain entities, and CARB holds quarterly allowance auctions of most of the remaining allowances, subject to a price floor. (17 Cal. Code Regs. §§ 95910-95915.)

The higher the demand for allowances, the higher allowance prices climb, creating a price signal that should reduce statewide emissions and help keep emissions below the cap. However, there is a limit to how high allowance prices can rise—and this limit, if reached, can function to create a "hole" in the cap. A small portion of allowances is allocated to a special reserve, the APCR, and those allowances are made available at higher prices once certain trigger levels are hit, creating a "soft" price ceiling that is intended to create market stability rather than accurately price GHG emissions commensurate with the harms they cause. (California Air Resources Board, Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Final Statement of Reasons ("2017 FSOR") (Aug. 2017) at 504 [explaining that the APCR price was designed "looking at the cost of abatement; as opposed

to the Social Cost of Carbon, which looks instead at a cost range related to damages caused by emissions."].) As part of the cap-and-trade extension legislation, CARB was directed to set a "hard" price ceiling, which will allow ***unlimited*** new allowances to be sold at the ceiling price. (Cal. Health & Safety Code § 38562, subd. (c)(2).)

This is a key point: If capped emissions don't decline sufficiently quickly, allowance prices may rise and hit CARB's "hard" price ceiling, triggering the sale of unlimited new allowances. (See Severin Borenstein et al., Expecting the Unexpected: Emissions Uncertainty and Environmental Market Design ("Borenstein Cap and Trade Report") (Aug. 2019) at 2-3 [explaining that the combination of uncertainty surrounding "business as usual" emissions and price-inelastic emissions abatement supply make prices at the ceiling one of the most likely cap and trade outcomes].) Depending on how long allowance prices sit at the ceiling and how many allowances are sold at that price, this could undermine or even negate the statewide cap on emissions. Thus, each of CARB's overlapping and complementary programs that reduces emissions from capped sectors plays an important role in keeping allowance prices down, emissions below the cap, and the cap-and-trade program functioning well. If left to bend California's emissions trajectory downward to the 2030 statewide limit through

allowance prices alone, cap and trade would likely not succeed. And because the existence of the "hard" price ceiling effectively removes the program's cap for emissions between years 2021 and 2030, Respondents' fundamental premise—that the existence of the cap means the Project's mobile source emissions must necessarily be mitigated—also fails.

Another important feature of the cap-and-trade program is the ability to bank allowances. While the cap represents the maximum number of emissions from allowances that are issued in any given year, emissions can, and do, sometimes fall below that maximum, and unused emissions allowances may be carried forward to a subsequent year when they can be used for compliance. (17 Cal. Code Regs. § 95922.) Conversely, real world emissions can exceed the number of emissions allowances issued in a given year, if unused allowances from a previous year are available to meet compliance obligations. (See LAO Cap-and-Trade Extension Report at 9.) In other words, while CARB plans to make fewer allowances available on the market each year, that does not necessarily mean that capped emissions will decrease year to year, because of banking of older allowances (and because of the price ceiling mechanisms described above). Allowance banking is, again, a price stabilizing mechanism for the cap-and-trade market—but it also creates the possibility that annual emissions targets, like California's 2030 target, may not be met

because compliance with the cap-and-trade program will be achieved through the use of banked allowances. (See LAO Cap-and-Trade Extension Report at 9 [explaining that due to banked credits, the Legislative Analyst's Office "found this general result—2030 emissions significantly higher than the annual target—under a couple different scenarios we analyzed."]; 2011 FSOR at 165.)

Lastly, it is important to note that CARB can adjust the annual statewide cap either upward or downward. (See Cal. Health & Safety Code § 38562, subd. (c)(2); LAO Cap-and-Trade Extension Report at 9, 14 [identifying cap adjustment as an area for legislative oversight].) This means, for example, that if complementary policies are doing an especially good job of controlling capped emissions and the state's emissions trajectory is declining faster than anticipated, the state can "capture" those gains. There is no sense in which the state's current cap is its emissions destiny.

2. Cap and trade was designed to work together with other laws, like CEQA, that reduce emissions from transportation—and it would be overburdened to the breaking point if asked to work alone.

Respondents argue that "the EIR and the City Council reasonably concluded that the impacts of the capped emissions have already been addressed by the cap-and-trade program, which ensures consistency with statewide greenhouse gas emissions reduction goals." (Resp. Br. at 56.) But this misapprehends the nature of the cap-and-trade program and its place among a large stable of state-level GHG regulations that are collectively intended to push California toward its ambitious GHG reduction targets. Cap and trade is not, and was never intended to be, the one regulation that guarantees compliance with statewide GHG emission reduction goals, and accordingly, even compliance with the program cannot *de facto* lead to a conclusion that a project's GHG impacts have been adequately mitigated.

If this Court were to adopt the EIR's approach, effectively releasing lead agencies from the requirement to mitigate transportation emissions at the project level and at the stage of project design and approval, emissions from developments like the Project would rise significantly as compared with the contrary case. The cap-and-trade market would have to absorb

that additional pressure. Respondents are, in essence, asking the Court to force other market sectors—heavy industry, fuel suppliers, electricity generators, and the like—to bear the weight of reducing emissions created by the development sector. That is not cap and trade's purpose or design.

Indeed, the cap-and-trade program is a minority contributor to GHG emissions reductions, and California cannot reach its looming GHG reduction mandates with cap and trade alone. Both the original Scoping Plan and the two subsequent Scoping Plan updates, as well as CARB's Final Statements of Reasons for the cap-and-trade and cap-and-trade extension regulations, are clear that CARB has never intended the program to be the sole mechanism through which statewide GHG reduction goals are met, even as to capped emissions. (See, e.g., 2011 FSOR at 138 [CARB "is pursuing both direct command-and-control regulations, such as, but not limited to, the low carbon fuel standard, advanced clean car regulation, stationary refrigeration regulation, and a market-based cap-and-trade regulation to reduce GHG emissions."]; 2017 FSOR at 1022 [explaining that in certain sectors, pressure from other programs causes GHG emissions reductions, meaning "the cap decline factor is not needed as an incentive to reduce GHG emissions."].) CARB has explained that cap and trade "is used to supplement, rather than replace, direct regulation approaches. It is also

designed to work in concert with other measures…" (2011 FSOR at 156.)

This fact is widely recognized even beyond CARB, especially in the context of land use decisions and transportation emissions. (See, e.g., California Air Resources Board, First Scoping Plan Update, Appendix D1 [California Air Pollution Control Officers Association's and Other Regional Efforts to Implement Climate Protection Strategies] (Feb. 10, 2014) at D1-2.) For example, the California Air Pollution Control Officers Association ("CAPCOA") explains "it is clear that state actions alone won't be sufficient [to meet coming statewide reduction goals]. State policy is most effective with the support, engagement, and complementary actions of regional and local efforts." (*Id.*) CAPCOA specifically points to mobile source emissions reductions as an area where state-level action must be supplemented by regional and local governments "through land use planning, both on a project-level basis and in integrated, long term blueprints…" and explains that state-level efforts to reduce mobile source emissions are undercut by regional and local decisions that do not prioritize GHG emissions reductions. (*Id.*) Indeed, the California Legislature re-authorized cap and trade in 2017 knowing that the program would continue to work alongside other complementary statutes and regulations designed to reduce transportation sector GHG emissions, such as SB 375—

comprehensive legislation designed to achieve emissions reductions from mobile sources using local land use and transportation planning tools—and the Low Carbon Fuel Standard. (See, e.g., Cal. Gov. Code §§ 14522.1, 14522.2, 65080.) The Legislature did not consider such overlapping measures to constitute "double counting" of mobile source emissions, but instead concluded that they were necessary to provide needed redundancy in light of the complex problem presented by transportation emissions.

CARB has consistently analyzed the percentage of necessary reductions it expects to be achieved by the cap and by other complementary measures, including the Low Carbon Fuel Standard, the Renewable Portfolio Standard, and regional land use and transportation measures; cap-and-trade does not account for even a majority of the needed GHG emissions reductions in those assessments. (See, e.g., 2017 Scoping Plan Update at 28.) CARB expects cap and trade to account for less than a third of the emissions reductions needed to meet California's 2020 target, and less than 40 percent of the emissions reductions needed to meet the 2030 target. (2008 Scoping Plan at 22; 2017 Scoping Plan Update at 26, 28.) Because other state-level, regional, and local policies are themselves effective at reducing GHG emissions, cap and trade allowance prices have historically remained low, auctioning for less than half of Social Cost of

Carbon estimates that many states use. (Borenstein Cap and Trade Report at 3, 23-24; see 2017 FSOR at 504 [allowance prices are not intended to reflect the Social Cost of Carbon].)] This means that, far from accurately reflecting the price to reduce or avoid the full amount of GHG emissions from covered sectors needed to meet statewide goals, as Respondents suggest (Resp. Br. at 57), cap-and-trade allowance prices understate those costs and the program itself simply serves as one program among many. In short, whatever the merits of cap and trade as a partial driver for GHG emissions reductions, it cannot be considered full mitigation for the cumulative impacts of carbon emissions, which is what the EIR proposes.

And because of the "hard" price ceiling the Legislature has directed CARB to create, it is critical that other emission reduction programs continue to take a laboring oar in reducing emissions from capped sectors. Otherwise, allowance prices could skyrocket as the system bears a burden it was never designed to hold. (Borenstein Cap-and-Trade Report at 23-24 [explaining that without complementary policies, the probability of very high allowance prices "more than triples" and could result in price ranges "likely to be politically unacceptable."].) As discussed *supra*, a result of skyrocketing allowance prices could be to undermine the cap, with unlimited allowances available for sale at the ceiling price.

In sum, the existence of the cap-and-trade program does not displace the need to use other state-level, regional, and local policies—including thoughtful land use decisionmaking through the CEQA process—to control emissions from capped sectors. To the contrary, cap and trade works well only if complementary policies are employed, too. Because it acts in concert with other policies to meet statewide goals, cap and trade cannot be relied upon alone as evidence that project-level emissions have been "mitigated" and are not significant. In fact, such an approach would overburden the cap-and-trade market and make it challenging for California to meet its emissions reduction targets. And for those same reasons, the EIR's approach is inadequate for CEQA purposes: The mere existence of the program cannot guarantee that the Project's emissions are addressed, and the EIR's lack of analysis to show that they are renders the document insufficient under CEQA.

3. Cap and trade will not ensure that Project-level emissions are reduced.

Cap and trade sets an economy-wide emissions cap that is not project- or sector-specific. This means that while the overall cap declines over time, emissions from an individual project need not, and often do not, decline. Even emissions from an entire sector may not decline in any given compliance period, as long as there are adequate allowances on the market to allow all covered

entities to meet their compliance obligations. Respondents say this doesn't matter; because the overall cap declines over time, this must mean that somewhere, someone is "mitigating" mobile source emissions in a way that allows California to achieve its climate targets. Their view is that because the statewide cap exists, it doesn't matter whether there are project-level efforts to reduce emissions; in aggregate, emissions will be reduced enough by operation of the cap.

In reality, though, the need for simultaneous project-level efforts to reduce emissions remains strong, for all of the reasons discussed *supra*. This is especially true with respect to the Project's transportation emissions, which make up the bulk of the emissions at issue in this case. Transportation emissions from the Project, and from similar development proposals around the state, will not be adequately controlled by cap and trade alone because significant mechanisms for reducing transportation sector emissions, like changing local land use patterns and making mass transit improvements, are out of the hands of fuel suppliers—who are the only covered entities with compliance obligations for transportation fuels under the cap. The success of California's climate policies depends, in part, on local and regional land use authorities and project developers working to reduce project-level GHG emissions throughout the design, approval, and operational phases of proposed projects.

Traditional CEQA mitigation tools, as applied to GHG impacts, are critical in these efforts, especially for a project that results in the creation of 70,000 truck trips per day that would otherwise not occur. The upshot of the EIR's approach is to leave meaningful, project-specific mitigation measures that would reduce transportation emissions on the table.

This is particularly troubling because accelerating reductions in transportation sector emissions is critical to achieving the statewide climate goals. In the worst-case scenario, overburdening the cap-and-trade system in this way could destabilize the market entirely, reducing even cap and trade's economy-wide efficacy as mobile source emissions associated with the development sector continue to rise.

4. The EIR's GHG analysis undermines CEQA's purpose and role.

Because it misrepresents the nature of the cap-and-trade program, the ability of the Project to ensure compliance with cap and trade, and the potential for mitigation of Project GHG emissions through cap and trade, the EIR's GHG analysis is inconsistent with CEQA's "fundamental goal": to ensure the public and decisionmakers are fully informed about a project's possible significant environmental impacts. (See *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 447.) The Project's EIR cannot serve its

proper purpose as an "environmental 'alarm bell'" when it dramatically understates the extent of the Project's GHG impacts, and, in turn, the amount and type of mitigation that would be required to address them. (See *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810; see also Cal. Pub. Res. Code § 21061 [the purpose of an EIR is to provide "detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project."].)

The EIR's analysis is misleading in two significant ways. First, the EIR improperly concludes, without any supporting analysis, that the existence of the cap-and-trade program means Project emissions are necessarily less than significant. Second, the EIR plays fast and loose with the term "mitigation," suggesting that Project emissions are "mitigated" for CEQA purposes when they are not, with serious adverse consequences for both this case and the ability of California to meet its GHG reduction targets.

a. The existence of state-level regulation does not obviate the need for a robust significance analysis under CEQA.

Respondents contend that the mere existence of the cap-and-trade program is enough to conclude that GHG impacts from

"capped" sources associated with the Project are not significant. But the EIR contains no analysis to support this conclusion. CEQA does not permit such a logical leap.

CEQA is designed to assess the significance of project-level impacts and ensure mitigation of those impacts. (See Cal. Pub. Res. Code §§ 21002; 21081.) Even though the cap-and-trade program may reduce economy-wide GHG emissions, it has no nexus to the Project's impacts: GHG emissions from the Project will not necessarily decline as a result of the operation of cap and trade and may even increase despite the existence of the program. Equally as important from a CEQA perspective, the Project has no control over whether the entities responsible for the "capped" emissions associated with the Project will actually meet the requirements of the law. The cap-and-trade program applies to a variety of covered entities in the industrial, electricity generation, and fuel production sectors. (17 Cal. Code Regs. § 95811.) Those entities are subject to compliance obligations under the law and must accordingly surrender compliance instruments to the state. (*Id*. at §§ 95811, 95850-95859.) But the Project is not among them: warehouses are not covered entities under cap and trade. (*Id*. at § 95811.) Respondents attempt to downplay the significance of this fact in their brief, calling the line between projects directly covered by cap and trade and those not covered at all, but which may draw

"downstream" emissions, "a distinction without a difference." (Resp. Br. at 63.) To the contrary, the distinction is key, not just for this case but for its CEQA implications more generally. Unlike a refinery, which itself must submit compliance mechanisms under cap and trade and can therefore guarantee that its emissions are being mitigated through the program, the Project has no compliance obligation, and no way to ensure that those who do have such obligations meet them. Without any way to ensure or demonstrate compliance—and without any attempt to explain how it ***could*** demonstrate compliance—the Project cannot fairly be said to meet its CEQA obligations. (See Cal. Nat. Res. Agency, Final Statement of Reasons for Regulatory Action, Amendments to the State CEQA Guidelines, OAL Notice File No. Z-2018-0116-12 (Nov. 2018) ("Nov. 2018 Guidelines FSOR") at 95 ["…it is only those plans and regulations that are enforceable against a particular project that a lead agency should consider."][discussing a lead agency's assessment of consistency with a plan or regulation for purposes of a GHG impact significance analysis].)

Setting aside the fact that the Project cannot itself ensure compliance with cap and trade, the EIR is required to present evidence demonstrating that compliance with an existing regulation or plan will, in fact, render emissions less than significant, and is also required to consider evidence that, despite

compliance with the regulation or plan, emissions will still rise to the level of significance. (See CEQA Guidelines §§ 15064, 15604.4; Cal. Nat. Res. 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 ["SB 97 FSOR"] (Dec. 2009) at 27, 98.) The Project's EIR did neither here.

"Compliance with the law is not enough to support a finding of no significant impact under the CEQA." (*Californians for Alternatives to Toxics v. Department of Food & Agriculture* (2005) 136 Cal.App.4th 1, 17 [citing *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881-882.].) Courts have consistently found that EIRs must do more than simply recite the existence of a state-level regulation or program when considering the significance of environmental impacts. (*Id.*; see also *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715 ("*SCOPE*").)

For example, in *Californians for Alternatives to Toxics v. Department of Food & Agriculture*, the State Department of Food and Agriculture ("DFA") developed a plan to address diseased grapes in vineyards, including vegetation removal and the use of pesticides. (*Californians for Alternatives to Toxics*, 136 Cal.App.4th 1, 9.) In concluding that the application of pesticides

would not cause an environmental impact, DFA relied on the existence of state and federal pesticide regulations and licensing and worker safety regulations. (*Id*. at 10.) The agency concluded that consistency with these regulatory schemes was sufficient to determine that impacts would be reduced to less than significant. (*Id*. at 17.) The court disagreed, finding that "DFA repeatedly deferred to the [state] regulatory scheme instead of analyzing environmental consequences of pesticide use and therefore fell short of its duty under CEQA to meaningfully consider the issues raised by the proposed project." (*Id*. at 16.) The EIR contained no analysis of the risks of utilizing particular pesticides or of their possible environmental or human health impacts. (*Id*. at 18.) While the existing state law was designed to regulate pesticide administration, the EIR contained no evidence to demonstrate that compliance with the program would not result in adverse environmental effects, and accordingly, the EIR's "conclusory statements [did] not fit the CEQA bill." (*Id*. at 17.)

Similarly, in *SCOPE*, an EIR improperly relied on the State Water Project's allocation of water deliveries to conclude that the project in question would not create significant water supply impacts, without analyzing the state program's application to the project in practice. (*SCOPE*, 106 Cal.App.4th 715, 720-721.) The EIR instead made "no attempt to calculate or even discuss the differences between entitlement and actual supply." (*Id*. at 722.)

Nor did the EIR give any suggestion that the operation of the program could not "be taken at face value," even though in reality, it was unclear whether the project's water supply impacts would truly be ameliorated by the program. (*Id*. at 723.) The end result, concluded the court, was that decisionmakers and the public could not arrive at a meaningful understanding of the project's impacts. (*Id*. at 722.)

And specifically in the context of GHG impacts analysis, the California Supreme Court has explained that mere reliance on and extrapolation from a state-level plan to project impacts is not enough; substantial evidence must support a conclusion that GHG impacts are not significant. (*Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204 ("*Newhall Ranch*").) In *Newhall Ranch*, the project's EIR referred to CARB's statewide Scoping Plan and its determination that statewide emissions would need to drop roughly 29 percent below "business as usual" levels in order to achieve California's GHG reduction targets. (*Newhall Ranch*, 62 Cal.4th at 218.) Finding that the project's own emissions would fall 31 percent below a hypothetical "business as usual" scenario, the EIR concluded that the project would not impede progress towards California's climate goals and that its impacts were accordingly less than significant. (*Id*.) The Supreme Court rejected this analysis, explaining that even though the EIR could look to consistency

with the Scoping Plan as a measure for determining the significance of project emissions, it did not contain adequate analysis explaining how the project's own GHG emissions reductions would be consistent with meeting the statewide reduction goal. (*Id*. at 225.) In other words, the EIR could not just conclude that a reduction in project emissions consistent with the state-level plan would necessarily result in less than significant GHG impacts; it had to support that conclusion with substantial evidence in the record. (*Id*. at 226-227.)

So too in this case. Just as in *Californians for Alternatives to Toxics* and *SCOPE* the EIR simply points to the existence of a state scheme—in this case, cap and trade—and declares the Project's GHG impacts insignificant. But the existence of, and potential compliance with, a regulation is "a starting point for a lead agency's analysis," not an automatic pass to skip a meaningful significance analysis. (Nov. 2018 Guidelines FSOR at 95.) Critically, the lead agency must consider whether "a project may still have a significant impact despite compliance with the regulation." (SB 97 FSOR at 98.) Thus, the EIR was required to demonstrate, first, that the Project would comply with the regulation, and next, that compliance with the regulation would, in actuality, render Project impacts less than significant. The EIR never explains how "capped" Project emissions could or would be reduced to less than significant. It offers no suggestion

for how the Project would ensure that fuel suppliers or electricity generators actually comply with the cap-and-trade regulation. Nor does it acknowledge the additional stress on the cap-and-trade system of declining to minimize the great majority of the Project's emissions, instead laying responsibility for reductions at the feet of fuel suppliers, who have no ability to control project design or operations. And it never explains that cap and trade does not require reduction or avoidance of the Project's specific emissions at all. "In the absence of substantial evidence to support the EIR's no-significance finding…the EIR's readers have no way of knowing whether the project's likely greenhouse gas impacts will indeed be significant, and, if so, what mitigation measures will be required to reduce them." (*Newhall Ranch*, 62 Cal.4th at 227.)

Respondents argue that the holding in *Association of Irritated Residents v. Kern County Board of Supervisors* (2017) 17 Cal.App.5th 708 ("*AIR*") is an endorsement of the EIR's approach. But *AIR* did not hold "that a threshold of significance for CEQA purposes could consider only greenhouse gas emissions not covered by the cap-and-trade program." (Resp. Br. at 37.) Instead, in *AIR*, the Fifth District Court of Appeal concluded that the project, a refinery that itself was subject to compliance obligations under the cap-and-trade program, could rely on its compliance with the program to demonstrate that certain of its

GHG emissions—notably, ***not*** its mobile source emissions—would be less than significant. (*AIR*, 17 Cal.App.5th at 742-744.) The fact that the *AIR* project had compliance obligations and could, in practice, ensure its own compliance with the cap-and-trade regulation is a critical distinction.

But to the extent that *AIR* held emissions for which the *AIR* project itself held no compliance obligation, like electricity generation emissions, could be treated as less than significant under cap and trade because other "upstream" entities have compliance obligations under cap and trade, that conclusion was incorrect, and this Court should decline to adopt that approach. As explained above, treating such emissions as necessarily less than significant, without more analysis, ignores the realities of the cap-and-trade program and understates the Project's GHG impacts. It also incorrectly places the burden of mitigating the Project's GHG emissions on entities that cannot control them and have no real obligation to reduce or avoid them.

Allowing the EIR to declare "capped" GHG emissions less than significant under these circumstances would have serious implications for California climate policy and for the administration of CEQA. It would lead to ill-informed land use decisions that overburden our state-level regulatory programs and make compliance with our upcoming GHG reduction targets all the more challenging. It would also undercut CEQA's

fundamental role as a public disclosure and transparency statute by allowing lead agencies to rely on the existence of a state-level regulation, without more, to justify a conclusion that project-level impacts are less than significant. A holding of that nature would have consequences not just in the realm of climate policy, but any time a state-level regulatory program intersects with project-level impacts. It would also be inconsistent with past precedent explaining the role state-level regulation should play to inform significance determinations. (See, e.g., *Californians for Alternatives to Toxics*, 136 Cal.App.4th at 17; *SCOPE*, 106 Cal.App.4th at 720-722.)

The CEQA Guidelines only allow that a lead agency may consider ***the extent of a project's compliance*** with an applicable GHG mitigation regulation when assessing significance of project emissions, but the mere existence of the regulation alone is not enough to remove project emissions from a significance calculus. Because the Project cannot ensure compliance with cap and trade, and because even if it could, compliance with the program is not conclusive evidence that the Project's GHG impacts are less than significant, the EIR was required to analyze the significance of the so-called "capped" emissions it discounted. (CEQA Guidelines, § 15064.4, subd. (b)(3); SB 97 FSOR at 98.) Its failure to do so renders the EIR

inadequate. (*Newhall Ranch*, 62 Cal.4th at 226-227; *Californians for Alternatives to Toxics*, 136 Cal.App.4th at 17.)

b. Project emissions are not "mitigated" as required by CEQA.

Respondents' brief repeatedly states that cap and trade will "mitigate" the Project's GHG emissions. (See, e.g., Resp. Br. at 35, 49, 57.) This terminology conflates the concept of mitigation of GHG emissions—meaning the reduction or avoidance of GHG emissions—with the concept of mitigation under CEQA, which requires that steps be taken to reduce project-specific environmental impacts. Eliding the two concepts, Respondents suggest that "the source of mitigation for greenhouse gases from fuel combustion—whether at the project level or the fuel supplier level—is irrelevant…" (Resp. Br. at 49.) But from a CEQA perspective, that statement is untrue.

As the California Natural Resources Agency, one of the state agencies responsible for updating the CEQA Guidelines, has explained, "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." (SB 97 FSOR at 27.) This is consistent with the well-settled CEQA principle that mitigation of project impacts must be fully enforceable and implemented as a condition of project development. (See, e.g., Cal. Pub. Res. Code § 21081.6, subd. (b);

CEQA Guidelines § 15126.4, subd. (a)(1)(D); *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1035; *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1260-1261.) Even Respondents acknowledge that mitigation of Project emissions has to be "enforceable and verifiable." (Resp. Br. at 49.)

Where mitigation is speculative and vague, it is inadequate under CEQA. (See *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 197-198; *Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 445 [mitigation must be feasible and enforceable].) Traditionally, CEQA mitigation occurs at the project level, and the adequacy of mitigation is subject to a project-by-project analysis. (See *California Native Plant Society v. County of El Dorado* (2009) 170 Cal.App.4th 1026, 1053; *Environmental Council of Sacramento*, 142 Cal.App.4th at 1024-1028.) Where mitigation is untethered to project-specific mitigation measures themselves, like in the case of in-lieu fee programs that allow a developer to pay into a fund to mitigate project impacts, CEQA still requires the proposed mitigation to be "sufficiently tied to the actual mitigation of the impacts." (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 140-141 [specific traffic improvement projects funded by

mitigation fees were in place and would actually reduce traffic impacts caused by the project]; see also *California Clean Energy Committee*, 225 Cal.App.4th at 197-199 [fee program to support fair share plans was impermissibly speculative mitigation and EIR did not adequately explain how it would address project impacts]; *California Native Plant Society*, 170 Cal.App.4th at 1056 [payment of a mitigation fee alone was not enough to ensure that project-level impacts would be mitigated to insignificance]; *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1188.)

Here, the EIR makes no attempt to tie the supposed cap-and-trade "mitigation" to mitigation of Project-specific GHG emissions—because it cannot. As discussed *supra* in Section II.B.3, the cap-and-trade program imposes an economy-wide cap, and as such provides no way to track or account for how the Project's own emissions would be reduced or avoided, if at all. And there is no way for the lead agency or the Project to enforce cap and trade against the fuel suppliers or electricity generators that hold compliance obligations under the regulation, or for them to verify that an adequate number of compliance mechanisms have been surrendered to cover the Project's emissions. This feature makes the cap-and-trade "mitigation" Respondents propose even more speculative than in-lieu fee programs: in the case of in-lieu fees, projects at least pay into fee

programs, but in this case, the Project has no relation to or involvement with the cap-and-trade program at all.

It also exemplifies the misleading nature of the EIR's GHG impacts analysis. The EIR suggests that the Project's own emissions will be reduced or avoided by operation of the cap-and-trade program such that decisionmakers and the public need not be concerned about the hundreds of thousands of metric tons of new GHG emissions the Project will produce ***every single year*** after it is built out. In reality, the Project will severely compromise Moreno Valley's ability to meet long-term climate goals. To illustrate, the City of Moreno Valley's own Energy Efficiency and Climate Action Strategy explains that to meet AB 32 targets, the City will have to implement local emission reduction policies. (City of Moreno Valley, Energy Efficiency and Climate Action Strategy ("Climate Action Strategy") (Oct. 2012) at 4 ["For California to reach its greenhouse gas reduction goals, communities must address how they grow."], 6 ["the City would still need to supplement the statewide measures with the implementation of local reduction policies" to meet its 2020 target].) To achieve compliance with AB 32, the City set a 2020 target of about 779,790 metric tons of CO_2e. (Climate Action Strategy at 6 [stating an emissions reduction target of 15 percent below 2010 emissions to meet 2020 mandate].) Assuming the City is able to meet its target and hold steady to that reduction

through Project buildout, the first year of Project emissions after buildout would result in total City emissions of 171,003 metric tons CO_2e ***above*** 2010 levels—rather than the 15 percent ***below*** 2010 levels that the City has committed to—totally erasing the City's progress toward its climate goal. All told, the Project alone would cause a nearly 40 percent jump in the City's emissions over and above its 2020 target. What's more, this analysis understates the Project's emissions impact relative to the City's climate goals because the City has not yet revised its Climate Action Strategy to meet 2030 reduction targets, which are even more ambitious. In other words, to stay on track to meet statewide climate mandates, the City would have to find some way to reduce ***more than one-third*** of its total annual emissions to accommodate the Project's emissions. Fuel suppliers cannot guarantee these reductions; it is the City and the Project that are "uniquely capable of addressing [these] emissions…" (Climate Action Strategy at 4.)

But the EIR does not contemplate Project-specific mitigation measures, having written off the bulk of those emissions before even comparing Project emissions to the Air District significance threshold. The EIR suggests that over 90 percent of the Project's GHG emissions will be mitigated by somebody else, but that is not, and in practicality cannot be, the case. Without properly acknowledging and attempting to

mitigate these emissions, the EIR cannot serve its proper purpose as an "informational document." (See Cal. Pub. Res. Code § 21061; Cal. Pub. Res. Code §§ 21002, 21081 [requiring mitigation of a project's significant environmental impacts].)

III. Conclusion

The EIR's analysis of the Project's GHG impacts misapprehends the cap-and-trade program and misinforms the public and decisionmakers about the true significance of the Project's emissions. The case for reversing the lower court decision on these facts strikes us as particularly strong, given the post-2030 timing of Project's emissions and the flimsy relationship of the Project to cap-and-trade compliance obligations. But beyond that, the cap-and-trade program was never intended to be California's sole mechanism for reducing emissions from capped sectors and should not be forced to bear that weight. The EIR's analysis, if endorsed, would have dire consequences for California's ability to meet its climate goals and would upend settled CEQA precedent about the role state-level regulation should play in assessing the significance of project impacts. We respectfully urge the Court to reject the EIR's approach and find the GHG impacts analysis inadequate.

Dated: December 26, 2019

By:_____

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CERTIFICATE OF COMPLIANCE

(California Rules of Court 8.204(c)(1))

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed brief of a*mici curiae* California CEQA and Climate Policy Experts is produced using 13-point Roman type including footnotes and contains approximately 9,945 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the Microsoft Word computer program used to prepare this brief.

Dated: December 26, 2019

By:_____

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PROOF OF SERVICE

ALBERT THOMAS PAULEK, et al.,
Plaintiffs and Respondents,

vs.

MORENO VALLEY COMMUNITY SERVICES DISTRICT, et al.;
Defendants and Appellants;

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1184, et al.,
Plaintiffs and Appellants,

vs.

MORENO VALLEY COMMUNITY SERVICES DISTRICT, et al.;
Defendants and Appellants;

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and am not a party to the within action; my business address is 385 Charles E. Young Drive, Los Angeles, California 90095. On December 26, 2019, I served true copies of the following document(s) described as:

PROPOSED AMICI CURIAE BRIEF OF CALIFORNIA CEQA AND CLIMATE POLICY EXPERTS

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 26, 2019, at Miami, Florida.

_____

Cara A. Horowitz

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