SUPERIOR COURT OF THE STATE OF CALIFORNIA

CONTRA COSTA COUNTY

FAST LANE TRANSPORTATION, INC., a California corporation,

Petitioner

V.

CITY OF LOS ANGELES, CITY COUNCIL OF THE CITY OF LOS ANGELES, PORT OF LOS ANGELES; LOS ANGELES BOARD OF HARBOR COMMISSIONERS and DOES 1 through 50, inclusive,.

Respondents

BNSF RAILWAY COMPANY, a Delaware corporation,

Real Party in Interest.

AND CONSOLIDATED CASES

Case No. CIV. MSN14-0300

Consolidated with:
Case No. CIV. MSN14-0308
Case No. CIV. MSN14-0309
Case No. CIV. MSN14-0310
Case No. CIV. MSN14-0311
Case No. CIV. MSN14-0312
Case No. CIV. MSN14-0313

OPINION AND ORDER ON PETITIONS FOR WRIT OF MANDATE

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I. Introduction

This is the Court's decision on seven petitions brought under the California Environmental Quality Act ("CEQA"). Each challenges the approval of the Southern California International Gateway Project ("SCIG" or "SCIG project"). All were consolidated for hearing.

The Attorney General has filed a petition in intervention in support of petitioners. This decision addresses her petition as well.

A. The Parties

There are seven petitioner groups: (1) Fast Lane Transportation, Inc.; (2) City of Long Beach, (3) Coalition for a Safe Environment, Apostolic Faith Center, Community Dreams, and California Kids IAQ; (4) East Yard Communities for Environmental Justice, Coalition for Clean Air, Century Villages at Cabrillo, Elena Rodriguez, Evelyn Deloris Knight, and Natural Resources Defense Council, Inc.; (5) Long Beach Unified School District; (6) South Coast Air Quality Management District; and (7) California Cartage Company, Inc., Three Rivers Trucking, Inc., and San Pedro Forklift.

Respondents are the City of Los Angeles, the City Council of the City of Los Angeles, the Port of Los Angeles, the Los Angeles Board of Harbor Commissioners, and the City of Los Angeles Harbor Department. (Different petitioners named different entities as respondents.)

Real Party in Interest is BNSF Railway Company ("BNSF").

The Attorney General is the petitioner in intervention.

In addition, some of the petitions named "Doe" defendants. No petitioner sought to identify any and the Doe allegations are now dismissed.

B. The Project

BNSF proposes to build a near-dock intermodal rail yard to handle containerized cargo moving through the Ports of Los Angeles and Long Beach ("Ports" or "San Pedro Bay Ports"). D.FEIR-02~02-22-2013~Chapter 1 Introduction, AR 3913:5-15.[1]

The Southern California International Gateway project would be located four miles from the Ports on land owned by the Los Angeles Harbor Department ("LAHD") in the City of Los Angeles, and also on adjacent private property in the cities of Los Angeles, Carson, and Long Beach. *Id.*, AR 3913:7-11.

The proposed project would occupy approximately 107 acres of LAHD property, 10 acres owned jointly by LAHD and the Port of Long Beach, and approximately 68 acres of non-LAHD property, for a combined total of approximately 185 acres. D.RDEIR-03~09-25-2012~ES.1 Executive Summary Los Angeles Harbor Department, AR 12208:15-18.

Once complete, the SCIG project will change the location at which BNSF handles direct intermodal cargo. Much of the truck traffic currently going from the Ports to BNSF's Hobart/Commerce Yard, located 24 miles from the Ports, will be rerouted to the SCIG rail yard instead. D.FEIR-02~02-22-2013~Chapter 1 Introduction, AR 3913:29-34.

C. Procedural History

1. Administrative proceedings

The lead agency for the SCIG project is the Los Angeles Harbor Department ("LAHD" or "POLA" or "Port"). *Id.*, AR 3906:6-9.

On September 19, 2005, POLA released a Notice of Preparation ("NOP") and an Initial Study for the SCIG project. Two scoping meetings followed, and on October 31, 2005 POLA released a Supplemental NOP. *Id.*, AR 3907:10-19.

[1] The Notice of Determination identifies the "Burlington Northern Santa Fe Railway" as the "Project Applicant." A-01~03-08-2013~Notice of Determination-Board of Harbor Commissioners, AR 1.

On September 23, 2011, the Draft Environmental Impact Report ("DEIR") for the SCIG project was released. D.DEIR-01~09-23-2011~Draft Environmental Impact Report For The Southern California International Gateway Project Cover Letter, AR 15163.

Two public hearings were held in November 2011, and an extended comment period ended on February 1, 2012. D.FEIR-02~02-22-2013~Chapter 1 Introduction, AR 3908:9-18. POLA received 143 comment letters on the DEIR. In addition, 329 oral and written comments were received at the public hearings on the DEIR. *Id.*

On September 27, 2012, a Recirculated Draft EIR ("RDEIR") was released. POLA received 784 written comments. A public hearing on the RDEIR was held on October 18, 2012 at which time another 165 oral and written comments were received. D.FEIR-02~02-22-2013~Chapter 1 Introduction, AR 3908:20-27.

On February 22, 2013, the Final EIR ("FEIR") was issued. D.FEIR-16~03-07-2013~FEIR Errata Southern California International Gateway, AR 12197.

After a public hearing on March 7, 2013, the Board of Harbor Commissioners adopted Resolution 13-7451, certifying the FEIR and approving the SCIG project. B-01~03-07-2013~Resolution 13-7451 adopted by Board of Harbor Commissioners re Final Environmental Impact Report re Southern California International Gateway, AR 4-24; A-01~03-08-2013~Notice of Determination-Board of Harbor Commissioners, AR-1.

At that time, the Board of Harbor Commissioners also adopted the "Final Findings of Fact and Statement of Overriding Considerations," as well as the Final Mitigation Monitoring and Reporting Program. C-01~03-08-2013~Final Findings of Fact and Statement of Overriding Considerations, AR 3748-3859; C-02~03-08-2013~Mitigation Monitoring Reporting Program, AR 3860-3904.

On March 8, 2013, POLA filed its Notice of Determination for the SCIG project. A-01~03-08-2013~Notice of Determination-Board of Harbor Commissioners, AR-1.

On March 21, 2013, the Board of Harbor Commissioners adopted Order 13-7125, recommending that the Los Angeles City Council approve a Site Preparation and Access Agreement and Permit No. 901 for the SCIG project. B-02~03-21-2013~Resolution and Board Order 13-7125 re SPAA & Permit 901, AR 114.11.

Petitioners appealed the certification of the FEIR and the approval of the SCIG project to the City Council of the City of Los Angeles.[2]

On May 8, 2013, the City Council held a public hearing on the appeals. At the end of the hearing, the City Council rejected the appeals and approved the project. AR G-17~05-08-2013~Video of City Council Public Hearing re Appeal re Certification of Final EIR, at 3:42:49 Item 9 on the agenda); B-03~05-08-2013~Motion of Los Angeles City Council including Motion 10-A, 10-B (as Amended), 10-D and 10-E, AR 115-123 (Item 10 on the agenda).

Immediately, the Site Preparation and Access Agreement was executed. B-04~05-08-2013~Site Preparation and Access Agreement 13-3121, AR 124 *et seq*. The permit was issued. B-05~05-08-2013~Permit 901 Granted by The City of Los Angeles to BNSF Railway Company, AR 3580 *et seq*.

2. Judicial proceedings

Between June 5 and 7, 2013, each of the seven sets of petitioners filed in Los Angeles County Superior Court a CEQA petition challenging the approval of the SCIG project.

[2] City of Long Beach, F-17~04-18-2013~City of Long Beach Appeal Council File No. 13-0295 Staff Report, AR 20300 et seq.; NRDC/Coalition for Clean Air/East Yard Comm. For Environmental Justice, F-18~04-18-2013~Coalition Clean Air East Yard Communities for Environment Justice NRDC Appeal Council File No. 13-0295-S1 Staff Report, AR 20423 et seq.; Fast Lane Transportation, F-19~04-18-2013~Fast Lane Transportation Inc. Council File Nos. 13-0295-S2 and 13-0295-S4 Staff Report, AR 20543 et seq.; Coalition for a Safe Environment, F-20~04-18-2013~Coalition for a Safe Environment Appeal Council File No. 13-0295-S3 Staff Report , AR 20581 et seq.; Long Beach Unified School District, F-21~04-18-2013~Long Beach Unified School District Appeal Council file No. 13-0295-S5 Staff Report, AR 20803 et seq.; South Coast Air Quality Management District, F-22~04-18-2013~South Air Quality Management District Appeal Council File No. 13-0295-S6 Staff Report, AR 20926 et seq.; Cal Cartage/Three Rivers Trucking/ LA Harbor Grain Terminal, San Pedro Forklift, F-24~04-25-2013~CalCartage Appeal Council File No. 13-0295-S8 Staff Report, AR 23595 et seq.

Two of the petitions also asserted that POLA committed due process violations in approving the project. (They are the petitions filed by (i) East Yard Communities for Environmental Justice, Coalition for Clean Air, Century Villages at Cabrillo, Elena Rodriguez, Evelyn Deloris Knight, and Natural Resources Defense Council, Inc. and (ii) Coalition for a Safe Environment, Apostolic Faith Center, Community Dreams, and California Kids IAQ.)

In addition, the East Yard petitioners asserted that the approval of the SCIG project violates Government Code § 11135, the California environmental justice statute.

On August 5, 2013, the Los Angeles County Superior Court consolidated all seven cases for purposes of the administrative record, briefing schedule, and hearing. On January 2, 2014, pursuant to stipulation, the consolidated cases were transferred to the Contra Costa Superior Court.

On July 25, 2014, pursuant to stipulation, the Court granted the Attorney General's motion to intervene in this action. She intervened in case MSN14-0312.

In pretrial proceedings, the Court set a briefing and hearing schedule and discussed with the parties the extent to which they could cooperate in briefing to avoid duplication. The parties agreed that respondents and real party would file one consolidated brief; and petitioners would file a consolidated opening and a consolidated reply brief. Petitioners and intervenor would split the issues to be briefed so as to eliminate duplication to the maximum extent possible. The Court set unusually long page limits to accommodate all that.

Those parties with Government Code § 11135 claims agreed to separate them from the remainder of the matter on the ground that the Court's decision on the CEQA issues might significantly affect the Government Code claims. (The Court will discuss that with the parties at the next case management conference.)

Other pretrial proceedings were held. Finally, the CEQA petitions came on for hearing on November 16 and 17, 2015. During the course of that hearing, there was a request for

additional briefing of one issue relating to the Transportation element of the Environmental Impact Report ("EIR"). That request was granted and briefs were filed through December 17, 2015, at which time the CEQA issues were taken under submission.

Although the Court had planned to hear the due process arguments at the same time, the two days of hearing were fully occupied by the CEQA issues. Oral argument of the due process issue was held on March 25, 2016. Those issues are addressed in this opinion as well.

II. A Few Preliminary Matters

A. The Form of Citation to the Administrative Record

The parties have provided the Court with paper copies of five volumes of the Environmental Impact Report and sundry other materials.

However the 200,000 page Administrative Record was provided, as the Court requested, in electronic form on a peripheral hard-drive. In addition, a Supplemental Administrative Record was provided on a compact disc.

Accompanying those materials were Excel spreadsheets containing an index to the Administrative Record and (separately) the Supplemental Administrative Record.

Therefore, there are two ways to find documents in the record. If one has only the "AR" citation, the Excel spreadsheets can be used to find where in the Administrative Record the document is located.

However, if one has the longer citation (beginning with a letter such as "D" or "H"), then one can go directly to the electronic list of files contained on the peripheral hard drive to locate the material. That eliminates the step of searching through the spreadsheets.

For ease of reference, the Court has provided both forms of citation. It makes the text of this decision a bit more congested. But it eases the work of anyone trying to refer back to the source material.

The Administrative Record pages are often preceded by several zeros, such as "AR000906." The Court has adopted the convention of omitting the leading zeroes.

B. The Form of Citation to CEQA and the Guidelines

The CEQA Guidelines are found at Cal. Code Regs., tit. 14, § 15000 et seq. They are cited as "Guidelines, §____." ("Courts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA." *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 391 n.2; accord, *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal. 4th 204, 217, fn. 4.)

Unless otherwise noted, all other unspecified references (*e.g.* "§ 21168.5") are to the Public Resources Code; *i.e.* the California Environmental Quality Act.

C. Standard of Review

The standard of review is important in any case. But it is particularly important in a CEQA case where the standard is often critical to the decision of an issue.

Section 21168.5 states the general rule:

> In any action or proceeding, other than an action or proceeding under Section 21168, to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with this division, the inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.

The standard of review therefore is "prejudicial abuse of discretion." That can be established in either of two ways: (i) "the agency has not proceeded in a manner required by law" or (ii) "the determination or decision is not supported by substantial evidence." *Id.*

To explain how a court is to apply those two tests, both petitioners and respondents cite *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412 ("*Vineyard Area"*). In that case, our Supreme Court gave important guidance.[3] Initially, the majority wrote,

> In reviewing an agency's compliance with CEQA in the course of its legislative or quasi-legislative actions, the courts' inquiry "shall extend only to whether there was a prejudicial abuse of discretion." (Pub. Resources Code, § 21168.5.) Such an abuse is established "if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (§ 21168.5; see *Western States Petroleum Assn. v. Superior Court*, *supra*, 9 Cal.4th at p. 568; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392–393 [253 Cal. Rptr. 426, 764 P.2d 278] (*Laurel Heights I*).)

Vineyard Area, 40 Cal. 4th at 426-427.

Later, the Court gave more explicit direction,

> … [W]e pause to clarify the nature of our review. As explained earlier, an agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence. (§ 21168.5.) Judicial review of these two types of error differs significantly: While we determine de novo whether the agency has employed the correct procedures, "scrupulously enforc[ing] all legislatively mandated CEQA requirements" (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 [276 Cal. Rptr. 410, 801 P.2d 1161]), we accord greater

[3] The California Supreme Court is now considering the standard and scope of judicial review under CEQA in another case, *Sierra Club v. County of Fresno* (2014) 226 Cal. App. 4th 704, review granted October 1, 2014, S219783. For now, this Court relies on the most recent, relevant, binding appellate guidance.

deference to the agency's substantive factual conclusions. In reviewing for substantial evidence, the reviewing court "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable," for, on factual questions, our task "is not to weigh conflicting evidence and determine who has the better argument." (*Laurel Heights I, supra,* 47 Cal.3d at p. 393.)

In evaluating an EIR for CEQA compliance, then, a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts. For example, where an agency failed to require an applicant to provide certain information mandated by CEQA and to include that information in its environmental analysis, we held the agency "failed to proceed in the manner prescribed by CEQA." (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236 [32 Cal. Rptr. 2d 19, 876 P.2d 505]; see also *Santiago County Water Dist. v. County of Orange, supra,* 118 Cal. App. 3d at p. 829 [EIR legally inadequate because of lack of water supply and facilities analysis].) In contrast, in a factual dispute over "whether adverse effects have been mitigated or could be better mitigated" (*Laurel Heights I, supra,* 47 Cal.3d at p. 393), the agency's conclusion would be reviewed only for substantial evidence. Thus, in *Laurel Heights I,* we rejected as a matter of law the agency's contention that the EIR did not need to evaluate the impacts of the project's foreseeable future uses because there had not yet been a formal decision on those uses (*id.* at pp. 393–399), but upheld as supported by substantial evidence the agency's finding that the project impacts described in the EIR were adequately mitigated (*id.* at pp. 407–408). (See also *California Oak, supra,* 133 Cal.App.4th at p. 1244 [absent uncertain purchase

> of additional water, as to which the EIR's discussion is legally inadequate, "substantial evidence of sufficient water supplies does not exist"].)

Vineyard Area 40 Cal. 4th at 435.

In their briefs, the parties differ somewhat in how they would have these tests applied. Understandably, petitioners tend to characterize defects in the EIR as omissions of required material which establish that the agency "failed to proceed in the manner required by CEQA." So, they write,

> [T]he EIR fails to properly describe the whole of the Project, and it uses an incorrect legal standard for addressing SCIG's growth-inducing impacts and an improper baseline for addressing SCIG's air quality impacts. The document further omits fundamental information about the Project's climate, noise, traffic, and cumulative impacts, and fails to provide adequate responses to public comments. Because the Port thus failed to proceed in the manner required by law, the Court must overturn its approval of SCIG. *See Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829 (a decision approving a project "is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project" required by CEQA). Petitioners' Opening Brief 14:6-14[4].

Respondents seek to characterize the dispute as one which is governed (perhaps exclusively) by the "substantial evidence" test. They write,

[4] Petitioners do concede that the "substantial evidence" rule applies "to their challenge to the Port's factual findings that various alternatives are infeasible. *See, e.g., Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 598-99. It also applies to claims that the EIR used incorrect assumptions when measuring SCIG's air quality impacts." Petitioners' Opening Brief 14:15-18.

> The substantial evidence standard of review governs the Court's review of POLA's factual findings, conclusions and determinations. This includes the 'proper scope of the analysis, the appropriate methodology for studying an impact, the reliability or accuracy of data, the validity of technical opinions, and the feasibility of further studies,' as well as the amount of information presented in an EIR. (*Santa Monica Baykeeper v. City of Malibu* (2011) 193 Ca1.App.4th 1538, 1545-46; *City of Long Beach v. Los Angeles Unified School Dist*. (2009) 176 Ca1.App.4th 889, 898; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198.) Respondents' Opening Brief 18:4-11.

As the Court reviews each argument it considers whether that particular issue entails a failure to include a subject in the EIR (governed by the strict procedural compliance standard) or whether there is simply a disagreement with respect to facts discussed in the EIR (governed by more deferential substantial evidence standard).

To the extent that the standard is "substantial evidence" the Court applies reasonably well settled rules.

> (a) "Substantial evidence" … means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency. Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence.

(b) Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.

Guidelines, §15384.

In determining whether substantial evidence supports a finding, the court may not reconsider or reevaluate the evidence presented to the administrative agency. (Pub. Resources Code, § 21168.) All conflicts in the evidence and any reasonable doubts must be resolved in favor of the agency's findings and decision. (*Topanga Assn. for a Scenic Community v. County of Los Angeles, supra*, 11 Cal.3d at p. 514.)

In applying that standard, rather than the less deferential independent judgment test, "the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision." (*Topanga Assn. for a Scenic Community v. County of Los Angeles, supra*, 11 Cal.3d at p. 514.)

Citizens of Goleta Valley v. Board of Supervisors (1988) 197 Cal. App. 3d 1167, 1177.

The parties have briefed, extensively, the standards that apply to the Court's decision. See, *e.g*. Petitioners' Opening Brief ("POB") at 13-14, Intervenor's Opening Brief ("IOB") at 5-6, and Respondents' Opening Brief ("ROB") at 17-21. The Court is well familiar with those authorities and will not lengthen this opinion by including a further preliminary recitation of them. Many are discussed with regard to specific issues, below.

D. Exhaustion

In many places, respondents contend that petitioners' arguments are not cognizable because they were not raised during the administrative proceedings. The Court has considered each of respondents' assertions. However, most of them are for naught, because the Attorney General has raised the issue in her petition and she need not exhaust. §21177(d).

True, the Attorney General did not argue every subject in her brief. But, in pre-trial proceedings, petitioners and intervenor divided the issues to avoid redundancy. Whether that division of labor put a given argument in petitioners' rather than intervenor's brief was a matter of convenience, not substance. It spared all parties and the Court unnecessarily redundant briefing.

So, as to each exhaustion claim made by respondents, the Court has examined whether the petition in intervention raised the issue. It has also noted those many places (including at oral argument) where the Attorney General affirmatively joined an argument made by petitioners. In some places, below, the Court rejects an exhaustion claim explicitly; elsewhere *sub silentio*. But all have been considered.

E. Requests for Judicial Notice and Objections to Evidence

On June 26, 2015 respondents asked the Court to take judicial notice of (a) the Final Statement of Reasons for Regulatory Action re Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB 97, adopted by the California Natural Resources Agency in December 2009, (b) a copy of the Port of Long Beach Recirculated Draft Environmental Impact Report for the Total Terminals International Grain Export Terminal Installation Project (April 2013), pages 3.1-19 – 3.1-20, and (c) the Port of Long Beach Board of Harbor Commissioners Minutes for September 30, 2013.

On October 5, 2015 petitioners filed objections with respect to the second and third documents. The Court sustained those objections and took notice of only the first of those three documents.

On November 12, 2015 respondents asked the Court to take judicial notice of Governor Schwarzenegger's Executive Order S-3-05. There was no objection and the Court took notice of it.

On November 3 respondents objected to Petitioners' citation (PRB 27 n.29), to a Federal Interagency Committee on Aviation Noise (FICAN) report. At the outset of oral argument, the Court deferred ruling on that. It has not relied on that report in this Opinion.

III. The Structure of this Opinion

The EIR is an impressive piece of work. It is clear that a great deal of careful thought has been given to the environmental impacts of the project. The Court infers that petitioners must share that notion, for they have not challenged extensive portions of the EIR.

Instead, they have identified discrete areas in which they believe the EIR is lacking. As to most of them, they have pointed to significant, real-world impacts that have not been analyzed sufficiently. In that same vein, the Court has not treated this as a hyper-technical review to see if some small error has been made; nor has it sought to reweigh conflicting evidence or substitute its views for those of the lead agency. *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal. App. 4th 656, 674.

The Court has reviewed each of the arguments made by petitioners and intervenors. It addresses them in substantially the order in which they are presented in petitioners' opening brief, with an occasional diversion to insert an issue briefed by intervenor.

The Court has made every effort to "specifically address each of the alleged grounds for noncompliance." § 21005(c). Despite the length of this opinion, there may be some matters raised by the parties that are not discussed. The Court has considered each and every argument made. If an issue raised by a party is not addressed explicitly, it is rejected. *See, Friends of the Santa Clara River v. Castaic Lake Water Agency* (2002) 95 Cal. App. 4th 1373, 1387.

In ruling on these matters, the Court does not direct any public agency to exercise its discretion in any particular way. § 21168.9.

IV. Executive Summary

A. Introduction

The administrative record exceeds 200,000 pages; the EIR exceeds 5,000 pages, and the parties' briefs exceed 300 pages. The latter raise dozens of issues. Hence, this long opinion.

To aid a casual reader, the Court has prepared this executive summary. It does not replace in any way the more careful statements contained in the rest of this document. If there is any conflict or even tension between what is said in this Section IV and anything else in this Opinion, the latter controls. This executive summary is for convenience only.

B. Summary

The Court rejects the challenges of petitioners and intervenor except as to the following matters. Because of its decision with respect to the following issues, the Court orders the relief stated in Section XV, below.

1. Hobart and Sheila

The EIR declines to analyze impacts that may arise with regard to Hobart and Sheila. As a result, it does not adequately apprise either the public or decision-makers of the reasonably foreseeable indirect impacts of the SCIG on Hobart. If the Port chooses to supplement the EIR with an evaluation of Hobart, then it must consider whether its conclusions with respect to Hobart require an evaluation of indirect impacts at Sheila. See Section V, below.

2. Air quality impacts

a) AQ-4: The ambient air quality dispersion analysis

The EIR's analysis of ambient air quality dispersion impacts (AQ-4) is wanting. The Port failed to proceed in the manner required by CEQA, and the EIR fails to set forth sufficient information to foster informed public participation and reasoned decision making.

The Court also expresses concern about the restricted sharing of information with the South Coast Air Quality Management District. See Section VII, below.

b) Mitigation measure AQ-9

Mitigation measure AQ-9 is not "fully enforceable" within the meaning of the law. Thus, it does not meet the standard of § 21002 or Guidelines, § 15126.4(a)(2). See Section VIII, below.

3. Greenhouse gases

As to GHG-1 (the "quantitative" analysis) and GHG-2 (the "consistency" analysis) the EIR is deficient because it omits to consider Hobart.

In addition, as to GHG-2 the EIR says, "[t]he project is consistent with key legislation, regulations, plans and policies described in Section 3.6.3 Applicable Regulations." Yet the EIR does not contain substantial evidence to support that statement. Thus, it does not properly inform the public or decision makers of the reason for an important conclusion. See Section IX, below.

4. Noise impacts

The EIR set a threshold of significance in NOI-6 and then failed to examine it adequately. It performed an analysis of average noise impacts, and failed to examine maximum noise impacts. In doing so, it did not provide substantial evidence to support its conclusion that the NOI-6 threshold was exceeded at only a very limited number of receptors, a limited number of times. For this reason, the noise analysis contained in the EIR is deficient and, as a result, it cannot be said that mitigation measures NOI-1 and NOI-3 are sufficient. See Section X, below.

5. Transportation impacts

The administrative record does not contain substantial evidence to support the EIR's determination that there will be no impact on San Gabriel Avenue from more than a thousand trucks a day traveling to SCIG from Highway 103. Nor is there substantial evidence to support a

decision not to analyze the impact of San Gabriel Avenue traffic on area residents, including those who live and work at Century Villages at Cabrillo.

Petitioners also contend that the EIR's density calculations resulted in underestimating the number of trucks that will use San Gabriel Avenue. Drawing on the material cited by the parties, the Court is unable to find substantial evidence in the record to support the questioned datum in Table 3.10-30. That is a deficiency in the EIR. There is not substantial evidence in the record to support this density calculation.

In addition, should a further analysis of Hobart indicate that additional truck trips will be generated, their non-speculative Transportation effects will, of course, have to be analyzed. See Section XI, below.

6. Cumulative impacts

The Cumulative Impacts section of the EIR failed to consider (or show it considered) the cumulative impacts on air quality from the operation of SCIG and ICTF combined. This is particularly true with respect to Cumulative Impact AQ-4, the pollutant concentration analysis.

In addition, with regard to Cumulative Impact AQ-7 (the toxic air contaminant analysis) there is not sufficient evidence to support the conclusion that "there is no significant cumulative impact on non-cancer risks."

Finally, since the EIR did not assess impacts on Hobart, there is not substantial evidence to support a conclusion that Hobart's distance from SCIG makes it irrelevant to a cumulative impacts analysis. See Section XII, below.

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V. The Hobart and Sheila Issues

A. Overview

The parties have a fundamental disagreement about the EIR's treatment of the interrelationship between (i) the SCIG and (ii) BNSF's operations at the Hobart/Commerce Yard in Commerce, California (the "Hobart Yard" or "Hobart"). There is a related disagreement regarding the BNSF's operations at the nearby Sheila Commerce Mechanical Repair Facility (the "Sheila Yard" or "Sheila").

Petitioners and intervenor do not exactly agree on how to define the challenge to the EIR. Petitioners focus first on the project description. Essentially they argue that the description of the project incorrectly excludes activities at BNSF's existing Hobart Yard and its Sheila maintenance facility. (POB 14-21.) In a related argument, petitioners also contend that the EIR does not adequately evaluate the growth-inducing effects of the project. (POB 21-26.)

Intervenor frames the question differently. She too argues that the project is incorrectly described. (IOB 7-8.) But then she also argues that the EIR fails to define the indirect impacts of the SCIG projects, *viz*. the impacts at Hobart and Sheila. (IOB 11-12.)

Respondents dispute these arguments, however framed.

B. Petitioners' Argument: Project Definition

Petitioners challenge the EIR on the ground that it does not properly describe the entire project. To be sure, the project to be approved is the SCIG. But petitioners say it is improper to examine only the impact of the SCIG itself.

The EIR "asserts that the 1.5 million containers handled at SCIG will simply replace an equal number of containers that would otherwise be processed at Hobart."[5] (POB 15:15-19.)

[5] For this they cite: "AR D: 12215-16 (SCIG's two million annual truck trips will simply "replace truck trips that would otherwise go to the BNSF Hobart [] Yard"), D: 12880 (SCIG will not generate new truck trips but would divert existing trips)." (POB 15:15-19.)

That is wrong, they say, because "SCIG's capacity will not replace Hobart's capacity. Rather, it will *add* to it, thereby greatly expanding the volume of cargo that BNSF and the Port can handle." (POB 15:27-16:1.)

They make this argument under the heading "The EIR's Artificially Narrow Project Description Prevented the Port from Disclosing All of SCIG's Impacts." (POB i:15.) In places, it appears they are arguing that the project description is "incorrect or incomplete" (POB 15:3-4) or "misleading and artificially narrow" (POB 15:10-11). They argue that the EIR improperly describes the project as "replacing off-dock rail capacity at Hobart with near-dock capacity at SCIG." (POB 15:20-21.)

C. Petitioners' Argument: Growth Inducing Impacts

Petitioners also contend that the movement of business from Hobart to SCIG will have growth inducing impacts. In places, the parties conflate this issue with the project description or indirect impact issues. Growth inducing impacts are discussed separately below in Section VI.

D. Intervenor's Argument: The Indirect Effects

The Attorney General takes a slightly different view of the challenge. She agrees with petitioners that the project will expand BNSF's capacity to handle cargo, but contends that the possible post-project increased use of Hobart and Sheila is an "indirect" effect of the project which must be analyzed under Guidelines, §15064(d)(2) ("An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project"). She argues that the failure to analyze the capacity remaining at Hobart and the future use of Sheila is improper.

E. Respondents' Argument – In Brief

1. The movement of goods through the Ports is the physical constraint on growth.

Respondents first argues that however one frames this issue, the fundamental fact is that "although the volume of cargo will grow due to the economy, the ports' marine terminals, not the rail yards, are physical constraints on growth….[S]tudies establish that such limitations at the marine terminals will result in the ports reaching maximum capacity in 2035….[C]onstructing a near-dock rail facility like the SCIG project has no effect on the amount of cargo processed at the ports." (ROB 5:10-15.)

So, they argue, "[t]he SCIG Project also does not 'double' BNSF operations, as petitioners wildly speculate. The SCIG Project only changes the location at which BNSF will process its share of international cargo passing through the ports: from its existing Hobart/Commerce Yard … 24 miles from the ports, to just 4 miles away, at SCIG." (ROB 5:10-15.)

Their argument is premised on a few simple propositions:

- The capacity of the Ports' marine terminals, not the rail yards, constrains growth.
- The amount of goods moving through the Ports is determined by economic conditions, not by the availability of rail capacity.
- The SCIG project will not increase the BNSF's operations; it will simply move a share of the goods flowing through the Ports from Hobart to SCIG.

This all focuses very tightly on the operations of the Ports – and the tacit assumption that the principal source of business for either Hobart or SCIG is the Ports' operations. It largely disregards the possibility that by freeing Hobart from the need to handle some of the Ports'

business the project provides the opportunity for other business to come to Hobart. This argument also does not touch on the issue of domestic cargo.

It also blurs the issue of the timing of impacts. If, for example, SCIG allows the Ports to compete for cargo business more effectively, it could bring more containers to the Ports sooner rather than later, accelerating the impacts discussed in the EIR. There is evidence that this may occur.

2. Hobart has capacity for the projected growth in domestic and transloaded cargo

Respondents make a second argument.

> "Hobart will continue to be used for other types of cargo, and POLA's expert modeling shows that Hobart is large enough to handle all of BNSF's cargo, with or without the SCIG Project, through at least 2046, well after the ports have reached their maximum capacity. Relocating one stream of that cargo to a near-dock facility like SCIG does not result in greater volumes of or demands to transport other cargo at Hobart. This point is further proven by evidence that Hobart has excess capacity today (and has for some time) and, yet, no new cargo streams have materialized to fill that capacity." (ROB 5:21-27.)

This argument is discussed below, after an explanation of the three kinds of cargo handled at Hobart.

F. Analysis

1. The statute and guidelines

The statute defines "project" in § 21065, in general terms,

"Project" means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following:

(a) An activity directly undertaken by any public agency.

(b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

(c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

The Guidelines add a bit, by defining "project," in relevant part, as,

the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" §15378 (emphasis added).[6]

The Guidelines also require that in an EIR "[d]irect and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects." Guidelines, § 15126.2(a).

The Guidelines explain the concept of an indirect impact: "An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project." *Id.* at § 15064(d)(2).

[6] Respondents note that §15378(c) says, "the term 'project' refers to the activity which is being approved…" That is relevant to the analysis, but not dispositive.

2. The adequacy of the definition of the the project is an important question of law

It is beyond question that the description of a project is critical to the EIR process. This was established relatively early in the history of CEQA. So for example, in *County of Inyo v. City of Los Angeles* (1977) 71 Cal. App. 3d 185, the Court of Appeal observed,

> A curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the "no project" alternative) and weigh other alternatives in the balance. An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR. *Id.* at 192-193.

When the issue is whether the project has been properly described, the question is one of law, subject to de novo review. This was explained in *Communities for A Better Environment v. City of Richmond* (2010) 184 Cal. App. 4th 70, 82-83:

> Our Supreme Court has counseled that "[i]n evaluating an EIR for CEQA compliance, … a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." (*Vineyard Area Citizens, supra*, 40 Cal.4th at p. 435.) The dispute on this issue centers on the question of whether pertinent information was omitted from the EIR.
>
> On appeal, "the existence of substantial evidence supporting the agency's ultimate decision on a disputed issue is not relevant when one is assessing a violation of the information disclosure provisions of CEQA." (*Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392 [133

Cal.Rptr.2d 718] (*Irritated Residents*).) "If a final environmental impact report (EIR) does not 'adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project,' informed decisionmaking cannot occur under CEQA and the final EIR is inadequate as a matter of law. [Citation.]" (*RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1201 [88 Cal.Rptr.3d 625] (*RiverWatch*); see *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1197–1198 [22 Cal.Rptr.3d 203]; *Irritated Residents, supra,* 107 Cal.App.4th at p. 1391; *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 118 [104 Cal.Rptr.2d 326] (*Save Our Peninsula*).)

Thus, we conclude that the claimed deficiencies in the EIR compel de novo review. (*Vineyard Area, supra,* 40 Cal.4th at p. 427.)

See also, *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal. App. 4th 1214, 1223-1224 ("the question concerning which acts constitute the "whole of an action" for purposes of Guidelines section 15378 is a question of law…"); and *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564 as quoted in *Vineyard Area, supra* at 435 (the court will determine, de novo, that the agency failed to proceed in the manner required by CEQA, "scrupulously enforc[ing] all legislatively mandated CEQA requirements").

3. <u>The project definition</u>

Here, the project definition is stated in Chapter 1 of the EIR at section 1.4.1 D.FEIR-02~02-22-2013, AR 3913:

> The proposed Project would include construction of a new, state-of-the-art, near-dock intermodal railyard (Figures 1-3a and 1-3b), located approximately four miles to the north of the Ports and connected to the Alameda Corridor. The proposed Project features and operations are summarized in Table 1-2. It is

> estimated that the proposed Project would handle approximately 570,800 TEUs in its first year of operation in 2016 and increase to its maximum capacity of 2.8 million TEUs, as proposed by the project applicant, by 2035. Construction would take approximately 36 months to complete (2013 through 2015), including crane installation that would occur in 2015 (more detail is provided below). The proposed Project would generate approximately 93 operational jobs starting in 2016 and 450 jobs by full build-out. The SCIG facility would be operated by BNSF under a new lease from LAHD, assumed for the purposes of this EIR to be 50 years from 2016 to 2066. (*The description continues with additional details through AR 3914*.)

Clearly, the focus of the project description is on the SCIG itself. It is premised, as petitioners say, on the idea that the SCIG will simply move work now done at Hobart to SCIG:

> Because of its location approximately 4 miles from the ports, the proposed Project would eliminate a portion (estimated at 95 percent; see Section 3.10 for details of this assumption) of existing and future intermodal truck trips between the ports and the BNSF's Hobart/Commerce Yard (hereafter, Hobart Yard), approximately 24 miles north of the ports in the cities of Los Angeles, Vernon, and Commerce, by diverting them to the proposed SCIG facility. As a result, truck traffic on I-710 (the route that trucks currently take to reach the Hobart facility) would be reduced by the number of trucks diverted to the proposed Project. D.FEIR-02~02-22-2013~Chapter 1 Introduction, AR 3913.

Indeed, the EIR frankly states that it does not include an analysis of environmental impacts related to either Hobart or Sheila:

> This document analyzes only impacts that arise as a result of the proposed Project (Public Resources Code 21065 and CEQA Guidelines 15378(a). It therefore does

not analyze activities at the Hobart Yard or the Sheila Commerce Mechanical Repair Facility, in Commerce (the Sheila facility). Whether or not SCIG is built, domestic traffic (i.e. traffic from non-Port sources) and transloaded cargos to Hobart will likely continue to grow at a rate related to market demand in the United States economy…. Because that growth is not dependent on SCIG being built, it is not appropriate to evaluate that growth as part of SCIG, or any truck trips not going to SCIG. The same is true for regional locomotive traffic. This approach is supported by BNSF's representation that they have no current plans to move intermodal business from other regional facilities to Hobart in the event that SCIG is built. (BNSF, 2012.) D.FEIR 02—02-22-2013 Chapter 1, Introduction, AR 3914, lines 30-42.

The question, then, is whether the EIR is deficient for not analyzing activities at Hobart or Sheila. As noted above, if this is a question of "project definition," the Court's review is de novo. Similarly, if this is a question of an omission of a necessary analysis of "indirect effects," the standard of review is the same. See *Vineyard Area*, at 435. ("…we rejected as a matter of law the agency's conclusion that the EIR did not need to evaluate the impacts of the project's foreseeable future uses….")

4. Understanding this argument – an explanation of the work that moves through the Ports and through Hobart

To understand the parties' arguments requires an understanding of the work that moves through the Ports – and the work done at Hobart.

As the EIR states, Hobart handles three streams of business, only two of which come from the Ports:

- Direct intermodal containers from the Ports (intact marine containers that are not transloaded). This stream is also known as "Inland Point Intermodal (IPI)."

Shipments are made under a single ocean carrier bill of lading. Ocean carriers contract with the railroads for this service. The SCIG project will handle IPI containers only.

- Transloaded containers (cargo that has been first taken out of 40-foot containers at a warehouse and then placed into 53-foot domestic containers before arriving at the railyard).
- "Pure" domestic cargo in either domestic 53-foot containers or trailers (cargo that has not passed through the Ports).

D.FEIR-11~02-22-2013~Appendix G4 Intermodal Rail Analysis, AR 9242 (Underlining and bullets added for clarity).

In essence, the first ("direct intermodal" or "IPI") and second ("transloaded containers") move through the ports. POB p.6, n.7; D.RDEIR-05~09-25-2012~Chapter 1 Introduction, AR 12326.

The third ("'pure' domestic cargo") does not move through the ports. (D.RDEIR-06~09-25-2012~Chapter 2 Project Description, AR 12371.

So, to the extent it focuses on the capacity of the *Ports*, the EIR describes the perceived limit on IPI and transload traffic; but that does not address domestic cargo.

For purposes of analyzing Hobart, one must look at both transload and domestic cargo, because BNSF will continue to process those workloads at Hobart, even if SCIG is built. (ROB 61:17-19.) Hobart will also continue to handle about 5% of the IPI load. (*Id.*)

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The EIR states the workload for Hobart in a table, derived from Appendix G4 (quoted just above), as follows:

Table 2-2. Cargo Activity at Hobart Yard With and Without SCIG.

Year	No-Build Alternative Demand (Lifts)				With SCIG Demand (Lifts)			
	IPI	Transload	Domestic	Total	IPI	Transload	Domestic	Total
2010	448,455	168,520	349,491	966,474				
2016	342,828	323,207	487,630	1,153,665	17,141	323,207	487,630	827,978
2023	485,043	458,781,	648,744	1,592,568	24,252	458,781	648,744	1,131,777
2035	1,097,160	718,954	1,021,846	2,837,960	54,858	718,954	1,021,846	1,795,658

Source: Appendix G4, RDEIR D.FEIR-03~02-22-2013~Chapter 2 Volume I Responses to Comments~ Recirculated Draft EIR; AR 3965.

As can be seen, the EIR examines carefully the amount of "IPI" work that will come to Hobart with and without SCIG. So, for a given year (*e.g.* 2023) the number of IPI lifts at Hobart without SCIG (485,043) is much greater than the amount of IPI work at Hobart with SCIG (24,252). Looking at only the IPI numbers in the table reveals the pattern:

Year	No-Build Alternative Demand (Lifts)				With SCIG Demand (Lifts)			
	IPI	Transload	Domestic	Total	IPI	Transload	Domestic	Total
2010	448,455	168,520	349,491	966,474				
2016	342,828	323,207	487,630	1,153,665	17,141	323,207	487,630	827,978
2023	485,043	458,781,	648,744	1,592,568	24,252	458,781	648,744	1,131,777
2035	1,097,160	718,954	1,021,846	2,837,960	54,858	718,954	1,021,846	1,795,658

But the same analysis simply asserts that the "Transload" and "Domestic" work to be done at Hobart in a given year will be the same with or without SCIG. Looking at only the transload and domestic numbers reveals the pattern:

Year	No-Build Alternative Demand (Lifts)				With SCIG Demand (Lifts)			
	IPI	Transload	Domestic	Total	IPI	Transload	Domestic	Total
2010	448,455	168,520	349,491	966,474				
2016	342,828	323,207	487,630	1,153,665	17,141	323,207	487,630	827,978
2023	485,043	458,781,	648,744	1,592,568	24,252	458,781	648,744	1,131,777
2035	1,097,160	718,954	1,021,846	2,837,960	54,858	718,954	1,021,846	1,795,658

So, while the number of IPI lifts at Hobart declines significantly once SCIG is built, the "Transload" and "Domestic" numbers do not. That appears to be largely because the EIR did not examine as carefully what volumes of work will be done at Hobart once its volume of IPI lifts declines as a result of SCIG.

5. Respondents' initial justification for not examining *transload* and *domestic* cargo

Respondents argue that the amount of transloaded and domestic cargo is controlled by economic conditions in the Los Angeles basin and, indeed, the country. (ROB 62:15–63:10.)

But the passages in respondents' briefs cite only *assertions* in the EIR unsupported by studies, analysis or evidence: *e.g.*

- "Growth in domestic and transload cargo will be determined by general economic growth, not by the presence of SCIG, and thus would not be affected by the proposed Project…" D.FEIR-03~02-22-2013~Chapter 2 Volume I Responses to Comments~ Recirculated Draft EIR. AR 3963.
- "Whether or not SCIG is built, domestic traffic (i.e. traffic from non-Port sources) and transload to Hobart will likely continue to grow at a rate related to market demand in the United States economy…" D.RDEIR-06~09-25-2012~Chapter 2 Project Description, AR 12378.
- "Pure domestic volumes…are assumed to continue to grow at a rate of 2% per year with or without SCIG being built. The market demand for pure domestic cargo and transload cargo is independent of a project's capacity….[T]he region's economy drives the demand for domestic and transloaded cargo which would grow at a rate unrelated to capacity at Hobart. A facility's capacity does not create growth in demand." D.FEIR-11~02-22-2013~Appendix G4 Intermodal Rail Analysis, AR 9245.

- "The market demand for pure domestic cargo and transload cargo is independent of the SCIG project." H-8.57~04-18-2013~13-0295-S7_130418 POLA Recommended Actions to LA City Council, AR 214351.

So, while the EIR relies on considerable studies done by or for the Port about the amount of *IPI* business that will be generated by the world economy over various periods of time, there is no comparable analysis of *domestic* volumes. In other words, there are ample studies about the volume of cargo that will move through the ports in coming years, *i.e*. the principal source of work for SCIG. But there is nothing like that kind of analysis for the work that will be done at Hobart.

At oral argument counsel for respondents argued that the domestic growth figures were supported by a study in the record: the February 3, 2009 "Final Technical Memorandum – I-710 Railroad Goods Movement Study" prepared for the Los Angeles County Metropolitan Transportation Authority. H.7 Vol2.NOP-DEIR SCIG-AR 115371~20090203_Final_ Revised_Rail_Study.pdf.

That 2009 study did not analyze the growth in domestic cargo at Hobart. Instead, it compared prior studies' estimates of "Intermodal Growth" including, where available, a breakout of domestic growth. *Id*. at AR 115375-115376. One of those prior studies (the 2008 "*Multi-County Goods Movement Action Plan*") was reported, in a column entitled "Intermodal Growth," to have estimated "[d]omestic - growth based on economic growth of 2-3% annually." *Id*. at AR 115376. The 2009 report then characterized that by saying "[t]he *Multi-County Goods Movement Action Plan* assumed domestic intermodal to grow 3% per year." *Id*. at AR 115378.

Then it said, "[t]his study [*i.e*. the 2009 study] does not project domestic intermodal growth, but assumes that domestic intermodal will backfill all off-dock intermodal facilities…." *Id*.

So, the 2009 study cited by counsel reported that (i) an earlier study "assumed" a 3% growth rate, and (ii) for present purposes, it would assume that Hobart will be backfilled. The EIR assertions, cited in respondents' brief are not supported by this.

In addition, there is very little consideration of what plans BNSF may have for Hobart's capacity once SCIG is built. That is a significant omission.

6. Port staff flagged the use of Hobart as an issue

The Port staff acknowledged this is a critical issue. At the March 7, 2013 special meeting of the Board of Harbor Commissioners, Mr. Cannon, the Director of Environmental Management for the Port of Los Angeles, gave the staff report on SCIG. (*See e.g*. D.FEIR-04~02-22-2013~Chapter 2 Volume II Responses to Comments Draft EIR, AR 6124. He said,

> … [B]y removing the international traffic from Hobart, you're essentially enabling new business [there] that couldn't have occurred because of the presence of the international cargo [that SCIG will remove from Hobart]. G-06~03-07-2013~Transcript of FEIR Public Hearing AR 21697 (Insertions added to reflect the comment in context).

He said that was discussed with BNSF which replied there was already sufficient capacity at Hobart to handle any business that might be available. Then Mr. Cannon said,

> And we actually asked them to send us a letter….we pressed them on this. We agree that it's a fair question to ask. But what they are saying and what I think others may also say is…'Okay. Fine. Well, then shouldn't there be a cap on Hobart, you know? Put your money where your mouth is. If you're not planning to do anything new at Hobart, then why don't you commit to not growing your business at Hobart?'
>
> The reason, of course, is because by growing the business at Hobart, you create all kinds of new impacts, you know, what otherwise you would think would be

> decreasing,….Now they're really not, so you didn't get the benefit of having the new SCIG Project, because you've now filled it up with all…kinds of stuff… We talked to the railroads. We didn't really ask them for a cap, but we said, 'Talk to us. What do you think about this? How can we be sure?' And they said: 'Listen, we're a business. We can't predict right now what's going to happen. … [O]ur judgment is, our projections are, our plans are that we're not going to be doing anything special. But to cap ourselves and if a new business opportunity comes along in five years that nobody ever thought of, and all of a sudden it's an opportunity, for us not to be able to do it, we're not going to put ourselves in that position.'
>
> So we left the discussion at that.

Id. at AR 21698-021699. ("CAAP" in original changed to "cap" to correct apparent error by court reporter.)[7]

7. The EIR lacks sufficient information or analysis of BNSF's plans for Hobart

The EIR cites one short writing by BNSF that echoes Mr. Cannon's statements. The Introduction to the Final EIR cites a document as "BNSF, 2012." D.FEIR-02~02-22-2013 Chapter 1 Introduction, AR 3914. It is dated September 19, 2012. See, *Id.* Section "1.6 References" at AR 3944. The document itself is found at H.6.RDEIR.006~~BNSF Russell Light SCIG Memorandum (September 19 2012), AR 88345. The first page is an e-mail from Russell Light to the POLA. There, he responds to a question from the Port ("[w]ill new domestic cargo

[7] Just a few days before this meeting, Caltrans commented on the project: "Caltrans has acknowledged that the project will reduce 1.3 million truck trips on I-710. However, those environmental benefits would be diminished if in future the truck traffic utilizes Hobart yard again. Therefore, the Lead Agency should conditional (sic) approve the project that the port providing (sic) that Hobart yard will not replace these trips till after the build out of the proposed I-710 freight corridor project or a separate environmental document is submitted to Caltrans for our review." D.FEIR-15~03-07-2013~Final Responses to Comments on Additional Comment Letters Received on the FEIR…, AR 11930. The response was a refusal "to cap container throughput at Hobart." *Id.* at AR 11931.

re-fill Hobart once the international cargo is transferred to SCIG?") with a somewhat off-point answer that says,

> "BNSF currently has no plans to transfer current or significant new business from other locations to the Hobart railyard as a direct result of SCIG being approved, although it is difficult to project what will happen over the next 50 years. If the SCIG project is approved, approximately 95% of the direct intermodal international throughput at Hobart would be transferred to the SCIG facility. If the SCIG project is approved, BNSF anticipates the Hobart railyard would continue to receive up to 5% of the direct international intermodal cargo volumes it currently handles, as well as, domestic cargo, including transload cargo from local transload warehouses, all based on market demand. "*Id.*

That e-mail attaches some pages "outlining steps that have been or could be taken with respect to adding capacity at Hobart." *Id*. Those pages show alternatives that would increase Hobart's capacity from 2,227,680 lifts to 2,878,163 lifts.

Note, however, that Mr. Light does not really answer the Port's question: "Will new *domestic* cargo re-fill Hobart…" Indeed, Mr. Light mentions domestic cargo only in passing. He says, carefully, that "BNSF currently has no plans" to transfer business to Hobart "as a direct result of SCIG being approved." But he does not really address what BNSF is going to do with the excess capacity at Hobart. Neither does the EIR.

In the Responses to Comments in the Final EIR a second BNSF memo is cited. *See* D.FEIR-03~02-22-2013~Chapter 2 Volume I Responses to Comments, AR 3964 [Citation to BNSF, 2012b] and AR 3967 [References]. That memorandum from BNSF to the Los Angeles Harbor District is dated November 28, 2012 and is found in the administrative record at H.6.FEIR-002~~BNSF Russell Light SCIG Memorandum (November 28 2012), AR 78361-

78362. It is a two page memorandum that addresses some of the same contentions as the memorandum discussed just above.

With respect to this issue, Mr. Light says,

> "BNSF is not aware of any currently unmet demand for cargo transportation that would be generated as a result of moving direct intermodal international cargo from Hobart to SCIG. All Southern California domestic cargo requiring rail transport is already being transported by rail. There is no latent demand for rail transport that is not being served.
>
> Cargo growth, as reasonably forecasted by the experts in the adopted Southern California Air Quality Management Plan's Regional Transportation Plan, not railyard capacity, created the potential for environmental impact. BNSF does not believe that latent railyard capacity or rail mainline capacity causes intermodal rail cargo volumes to increase or the capacity of the Ports to increase, but rather responds to and accommodates existing and reasonably foreseeable market-driven demand." *Id.* at AR 78361-78362.

Again, Mr. Light does not address the question of what BNSF plans to do with the unused capacity at Hobart. In his September 12, 2012 memorandum (quoted above) he said, "BNSF currently has no plans to transfer current or significant new business from other locations to the Hobart railyard as a direct result of SCIG being approved, although it is difficult to project what will happen over the next 50 years." In his November 28, 2012 memorandum he avoids that topic altogether. There is simply no analysis, anywhere, of what BNSF might do to transfer business to Hobart, compete more effectively for business at Hobart, or otherwise use the capacity that is generated.

The administrative record does not appear to contain the "Southern California Air Quality Management Plan's Regional Transportation Plan" to which Mr. Light refers. The Court

considers that may be a typographical error and Mr. Light may have meant to refer to the "South Coast Air Quality Management District." But the parties have cited nothing in the administrative record that meets that description and the Court has not found any such document.

It is noteworthy – if Mr. Light is relying on something from the SCAQMD, that the Air District is a petitioner in this matter and is critical of the failure to analyze the freed-up capacity at Hobart. (*See* POB 14-19; *See also* SCAQMD's Comments on Recirculated Draft EIR, dated November 14, 2012 ("the Recirculated DEIR must evaluate the extent to which capacity [is] opened up at the Hobart Railyard by the construction of the proposed SCIG facility. The amount, origination, destination, and growth of other cargo, e.g. domestic freight containers at the Hobart Railyard as a result of the proposed SCIG facility being built can certainly be reasonably estimated…").) H7.Volume 4.RDEIR-FEIR, SCIG-AR156713~Final SCAQMD Comments SCIG Recirculated DEIR, AR 156716; *see also id.* at AR 156721-156722.

The administrative record does contain some material regarding the Southern California Association of Governments' ("SCAG") Regional Transportation Plan. But respondents' brief cites no SCAG analysis that bears on this question.

In some respects, this issue is much like the one raised in *Communities for a Better Environment v. City of Richmond, supra.* There, the question was whether certain defined changes to a Chevron refinery would increase its capacity to process lower quality, heavier crude oil. *Id.* at 184 Cal. App. 4th 83. Here, the question is whether the construction of SCIG would create capacity for BNSF to handle more cargo at Hobart.

There, "the EIR states in conclusory terms that the proposed Project will not result in an increased capacity…" *Id.* Here, the EIR states in conclusory terms that the proposed project will not lead to backfill at Hobart.

There, some commenters, including the Attorney General, sought to resolve the issue by having Chevron agree to a "crude cap." *Id.* at 84. Here, the Port discussed a cap with BNSF.

There, Chevron refused, saying,

> "[I]t's an extremely fluid and complex process for identifying and selecting crudes to process at a given refinery, and depending on the operating scenario, the product demand, what's available, … there is [*sic*] any number of combinations of crude oil that can come into the refinery. And the concern is that this selection of crude oil would be so far constrained that *we would not be able to take full advantage of the process capability of the refinery*." (Italics added.)." *Id.*

Here, according to the Port's representative, BNSF objected to a cap saying,

> "'Listen, we're a business. We can't predict right now what's going to happen. … [O]ur judgment is, our projections are, our plans are that we're not going to be doing anything special. But to cap ourselves and if a new business opportunity comes along in five years that nobody ever thought of, and all of a sudden it's an opportunity, for us not to be able to do it, we're not going to put ourselves in that position.'" G-06~03-07-2013~Transcript of FEIR Public Hearing, AR 21698-21699.

Chevron's answers were insufficient. They contributed to a finding that the project description was not accurate, stable, and finite. BNSF's response is equally unsettling.

8. <u>The argument that Hobart already has excess capacity</u>

Respondents make a second argument: there is already excess capacity at Hobart, so the construction of SCIG will not enable BNSF to do anything is cannot already do. Therefore, there is no need to examine Hobart.

This is addressed in the Response to Comments, "Back-Fill at Hobart." D.FEIR-03~2-22-13~ Chapter 2 Volume I Responses to Comments ~ Recirculated Draft EIR, AR 3964-3965. There, the EIR says,

> [I]f SCIG were not built Hobart would handle approximately 1.2 million lifts (3.1 million TEUs) in 2016, consisting of transload and domestic cargo as well as BNSF's direct intermodal cargo. Hobart has, or can build, enough capacity to handle those volumes (AECOM, 2012). If SCIG were built, Hobart would still handle nearly 830,000 lifts (2.5 million TEUs), consisting largely of domestic and transloaded cargo but including 5 percent of BNSF's direct international cargo. (Appendix G4) That volume would amount to approximately 86 percent of the volume handled in 2010…*Id.* at AR 3964.

That takes the analysis through 2016. However the table printed above shows that without SCIG, Hobart reaches its capacity of 1.7 million lifts sometime shortly after 2023.[8] If SCIG is built, it will still have excess capacity of approximately half a million lifts at that same point in time.

BNSF says it *could* expand Hobart to increase its capacity. But that would not be necessary (or not necessary as quickly) if the SCIG is built, for the effect of SCIG is to increase Hobart's capacity by removing 95% of the IPI cargo from Hobart.

Petitioners note that by constructing SCIG, BNSF will add capacity for another 1.5 million lifts per year. That increases BNSF's capacity to 3.2 million lifts per year – nearly double what it is now. The question is what will be done with that total capacity. (POB 17.)

As noted above, respondents says this excess capacity will not generate new work; the volume of work is controlled by market conditions.

In reply, petitioners point to *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal. App. 4th 645. There, a mine operator sought a conditional use permit that would

[8] It "maximum practicable capacity is currently 1.7 million lifts. D.FEIR-03~02-22-2013~Chapter 2 Volume I Responses to Comments, AR003964. According to the table reprinted above it would have 1.592 million lifts in 2023. The average growth from 2010 to 2023 is nearly 50,000 lifts per year. At that rate, it would reach 1.7 million lifts in 2025.

allow it to increase the annual limit on the tonnage of aggregate that it could produce. It argued that it would not actually increase the amount of mining it did. It said the amount mined was controlled by market conditions, among other things. *Id.* at 651. The Court rejected that argument. It focused on the additional capacity for mining that would be created by the change in the permit.

> The inconsistent description, which portrayed the Project as having "no increase" in mine production while at the same time allowing for substantial increases above recent historical averages, failed to adequately apprise all interested parties of the true scope and magnitude of the Project. For this reason, we conclude that the EIR in this case was insufficient as an informational document for purposes of CEQA, amounting to a prejudicial abuse of discretion. *Id.* at 673-674.

There, the concern was over the direct effect of the "Project" – *i.e*. granting the Conditional Use Permit and increasing capacity. Here, the concern is with the indirect effect of the "Project" – *i.e*. nearly doubling BNSF's capacity for containerized cargo, moving work to SCIG and freeing-up capacity at Hobart. However, the principle seems to be transferable. It is the increase in *capacity* that should be studied – and the reasonably foreseeable impacts of that increase in capacity.

The EIR rejoins "there is no hidden reservoir of *transloaded* cargo that will suddenly materialize if SCIG is built." O12.D.FEIR-03~02-22-2013~Chapter 2 Volume I Responses to Comments ~ Recirculated Draft EIR, AR 5010. But that is not the point. The question is what is going to happen at Hobart with the *domestic* and transloaded cargo. How is BNSF going to utilize Hobart once additional capacity is created? That simply was not analyzed. The EIR did not provide information about that.

There is an echo of *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376 here. Although this is not a "piecemealing" case, there is a significant question about future activities. Our Supreme Court said,

> an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. *Id.* at 396.

Indeed, at oral argument, counsel for the Port argued that the only clear indirect impact this project is going to have on Hobart is to lower the level of activity in the short run. Then, he continued, "eventually, projects that have nothing to do with SCIG will backfill that." (Oral argument, afternoon of November 16, 2015.)

Here, it appears that the future use of Hobart is reasonably foreseeable and that it will likely change the scope of the environmental effects of SCIG. Rather than simply focusing on the environmental impacts of SCIG (and taking credit for taking trucks off the road), consideration of Hobart will give a more complete picture of the impact of doubling BNSF's capacity to handle intermodal cargo in the area serving the ports.

9. <u>The EIR does not address a related point made by the SCAQMD</u>

In its appeal letter, the SCAQMD addressed the Hobart issue again. It wrote,

> "There has been no evidence provided by BNSF or the Port to support the position that the Hobart rail yard will be underutilized as a result of the project. In fact, evidence supports that the freed up capacity at Hobart, as a result of SCIG, will be filled through transload activity. However, the FEIR <u>fails to analyze the potential impacts associated with a greater percentage of transload activity using Hobart, with originating and destination points throughout Southern California,</u>

rather than the fixed distance to the Port. H7.Vol.5 FEIR-App, SCIG-AR172719~SCAQMD Supp. Appeal Letter 5.8.13, AR 172720 (emphasis added).

Respondents have not identified anywhere in the EIR that addresses these two points: One, the nature of the work is changing at Hobart. According to the figures given in the EIR, in 2023, without SCIG, IPI will be approximately 30% of Hobart's workload; with SCIG, IPI will be only 2%. (See the tables reproduced above.) Instead, Hobart's capacity will be occupied by transload and domestic work. What, if any, are the impacts of that at Hobart? In the surrounding area? The EIR does not assess these.

Two, the IPI and transload work goes only from the ports to Hobart (and then to destinations around the country). But domestic cargo comes from everywhere *but* the ports. What are, *e.g.* the traffic and air pollution impacts in the areas through which that domestic cargo travels to Hobart? Can they be analyzed?[9]

Respondents say that these points need not be examined, because there is enough capacity at Hobart for this work regardless of whether SCIG is built. That may be so. But if there is backfill at Hobart as a result of the construction of SCIG, then these kinds of questions must be discussed to provide the public and the decision-makers with a fuller picture of the impacts of doubling BNSF's capacity.

10. The EIR's failure to analyze what will happen at Hobart does not sufficiently account for commercial reality

Petitioners cite the concerns addressed in *Ocean Advocates v. United States Army Corps of Engineers*, 402 F.3d 846 (9th Cir. 2005). There, BP West Coast Products sought the issuance and extension of a permit to build an addition to an existing oil refinery dock. The Army Corps of Engineers (the lead agency) cited "a letter from BP stating that only market forces, and not the

[9] In this limited respect may not be possible to do each kind of analysis contained in the EIR. For example, while traffic patterns may be speculative, it may be possible to model mass air emissions. But the EIR should consider what can be analyzed.

additional pier, would increase total vessel traffic." *Id.* at 866. It determined an Environmental Impact Statement was unnecessary. The Ninth Circuit rejected that, saying, in part,

> Common sense suggests that BP may have hoped that its sizable investment in the dock would facilitate its ability to handle a greater number of tankers a day, thereby increasing tanker traffic to the facility. The Corps' failure to look through BP's claims that it wanted only to increase its efficiency in handling existing congestion and its consequent failure to consider increased vessel traffic as a likely result of the project is unreasonable and insufficiently explained. *Id.* at 867.

Here too, the Port cited a letter from BNSF and refused to "look through [BNSF]'s claims that it wanted only to increase its efficiency."[10]

In a discussion of the No Project Alternative, the EIR says,

> "BNSF has already undertaken physical modifications and operational changes that have expanded the capacity of the Hobart Yard. To accommodate future increased cargo volumes at Hobart, BNSF would undertake additional operational and physical changes. Operationally, BNSF would re-organize its Southern California operations to handle primarily international (*i.e.* port) cargo at Hobart and shift the domestic cargo currently occupying a share of Hobart's capacity to other regional intermodal facilities." D.RDEIR-16~ 09-25-2012~Chapter 5 Alternatives, AR 12959.

Note two things about this passage. One, BNSF has *already* expanded Hobart to some extent. ("BNSF has already…expanded the capacity of the Hobart Yard.") Two, operationally, BNSF is able to "re-organize its Southern California operations to…shift the domestic cargo occupying a share of Hobart's capacity to other regional intermodal facilities." If it can shift

[10] See Mr. Light's September 19, 2012 e-mail: "BNSF has pursued a near dock facility [SCIG] to be more efficient in handling cargo moving from the ports." H.6.RDEIR.006~~BNSF Russell Light SCIG Memorandum (September 19 2012), AR 88345.

cargo from Hobart to "other regional intermodal facilities" then there is the unexplored question of whether it can shift cargo from those other facilities *to* Hobart to utilize the capacity it has created and can create at Hobart, or simply to make its operations more efficient. The EIR explores none of this.

The potential for additional environmental impacts at Hobart is too great to escape analysis simply on the strength of two scant letters which assert that BNSF has "no plans" to backfill Hobart. The EIR did a searching analysis of many things. Its treatment of Hobart stands in stark contrast.

11. Summary

The statute and Guidelines both define "project" to include reasonably foreseeable indirect changes. § 21065; Guidelines, § 15378(a). To the extent that the description of the SCIG does not include a discussion of reasonably foreseeable indirect changes at Hobart, as discussed above, it is deficient.

The Guidelines further require that "[i]n evaluating the significance of the environmental effect of a project, the lead agency shall consider…reasonably foreseeable indirect physical changes in the environment which may be caused by the project." Guidelines, § 15064(d). "An indirect physical change…is caused indirectly by the project." Guidelines, § 15064(d)(2). To the extent that the EIR did not consider the changes at Hobart caused indirectly, by freeing capacity at Hobart, as discussed above, it is deficient.

The Court concludes that the EIR omitted material information. It did not adequately apprise either the public or decision-makers of the reasonably foreseeable indirect impacts of the project, and thereby prevented intelligent weighing of its environmental consequences. Since informed decision-making cannot occur under CEQA, the EIR is inadequate as a matter of law.

12. Sheila

There is less information in the record about activities at Sheila. The EIR says,

> The Sheila facility is a locomotive mechanical shop that primarily supports operations at the nearby BNSF Hobart Railyard. Operations at the Sheila facility include, among other things, locomotive maintenance. This facility would continue to service the same volume of locomotives moving domestic and international cargo operating at the SCIG and Hobart railyards as it would if SCIG were not built. D.FEIR-02~02-22-2013~ Chapter 1 Introduction, AR 003914.

The administrative record contains a couple of descriptions. BNSF provided this description in Mr. Light's November 28, 2012 memo:

> The BNSF Sheila Mechanical Railyard is a locomotive mechanical shop facility located in Commerce, California supporting BNSF's operations in Southern California. Operations at the Sheila Railyard include locomotive fueling, locomotive maintenance and rail car inspection and repair. Locomotive maintenance refers to locomotive repairs, load testing, and periodic maintenance of parts, components, mechanical and electrical systems as needed and as required by the Federal Railroad Administration (FRA). Maintenance does not necessarily occur each time a locomotive arrives in the Basin, but rather is performed at any of BNSF's maintenance locations throughout the country based on the particular locomotive's miles travelled and/or time elapsed as required by the FRA. H.6.FEIR-002, BNSF Russell Light SCIG Memorandum *et al.*, AR 78363.

The administrative record also includes a description of Sheila, submitted by the Southern California Environmental Health Sciences Center, which is said to be taken from the California Air Resources Board's Health Risk Assessment for that yard:

> "The BNSF Sheila Mechanical Railyard is a locomotive mechanical shop facility, and mainly supports the operations at the BNSF Hobart Railyard nearby.

> Operations at the railyard include locomotive fueling, locomotive maintenance, locomotive line haul, passenger locomotives, track maintenance, portable power generators, on-road fleet vehicles, and other stationary sources. There were 14,577 locomotives serviced at the BNSF Sheila Mechanical Railyard in 2005." D.FEIR-04~02-22-2013~Chapter 2 Volume II Responses to Comments Draft EIR, AR 6136.

The commenter who submitted this description estimate that 1.9 tons of diesel particulate matter would be emitted by Sheila due to the additional work required by SCIG. The response to this comment did not take issue with this, but simply referred back to "Master Response 3, Hobart." *Id.* at AR 6181.

That Master Response is found at D.FEIR-03~02-22-2013~Chapter 2 Volume I Responses to Comments ~ Recirculated Draft EIR, beginning at AR 3961. It makes some of the same contentions as are discussed above, *e.g*. that transload and domestic cargo will not increase as a result of the project. Then it explains that Sheila's activity levels will not change because

> all locomotive maintenance and rail car inspections and repairs in the South Coast Basin that would be required once the Project is operational are already occurring in the Basin…The locomotives that would haul trains to and from the SCIG facility would not be additional locomotives, but rather they would be existing and future locomotives that would haul international cargo trains with or without the Project. The locomotives serving the SCIG facility would continue to be maintained at the Sheila Commerce Shop as is occurring today, based on FRA requirements or as required by malfunctions. No additional locomotives would be provided with maintenance at the Sheila facility as a direct result of the SCIG project; the growth in locomotive servicing activity would occur with or without

the Project, as a result of overall growth in train numbers associated with the growth in cargo. *Id.* at AR 3966.

To some extent this issue follows directly from the Hobart issue; to some extent it does not. For Sheila seems to do different kinds of work. Some seems to be locally generated, such as locomotive fueling, track maintenance, on-road fleet vehicles, maintenance of stationary sources, and perhaps some other local maintenance. Some seems to be done at Sheila simply because it is part of a nationwide network of BNSF maintenance and repair facilities, and it takes care of those locomotives that are in the vicinity when the time comes for their FRA scheduled service. The latter seems to be independent of SCIG or Hobart. The former seems to be more likely dependent on levels of need generated by SCIG and Hobart.

As noted above, the EIR frankly stated that it did not need to evaluate Sheila. The Court has found the EIR deficient for its failure to evaluate Hobart. If the Port chooses to supplement the EIR with an evaluation of Hobart, then it must consider whether its conclusions with respect to Hobart lead to the conclusion that additional work will be done at Sheila which may have environmental impacts.

VI. Growth Inducing Impacts

A. The Dispute Summarized

Petitioners argue, "The EIR Fails to Accurately Describe the SCIG Project's Growth-Inducing Impacts or Analyze the Impacts of Project-Related Growth." (POB 21:1.)

In this regard, they rely on §15126.2(d) of the Guidelines, which reads:

> (d) Growth-Inducing Impact of the Proposed Project. Discuss the ways in which the proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment. Included in this are projects which would

> remove obstacles to population growth (a major expansion of a waste water treatment plant might, for example, allow for more construction in service areas). Increases in the population may tax existing community service facilities, requiring construction of new facilities that could cause significant environmental effects. Also discuss the characteristic of some projects which may encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively. It must not be assumed that growth in any area is necessarily beneficial, detrimental, or of little significance to the environment.

Petitioners observe that the EIR discusses this subject in just over three pages. Draft EIR, Chapter 8, D.DEIR-25~09-23-2011, AR 16332-AR 16335. The EIR's discussion of "Growth-Inducing Impacts" is very brief. It is divided into two segments: direct and indirect impacts.

Petitioners argue that the SCIG is, in fact, growth inducing. With respect to direct effects, they point principally to the potential for additional cargo handling capacity and to the international competition for port business to urge that the "project could foster economic…growth." With respect to indirect effects, they examine the evidence regarding the additional jobs to be created by the project.

They contend there is a substantial discordance between the position the Port and BNSF took in promoting SCIG before (and apart from) the environmental review process, and that which they took in connection with the EIR.

Respondents disagree. They note the EIR concluded that the SCIG will neither directly nor indirectly stimulate growth in the surrounding area. *Id.* at AR 16332. The project, they say, will accommodate -- not induce -- growth.

During oral argument, the parties somewhat blended this argument into the discussion of Hobart. However, since it was briefed separately, the Court addresses it separately.

B. Petitioners' Position

1. Direct effects

a) Additional cargo and existing capacity limitations

Petitioners point to many places in the EIR and the administrative record in which the Port, BNSF or their consultants stated that the ports' capacity for additional cargo is constrained by rail capacity. They say that construction of SCIG will remove a barrier to economic growth. They refer to much evidence, including the following.

In 2006, Parsons prepared a report for the Ports that said "…to meet the projected demand for direct intermodal cargo, the Ports will need to develop all planned on-dock facility expansions as well as one of the "Other Potential Projects," as listed in Table 3-8." H.6 FEIR-42~Parsons San Pedro Bay 2006 Rail Study Update, AR 80786. SCIG is one of the "Other Potential Projects." *Id.* 80784

In May 2007, BNSF made a presentation entitled "BNSF Railway & Port of Los Angeles: Partners in Green Growth." The first three bullets of that presentation were:

- All studies show container volume will grow
- On-dock alone will not meet future needs
- SCIG must be part of any realistic plan to accommodate growth

H.7-Vol.2 NOP-DEIR SCIG-AR 110393, at AR 110394.

The December 2007 Tioga Report stated, generically, that "container port throughput capacity is a function of three factors: Port infrastructure, Productivity, and Inland infrastructure. The last ("inland infrastructure) includes "highway and rail capacity to move containers to and from the port.") H.6 DEIR-338~Tioga San Pedro Bay Cargo Forecast (2007), AR 74628.

More specifically, petitioners quote from the Growth-Inducing Impacts section of the EIR,

> The need for additional rail facilities to support current and expected cargo volumes, particularly intermodal container cargo, was identified in several recent studies…As discussed in those studies, even after maximizing the capacity of existing and potential on-dock rail yards, the demand for intermodal rail service will exceed rail yard capacity.
>
> D.DEIR-25~9-23-2011~Chapter 8 Growth-Inducing Impacts, AR 16333.[11]

That is consistent with a statement attributed to BNSF in the Tioga Report:

> Without the planned infrastructure improvements in on dock and near dock rail capacity, based on the Rail Master Planning Study, to be completed around 2010, 2015, and 2020, the demand at the San Pedro Bay Ports will exceed capacity resulting in slower than predicted growth and a diversion of traffic.
>
> H.6 DEIR-338~Tioga San Pedro Bay Cargo Forecast (2007), AR 74755.

Similarly, the Project Description in the EIR says "expansion of near/off-dock rail capacity will be necessary to accommodate projected increase in intermodal cargo volumes." D.RDEIR-06~09-25-2012~Chapter 2 Project Description, AR 12368, lines 34-35. And,

> [t]he Port's analysis indicates that at some point in the future, existing near- and off-dock facilities as currently configured will not be able to accommodate future volumes, given the expected growth in domestic and transload cargo. Accordingly, additional lift capacity is needed for each railroad. The shortfall in capacity will be addressed either by the proposed Project or by the modification of existing off-dock railyards... *Id.* at AR 12371, lines 8-13.

Indeed, even some of the parts of the record cited by respondents contain similar language. For example, their brief cites the January 2007 "Goods Movement Action Plan" of the

[11] The next paragraph says, however, "The estimated demand for intermodal cargo capacity in the Los Angeles region can be accommodated by existing UP and BNSF intermodal facilities, especially in view of the planned capacity improvements (e.g. the expansion of Hobart….) *Id.*

Business, Transportation and Housing Agency and the California Environmental Protection Agency. Table I-2 of that Plan says one of the benefits of SCIG is that it "relieves rail terminal capacity constraint." H.6.FEIR-009~CARB Good Movements (sic) Action Plan (January 2007), AR078664, at AR 78761.

Perhaps more telling with respect to the consistency of the EIR's description is this. The Long Beach Unified School District commented that SCIG was unnecessary if, as the EIR sometimes said, existing facilities could accommodate all the cargo projected to come to the Ports. The EIR's response was,

> The commenter accurately cites the RDEIR for the proposition that existing facilities can accommodate future demand, although less efficiently than with the proposed Project. The commenter's assertion that the Project is not necessary because future demand can "easily" be accommodated by other BNSF facilities is erroneous and commenter provides no substantial evidence in support of its claims. Contrary to the commenter's representation, the figures it cites (Appendix G4) demonstrate that all facilities would be near or over 100% capacity without the Project, which means they would be struggling to meet demand.
>
> D.FEIR-03~02-22-2-13~ Chapter 2 Volume I Responses to Comments, AR 4530.

b) Trade competition

Petitioners also point out that the EIR takes a crabbed view of international trade by ignoring (i) the competition for port business among the many facilities along the West Coast and (ii) the threat to business caused by the Panama Canal project.

They say, "[t]he railyard capacity created by SCIG will also enable Los Angeles to compete with other ports vying to receive a greater share of the burgeoning market for imported goods. Although adding rail capacity by itself may not cause U.S. demand for imported products

to grow, it will certainly affect whether those goods are shipped through the Port of Los Angeles – thereby causing Port growth – or through one of the Port's competitors." (POB 23:3-7.)

They also point to the EIR's response to a comment about the Panama Canal:

> Will SCIG help us compete with the Panama Canal?
>
> The key to competing with the Panama Canal is providing the infrastructure and level of service that importers and exporters need to move cargo efficiently. The SCIG would provide 1.5 million lifts per year in intermodal rail capacity for Inland Point Intermodal (IPI) traffic. This component of port traffic that (sic) is considered 'discretionary' and therefore subject to diversion to other West Coast gateways. The SCIG will help to maintain the POLA's and POLB's competitiveness relative to these alternative gateways.
>
> D.FEIR-15~03-07-2103- Final Responses to Comments on Additional Comment Letters Received on the FEIR Southern California International Gateway Project EIR, AR 12193.

That seems to resonate with the comments made by Dr. Geraldine Knatz (the Executive Director of the Port of Los Angeles) to the Los Angeles City Council at its May 8, 2013 hearing on the project. She said,

> The Burlington Northern is…going to create…over a thousand direct and indirect jobs. But more importantly, B.N. is our strategic partner. We've been before you talking about the competitiveness issues, about how Chicago is the battleground. The railroads can make or break us in this battle against the Panama Canal and against [the] growth of ports in Canada, and we're working with them like never before.
>
> B.N.'s…trying to move that battleground to Kansas City where they can control it where the Canadians don't have access. We like that strategy. We think that's

> the way to protect our competitiveness in the future, and we urge you to support this project.
>
> G-16~05-08-2013~Transcript of City Council Public Hearing re Appeal re Certification of Final EIR, AR 22262:7-22.

Indeed, the motion by which the Los Angeles City Council approved the project said,

> A 50-year term facilitates the Port of Los Angeles'…ability to retain and grow market share as global competition brought about by the Panama Canal widening and other factors intensifies…
>
> B-03~05-08-2013~Motion of Los Angeles City Council including Motion 10-A, 10-B (as Amended), 10-D and 10-E, AR 117.

2. Indirect effects

With respect to jobs, petitioners cite a December 2007 study prepared for BNSF by Global Insight, entitled "Macroeconomic Impacts of the Southern California International Gateway (SCIG) Project." D.FEIR-03~02-22-2013 ~ Chapter 2 Volume I Responses to Comments ~ Recirculated Draft EIR, AR 4811- 4845. That study finds "that SCIG will most likely cause an increase of 25-40% in total cargo purchased and…create up to…14,600 new jobs in Los Angeles." (POB 22:13-16.[12]) It quotes that study as saying those jobs "will be lost if the facility is not built." (POB 22:17.[13])

[12] The 25-40% figure is at AR 4832. However it is not clear that petitioners restate this entirely correctly. The report says that under Scenario 4 "Operation of the SCIG facility will lead to an increase in the total cargo purchased in the Southern California and Los Angeles region. The increase for the region is estimated at 40% of the total TEUs handled at SCIG." For Scenario 3 "40%" is "25%." (Scenario 3 and 4 are said to be "more likely…the case." *Id.*) However the 25% to 40% appears to relate to the *share of work at SCIG*, not an increase in total cargo purchased in Los Angeles. Nonetheless, petitioners' fundamental point is valid. The report clearly states, "Operation of the SCIG facility will lead to an increase in the total cargo purchased in the Southern California and Los Angeles region." *Id.*

[13] The reference to 14,600 new jobs in Los Angeles is at AR 4813. "Jobs will be lost" is also at AR 4813.

C. Respondents' Position

1. Direct effects

As to direct effects, the EIR asserts that SCIG would not foster economic growth, population growth or the construction of new housing. It also notes that the project would not have any material effect on water supply, waste water, solid waste disposal, or electrical issues. With the exception of the first ("economic growth") petitioners do not challenge those assertions.

Then the EIR says,

> The need for additional rail facilities to support current and expected cargo volumes, particularly intermodal container cargo, was identified in several recent studies (see Section 2.1). As discussed in those studies, even after maximizing the capacity of existing and potential on-dock rail yards, the demand for intermodal rail service will exceed rail yard capacity (Parsons, 2006). Those studies specifically identified a need for additional near-dock intermodal capacity to complement and supplement existing, planned, and potential on-dock facilities (Parsons, 2006). D.DEIR-25~9-23-2011~ Chapter 8 Growth-Inducing Impacts, AR 16333, lines 15-21.

However, it says,

> Although the proposed Project would provide a needed goods movement facility, it would not induce more cargo through the San Pedro Bay ports. The estimated demand for intermodal cargo capacity in the Los Angeles region can be accommodated by existing UP and BNSF intermodal facilities, especially in view of the planned capacity improvements (*e.g.*, the expansion of Hobart, see sections 2.5.3.1, No Project, and 4.2.10.7, Cumulative TRANS-5). *Id.* lines 35-39.

2. Respondents' additional arguments

As with Hobart, respondents focus their argument principally on the contention that "SCIG…cannot increase the ports' throughput, which is constrained by the physical and operations capacity of the marine (ship) terminals, *not* by any shortfall associated with the near-dock or off-dock rail yards." (ROB 58:25-59:1.) In support of this argument, they cite material in the administrative record not discussed or cited in either the EIR's "Growth Inducing Impacts" chapter or the other parts of the Draft EIR to which that chapter makes reference.

To establish the capacity of the Ports, respondents cite material discussed elsewhere in the EIR, most notably, the discussion of "Container Terminal Capacity" in the Introduction that was published in the revised draft environmental impact report. D.RDEIR-05~09-25-2012~Chapter 1 Introduction, AR 12338. That section explains that there are two parts to a relevant analysis. One is the expected growth in cargo demand, based on world economic conditions. Two is the amount of cargo the Ports can physically handle. The EIR concludes that the second is less than the first. Therefore, of those two factors, the Ports' capacity is the constraint on the amount of cargo that will move through the Ports.

This means, they say, that adding rail yard capacity will not change the volume of cargo flowing through the Ports. From this, they conclude, that SCIG will accommodate growth, not induce it. More precisely, they argue, that the direct intermodal cargo (IPI) will be approximately 2.0 million TEUs; well within SCIG's capacity of 2.8 million TEUs.

They rely on the EIR's discussion (in a few places) that studies more recent and or credible than those relied on by petitioners show that constructing SCIG will not induce growth. Rather, the constraint on the growth of cargo to the ports consists of the capacity of the terminals themselves, including both "backland capacity" and "berth capacity". D.RDEIR-05~09-25-2012~Chapter 1 Introduction, AR 12338-12339. Thus, "adding rail yards, such as SCIG, cannot change the volume of cargo that can pass through the ports…" (ROB 58:15-16.)

3. Indirect impacts

In the section on indirect impacts, the EIR addresses the jobs issue. It refers to and relies on an extensive discussion of the socioeconomic setting contained in Chapter 7 of the Draft EIR and Final EIR. It concludes, from the studies cited, that the project could add "between 660 jobs in 2016 [and] 1,096 jobs in 2046. D.DEIR-25~9-23-2011~Chapter 8, Growth-Inducing Impacts, AR 16334, lines 23-24. Approximately one-third of the jobs are earmarked for local residents.

Respondents criticize petitioners' reliance on the Global Insight report's job creation prediction. They observe that the study simply projected demand and, did not account for the limit on the amount of traffic that can be handled by the Ports. That grossly overestimated the number of jobs that might be created.

They say that the Ports – and the EIR – rely on studies that account for both projections in growth in trade *and* the ability of the ports to handle all the business that might come their way. For this respondents, and the EIR, cite the 2007 Tioga study and the 2008 POLA/POLB study of "Throughput Projections." *See* D.RDEIR-05~09-25-2012~ Chapter 1 Introduction, AR 12338. That projects far more moderate job growth.

D. Analysis

The EIR discusses some aspects of the question of growth-inducing impacts. To the extent that the question is predominantly a dispute over a question of fact, the Court's inquiry is limited to a determination of whether there is substantial evidence to support the EIR's conclusions. To the extent that the EIR fails to address an issue, the review is de novo.

1. Indirect impacts - jobs

As to the question of jobs, the parties have a dispute of facts that is well-addressed in the EIR. Clearly there is substantial evidence to support the EIR's conclusion as to the number of jobs that will be created. Indeed, the EIR contains a much more detailed analysis of that issue

than is found in the Global Insight study. Thus, the Court finds this discussion in the EIR is adequate.

2. Direct impacts –the Hobart tie-in

With respect to direct impacts, the Guidelines require a discussion of "the ways in which the proposed project could foster economic or population growth." Guidelines, § 15126.2(d). There is no credible argument here that SCIG would foster population growth; the only question is whether SCIG would "foster economic…growth…either directly or indirectly, in the surrounding environment." *Id*.

3. "Accommodating growth" or "removing an obstacle to growth"

The parties debate whether SCIG removes an "obstacle to growth" (petitioners) or simply "accommodates" inevitable growth (respondents). In the context of this case, it is difficult to see a difference between "accommodating growth" and "removing an obstacle to growth." If capacity is needed to "accommodate growth" then the lack of that capacity is an "obstacle to growth."

So here, were the Ports constrained by inadequate rail capacity,[14] it would limit the amount of cargo as Port staff feared. Developing that rail capacity (by building SCIG) "accommodates growth" by "removing [the inadequate rail capacity] barrier to growth."

a) Putting the Ports in a better competitive position along the West Coast and internationally

Respondents make a case that the growth in IPI cargo is controlled simply by macro-economic factors. But petitioners credibly argue that neither the "Growth Inducing Impacts" chapter of the EIR nor respondents' brief address the comments cited above which show that the

[14] See, *e.g.*, H.6 FEIR-42~Parsons San Pedro Bay 2006 Rail Study Update, AR 80786; H.7-Vol.2 NOP-DEIR SCIG-AR110393, at AR110394; D.DEIR-25~Chapter 8 Growth-Inducing Impacts, AR 16333; D.RDEIR-06~09-25-2012~Chapter 2 Project Description, AR 12371, lines 8-13.

Ports believe they will be more competitive with other ports along the West Coast (and with the Panama Canal improvements) once SCIG is built. The macroeconomic pie may not grow, but the Ports are competing for a larger slice of that pie, and, they have said, SCIG will help them fight for that larger slice. That is simply not addressed in the EIR's scant discussion of "Growth Inducing Impacts."

b) The EIR's competing view of whether Hobart can accommodate growth

The EIR itself contains two versions of whether an expanded Hobart can accommodate the projected growth (even if the Ports' share of the cargo pie remains the size it is now.) In places it says it can. D.DEIR-25~9-23-2011~Chapter 8 Growth-Inducing Impacts, AR 16333, lines 36-39. In places it says it cannot. D.FEIR-03~02-22-2-13~ Chapter 2 Volume I Responses to Comments, AR 4530. The great majority of references suggest it can accommodate the growth.

4. Hobart, again

But in the end, it comes down to this: petitioners do not make clear what growth *in the surrounding environment* is omitted from the EIR – except growth at Hobart. Indeed, as noted above, at oral argument, the issue of "growth-inducing impacts" was largely subsumed in the argument over Hobart.

Petitioners make no serious argument about any other growth inducing effect. Of course, they bear the burden of proving that the EIR has omitted some matter. *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 117. Thus, the Court gives no further consideration to any effect other than at Hobart.

The potential for growth at Hobart has already been discussed above. So to the extent that Hobart is, again, the gravamen of petitioners' argument, it is disposed of above. In the final analysis, the "growth-inducing effects" argument, is simply another argument about Hobart. The

Court's ruling with respect to Hobart resolves the "growth-inducing effects" debate. A separate determination is not required here.

VII. Air Quality

A. Three Different Analyses are in Dispute

The parties' disputes concerning air quality impacts refer to three different analyses found in the EIR. All three relate to the *operation* of the project once it is completed; there appears to be no dispute about air quality impacts during *construction* of the project.

The three analyses at issue are these:

- Regional mass emissions (AQ-3):
  - This states the *mass* of pollutants to be emitted by operation of the SCIG.
  - A mass is stated as, *e.g.*, pounds per day, or tons per year.
  - A mass can be measured (or modeled) as a quantity emitted by given source over a given time.
  - The EIR states "average daily emissions" and "peak daily emissions"
    - "Average daily emissions" "represent annual emissions divided by 360 days per year of operation." D.RDEIR-16~09-25-2012~Chapter 5 Alternatives, AR 12968, line 1.
    - "Peak daily emissions" "assume the simultaneous occurrence of maximum theoretical daily equipment activity levels. [They] would rarely if ever occur during day-to-day operations of the facility." D.RDEIR-16~09-25-2012~Chapter 5 Alternatives, AR 12970, lines 1-2.
  - These are the total amounts of pollutants being added to the air basin.

- Ambient air quality dispersion (AQ-4):
    - This states the *concentration* of pollutants that would occur at different geographical locations as a result of operation of the SCIG.
    - A concentration is stated as, *e.g.*, "micrograms per cubic meter" or "parts per million."
    - A concentration can be measured (or modeled) at a given point in time at a given location.
    - Multiple data points are then averaged and reported as, *e.g.* "average 1-hour concentration," "average 24-hour concentration," or "average annual concentration," etc.[15]
    - These are the concentrations of contaminants that people are expected to breathe.
- Toxic air contaminants (AQ-7):
    - This states the *risk* that someone exposed to the impacted air will develop cancer or some chronic or acute non-cancer hazard.[16]
    - A risk is stated as, *e.g.* 10 in one million, meaning that if one million people are exposed, ten will develop, say, cancer.
    - This is an attempt to identify certain (but not all) health effects that might be caused by the operation of the SCIG.

[15] To model concentrations, one must input the mass emissions from a source or sources and then disperse (diffuse) that mass over distances, usually influenced by wind speed and direction. (This is, of course, a very simplified statement. See, *e.g*, D.RDEIR-22~09-25-2012~Appendix C2~Dispersion Modeling of Criteria Pollutants, Section 2.3 at AR 13630.) In other words, the mass emissions analysis looks primarily at how much air pollution is generated by the project. The concentration analysis projects where those pollutants go, and at what concentration they are found at various locations as one moves farther from the sources of contamination.

[16] See D.RDEIR09~09-25-2012~Section 3.2 Air Quality, AR 12490, lines 32-33.

One can *measure* existing levels of contamination. But, to the extent the EIR is predicting future emissions, it is not *measuring* them; rather, it is *modeling* them. Air models are, essentially computer programs that uses certain inputs to predict (i) the *mass* of air contaminants that will be produced by a source or sources at different times, (ii) the *concentration* of air contaminants that will result at various locations and times, and (iii) the *cumulative exposure* to toxic air contaminants over an extended period of time.

Each of the three analyses considers somewhat different set of contaminants:

- The regional mass emissions analysis (AQ-3) looks at:
  - VOCs (volatile organic compounds),
  - CO (carbon monoxide),
  - NOx (oxides of nitrogen) [17],
  - SOx (oxides of sulfur),
  - PM_{10} and $PM_{2.5}$ (particulate matter less than 10 microns in diameter, and less than 2.5 microns in diameter.)

  (D.RDEIR-09~09-25-2012~ Section 3.2 Air Quality, AR 12489);
- The ambient air quality dispersion analysis (AQ-4) looks at:
  - CO (carbon monoxide),
  - NOx or NO_2 (nitrogen dioxide)[18]
  - SO_2 (sulfur dioxide)
  - PM_{10} and $PM_{2.5}$ (particulate matter less than 10 microns in diameter, and less than 2.5 microns in diameter.)

[17] "NOx is a generic term for the total concentration of mono-nitrogen oxides, nitric oxide (NO) and nitrogen dioxide (NO_2)." H.7-Vol.3.DEIR-RDEIR~SCIG-AR146206~CAPCOANO2GuidanceDocument10-27-11, at AR146214. In places, the EIR used a conversion rate to translate NOx concentrations to NO_2 concentrations. See, *e.g.* D.FEIR-07~02-22-2013~Appendix C2 Dispersion Modeling of Criteria Pollutants, AR 6967, lines 19-21.

[18] At D.RDEIR-09~09-25-2012~ Section 3.2 Air Quality, AR012489 the document refers to NOx; at AR012505, Table 3.2-12 refers to NO_2. See the previous note for the relationship between them.

D.RDEIR-22~09-25-2012~Appendix C2~Dispersion Modeling of Criteria Pollutants, AR 13645

- The toxic air contaminant analysis (AQ-7) looks at a long list of elements, compounds and particulates, most of which are different from those included in the regional mass emissions and ambient air quality dispersion analyses. Some are identified below. However, the EIR reports the principal substance of concern is diesel particulate matter.

  D.RDEIR-09~09-25-2012~ Section 3.2 Air Quality, AR 12545:45-12546:3.

To determine an impact, it is generally the case that one takes the difference between the amount of pollution with the project and without it. One subtracts the subtrahend ("baseline") from the minuend (the projected amount of pollution or risk) to find the difference.

Some of petitioners' arguments challenge the minuend, and some the subtrahend. For clarity of analysis, it is important to focus on what is at issue. Essentially, petitioners make three, distinct, major arguments.

- As to the regional mass emissions analysis (AQ-3) petitioners argue that the subtrahend should have employed a "floating baseline" instead of a "current" baseline. The "current baseline" describes conditions as they existed in 2010. D.RDEIR-09~09-25-2012~ Section 3.2 Air Quality, AR 12519, lines 16-20.
- As to the ambient air quality dispersion impacts (AQ-4) petitioners argue that the EIR does not contain an adequate No Project analysis because it used only a modeled "single composite emissions scenario" as the minuend. D.RDEIR-09~09-25-2012~ Section 3.2 Air Quality, AR 12528, line 13.

- As to the toxic air contaminant analysis (AQ-7) petitioners argue that the EIR erred by using an incorrect factor in the minuend to state a child's exposure. They do not specifically challenge the subtrahend, because it used a floating baseline "to fully apprise the public and decision makers of the Project's environmental impact." D.RDEIR-09~09-25-2012~ Section 3.2 Air Quality, AR 12545, lines 24-31.

There are other points raised. They are also discussed below.

B. The Regional Mass Emissions Analysis (AQ-3): the Use of "Existing" Versus "Floating" Baseline

The regional mass emissions analysis (AQ-3) modeled emissions associated with operation of the SCIG in the years 2016, 2023, 2035, 2046 and 2066. For each of those years, it compared them with the "CEQA Baseline (2010)". D.RDEIR-09~09-25-2012~ Section 3.2 Air Quality, AR 12519, lines 16-20.

Petitioners say that resulted in a misleading analysis of the impacts; the EIR should have used a "floating" baseline instead of an "existing conditions" baseline.

1. The importance of a baseline

An accurate baseline is essential to an understanding of the impact of a project.

> The fundamental goal of an EIR is to inform decision makers and the public of any significant adverse effects a project is likely to have on the physical environment. (§ 21061; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 428 [53 Cal. Rptr. 3d 821, 150 P.3d 709].) To make such an assessment, an EIR must delineate environmental conditions prevailing absent the project, defining a baseline against which predicted effects can be described and quantified. (*Communities for a Better*

Environment v. South Coast Air Quality Management Dist. (2010) 48 Cal.4th 310, 315 [106 Cal. Rptr. 3d 502, 226 P.3d 985]).

Neighbors for Smart Rail v. Exposition Metro Line Construction Authority (2013) 57 Cal. 4th 439, 447 ("*Neighbors*").

2. Petitioners' argument for departing from current baseline

a) "Baseline" usually describes "current" conditions

Normally, the "baseline" describes "the physical environmental conditions…as they exist at the time the notice of preparation is published…" Guidelines, §15125(a). With respect to large projects, the notice of preparation may occur years before the EIR is completed.

b) Petitioners say the use of a "current baseline" is misleading

Petitioners acknowledge the usual rule, but argue that it results in a misleading baseline. They contend that already-existing environmental regulations will reduce emissions below what is now the baseline level. Thus, projecting the current baseline into a future in which baseline emissions are certain to be reduced leads to a misleading analysis of the impacts of the project.

The EIR itself recognizes that the future effect of existing regulations should be included in modeling *future* air emissions (the minuend). It said,

> Several commenters have stated that the air quality analysis should not take credit for regulations that will be enforced whether or not the Project is implemented. The commenters are incorrect. Including regulations in analysis is consistent with CEQA case law and standard practices in air emissions modeling. For example, emissions reduction regulations are included in CARB EMFAC and OFFROAD emissions models. New regulations are a major reason the models are frequently updated. For example, "EMFAC2011 includes the latest data on California's car and truck fleets and travel activity. The model also reflects the emissions benefits of ARB's recent rulemakings including on-road diesel fleet rules, Pavley Clean

> Car Standards, and the Low Carbon Fuel standard." (CARB, 2011). D.FEIR-03~02-22-2013~Chapter 2 Volume I Responses to Comments~ Recirculated Draft EIR, AR 3960, lines 36-45.

So, the regional mass emissions model includes the future effect of existing regulations when stating the level of pollutants in 2016, 2023, 2035, 2046 and 2066 (the minuend). But it then compares those levels to the 2010 baseline (the subtrahend) – as if there would be no change to the baseline as a result of those same existing regulations. That is petitioner's complaint: the subtrahend does not "float," even though the minuend does.

a) The *Neighbors* case

Petitioners rely heavily on *Neighbors, supra,* a case decided by our Supreme Court in three opinions. Justice Werdegar wrote the main opinion (joined by Justices Kennard and Corrigan). Justice Baxter concurred and dissented (joined by the Chief Justice and Justice Chin), and Justice Liu concurred and dissented.

In Justice Werdegar's opinion, the Court framed the question before it as follows:

> …whether that baseline may consist *solely* of conditions projected to exist absent the project at a date in the distant future or whether the EIR must include an analysis of the project's significant impacts on measured conditions existing at the time the environmental analysis is performed. *Neighbors,* at 447.

Neighbors dealt with a situation in which an agency used a future conditions baseline instead of an existing conditions baseline. Thus, it was the inverse of our case.

Here, petitioners are arguing that the lead agency erred in using the current conditions as baseline; in *Neighbors* petitioners argued that the lead agency erred in using future conditions as baseline. Here petitioners seek to have the lead agency use future conditions in the baseline analysis; in *Neighbors* petitioners sought to have the lead agency use current conditions in the baseline analysis.

Neighbors held the lead agency erred because there was not sufficient justification in the administrative record to justify its decision to use *only* a baseline of conditions projected to exist in the year 2030.[19]

So petitioners do not rely on the Court's holding in *Neighbors.* Instead they rely on the Court's explanation of its decision. The main opinion says,

> While an agency has the discretion under some circumstances to omit environmental analysis of impacts on existing conditions and instead use only a baseline of projected future conditions, existing conditions "will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." (Cal. Code Regs., tit. 14, § 15125, subd. (a).) A departure from this norm can be justified by substantial evidence that an analysis based on existing conditions would tend to be misleading or without informational value to EIR users. *Id*. at 445.

The majority explained when future conditions may be used as the *sole* baseline:

> Projected future conditions may be used as the sole baseline for impacts analysis if their use in place of measured existing conditions—a departure from the norm stated in Guidelines section 15125(a)—is justified by unusual aspects of the project or the surrounding conditions. That the future conditions analysis would be informative is insufficient, but an agency does have discretion to completely omit an analysis of impacts on existing conditions when inclusion of such an analysis would detract from an EIR's effectiveness as an informational document, either because an analysis based on existing conditions would be uninformative or because it would be misleading to decision makers and the public. *Id.* at 451-452.

[19] Nonetheless, finding the agency's abuse of discretion to be non-prejudicial, the Supreme Court affirmed the Court of Appeal's affirmance of the superior court's denial of the petition for writ of mandate. Apart from the issue of prejudice, this part of the opinion commanded a majority of the court. *Id.* 447 n.2

The *Neighbors* court added,

> CEQA imposes no "uniform, inflexible rule for determination of the existing conditions baseline," instead leaving to a sound exercise of agency discretion the exact method of measuring the existing environmental conditions upon which the project will operate. (48 Cal. 4th at p. 328) Interpreting the statute and regulations in accord with the central purpose of an EIR—"to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment" (§ 21061)—we find nothing precluding an agency from employing, under appropriate factual circumstances, a baseline of conditions expected to obtain at the time the proposed project would go into operation. *Id.* at 452-453.

Agencies have discretion to "use conditions predicted to prevail in the more distant future, well beyond the date the project is expected to begin operation" even "to the exclusion of an existing conditions baseline." *Id.* at 453. An agency may do this if the existing baseline analysis "would be uninformative or misleading to decision makers and the public." *Id.* at 453.

To support the latter point, it added footnote 5, containing a hypothetical from an amicus brief filed by the South Coast Air Quality Management District. That posited conditions in which emissions of pollutants are expected to decline in the future due to the enforcement of regulations already adopted. Comparing emissions from a project several years hence to current rather than to future emissions in the area would arguably be misleading, as explained in that footnote. Thus, an agency would have discretion to use a future conditions baseline. Petitioners say that is precisely our case.

3. What the EIR used as baseline and why

The Port exercised its discretion to depart from the Guidelines' direction to use the date of the Notice of Preparation as baseline. D.RDEIR-09~09-25-2012~Section 3.2 Air Quality, AR

12474. ("The baseline year for determining the significance of potential proposed Project impacts is 2010.")

As explained in the Response to Comments,

> Section 15125(a)…provides that the existing conditions are normally described as they exist at the time the notice of preparation (NOP) is published, which in the case of the proposed Project was 2005. However, the LAHD, as lead agency, has determined that with the passage of seven years since the NOP date and changes in conditions over this period, the existing environmental setting is best reflected by a 2010 baseline year, which was the most recent year for which the lead agency had complete data.
>
> D.FEIR-03~02-22-2013, Chapter 2 Volume 1 Responses to Comments: RDEIR, AR 3958.

At a public hearing, the Port staff explained, in general terms, that

> [I]n 2005 the baseline was clearly double of what the baseline was in 2010. So that gives you an idea of the magnitude of the emissions reductions of the Port's Clean Air Action Plan and other emissions environmental programs have resulted. Literally, the 2010 baseline is half. And so the public wanted to have the project be compared to current conditions with a lot cleaner air, and so that's why we agreed that it was a good comparison…
>
> G-12.2~03-07-2013~Minutes of FEIR Public Hearing, AR 21969:25-21970:8.

So, the EIR already departed from the Guidelines. The precise question then is whether there is sufficient evidence in the record to support its decision not to depart further from that Guideline's norm.

In theory, it would appear that petitioners have a point. The EIR recognized that existing regulations will necessarily drive down the level of pollutants from Port operations, *ceteris*

paribus. Port staff's comments in the administrative record also suggest that the drop in pollution could be significant. Thus, it would appear that this case is much like footnote 5 in *Neighbors* and that the EIR could be misleading were the Port to use only a 2010 baseline.

4. Respondents' key argument

Respondents make several arguments. However, one is dispositive. They observe that *Neighbors* endorsed the rule enunciated in *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351.[20]

> [A] project's effects on future conditions are appropriately considered in an EIR's discussion of cumulative effects and in discussion of the no project alternative. (*Sunnyvale West*, *supra*, 190 Cal.App.4th at pp. 1381–1382.) *Neighbors* at 454.

Respondents say that the EIR did precisely that. It discussed the "floating baseline" in the "No Project Alternative." (ROB 27.) Indeed, it did.

In the Recirculated Draft EIR the Port responded to public comments by adding an analysis that does precisely what petitioners say is missing.

> In response to comments on the Draft EIR, the difference in mass air emissions between the proposed Project and the No Project Alternative was calculated and presented below in Table 5-5 for average daily emissions and Table 5-6 for peak daily emissions. Although this analysis is not required by CEQA and is not being used to evaluate impacts, it is being presented for informational purposes. D.RDEIR-16~09-25-2012~Chapter 5 Alternatives, AR 12966.

The final version of these tables were contained in Chapter 3 "Modifications to the DEIR and RDEIR" beginning at page AR 6501. There, the EIR displays the average daily operational emissions (AR 6501 to AR 6503) and peak daily operational emissions (AR 6503-AR 6505) for

[20] The Court disapproved *Sunnyvale West* "insofar as [it holds] an agency may never employ predicted future conditions as the sole baseline for analysis of a project's environmental impacts." *Neighbors* at 457.

the years 2016, 2023, 2035, 2046 and 2066. It compares the modeled "project emissions" with the modeled "no project emissions." By doing so, it shows precisely what a "floating baseline" would show.[21]

In their reply brief, petitioners do not dispute that the "no project" analysis displayed the regional mass emissions in each of several years using a floating baseline. Instead, they argue, "the Port did not actually use th[ose] tables…to determine Project impacts." (PRB 18:19-20.) Had the Port done that, it would have discovered significant exceedances for carbon monoxide in 2035, 2046 and 2066. (*Id.* at lines 22-23.)

That is true. But a close examination of the tables shows those are the only three data points as to which that is true. Tables 5-5 and 5-6 contain 30 different data points (six pollutants times five sample years). For twenty-seven of those data points, the floating baseline analysis does not show an amount that exceeds a threshold of significance. In this respect, for 90% of the data points, the use of a floating baseline leads to no different result than the use of the 2010 baseline.

Even as to those three data points, they are there, in the EIR, for the public and decision makers to see.

The standard of review with respect to choice of baseline is "substantial evidence."

> We first ask whether an agency's discretion *ever* extends to use of a future conditions baseline to the exclusion of one reflecting conditions at the time of the environmental analysis. Concluding that existing conditions is the normal baseline under CEQA, but that factual circumstances can justify an agency departing from that norm when necessary to prevent misinforming or misleading the public and

[21] In its zeal to refute comments the Final EIR explained why it did not use a floating baseline in Chapter 3 ("Environmental Analysis") of the RDEIR. See D.FEIR-03~02-22-2013~Chapter 2 Volume 1 Response to Comments ~Recirculated Draft EIR, AR 3959, line 44 to AR 3960, line 7. However, that does not detract from the fact that the information is displayed in a different place in the EIR.

> decision makers, we then ask whether the administrative record here contains substantial evidence of such circumstances. *Neighbors* at 447-448.
>
> Because the standard articulated here involves a primarily factual assessment, the agency's determination is reviewed only for substantial evidence supporting it. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, *supra*, 40 Cal.4th at p. 435.) If substantial evidence supports an agency's determination that an existing conditions impacts analysis would provide little or no relevant information or would be misleading as to the project's true impacts, a reviewing court may not substitute its own judgment on this point for that of the agency. (*Ibid.*) *Neighbors* at 457.

Here, there is substantial evidence to support the Port's determination not to use a floating baseline for its regional mass emissions analysis in Chapter 3. The floating baseline analysis displayed in Chapter 5 shows that there is a limited difference between the use of the 2010 baseline (Chapter 3) and the floating baseline (Chapter 5).

> In reviewing for substantial evidence, the reviewing court "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable," for, on factual questions, our task "is not to weigh conflicting evidence and determine who has the better argument." (*Laurel Heights I*, supra, 47 Cal.3d at p. 393.) *Vineyard Area, supra,* 40 Cal. 4th at 435.

As respondents have argued, the Guidelines and cases do not require a "perfect" EIR.

> An EIR should be prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the

> sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts. The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure. Guidelines § 15151. See, also, *e.g. Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal. App. 4th 351, 368. ("Technical perfection is not required.")

Here, there is substantial evidence to support the EIR's decision to use the 2010 baseline instead of a floating baseline in its analysis of regional mass emissions. In any event, to the extent that there is a difference in the result that is obtained by using a floating baseline, the EIR displays it in Chapter 5. The information allows reasoned analysis by decision-makers and the public.

C. The Ambient Air Quality Analysis (AQ-4): the Use of a "Composite" Minuend

The issue with respect to the ambient air quality analysis is quite different. At oral argument, petitioners said they focus on this area, in significant part, because this is the part of the environmental report that informs the public and decision-makers what will be in the air that people breathe. It should, they say, inform them of what those additional levels of contamination will be at various times and in various places.

1. How the EIR analyzed ambient air quality: the minuend

When it came to stating the *mass* of pollutants, the EIR displayed the amounts of pollutants, from various sources, for each of five modeling years (2016, 2023, 2035, 2046 and 2066.) With regard to *concentrations* it did not do that.

Instead, it did something of a worst-case analysis. As to each "criteria pollutant" (*e.g.* NO_2) it input into its air model the highest mass emissions for each source, regardless of when

that highest value occurs. So, for example, petitioners correctly observe, "emissions from 2016 cargo handling equipment might be combined with emissions from 2046 truck activity to arrive at the 'composite' scenario used to determine the No Project's projected ambient air pollution impacts." (POB 39:16-18.)

Respondents do not dispute this. Indeed, the EIR explains,

> Dispersion modeling of onsite and offsite Project operational emissions was performed to assess the impact of the Project on local offsite air concentrations. A screening method, which results in conservative predictions of concentrations from project operational emissions, was used. For instance, rather than modeling each analysis year to identify the maximum pollutant concentrations, a single composite emissions scenario was modeled as a conservative approach. The composite emissions scenario is a combination of the peak year (for the annual NO_2 and PM_{10} concentration thresholds), peak day (for the 24-hour SO_2, PM_{10}, and $PM_{2.5}$ concentration thresholds), or peak hour (for the 1-hour NO_2, 1-hour and 8-hour CO, and 1-hour SO_2 concentration thresholds) emissions within the modeling domain by source category. *Note that the peak year or day emissions for a particular source category may not necessarily occur in the same year or day as the other categories*. D.RDEIR-09~09-25-2012~Section 3.2 Air Quality, AR 12528, lines 9-20 [emphasis supplied].

2. Petitioners' Challenge

a) Failure to do a No Project Alternative calculation

Petitioners do not contend that the EIR failed to calculate the No Project Alternative *concentrations* of air pollutants. As respondents point out, the EIR contained a "composite emissions scenario" which was a form of calculation of the No Project Alternative ambient air

pollutant concentrations. D.FEIR-07~02-22-2013~Appendix C2 Dispersion Modeling of Criteria Pollutants, AR 6995 to AR 6998.

b) Petitioners challenge the use of a "composite emissions scenario"

Instead, petitioners contend "these 'composite emissions scenarios' do not represent actual emissions from the No Project alternative *at any particular point in time*. Accordingly, the EIR failed to accurately portray for the public and decision-makers the actual impacts of the No Project alternative." (POB 39:18-21.) Essentially, they argue this is a false construct that is misleading and incomplete.

Respondents' brief seeks to dispute this. First it argues that "the EIR contains a detailed, side-by-side comparison of predicted average daily emissions for the Project and No Project alternative…" (ROB 35:17-19.) But for that it cites the regional *mass* emission data discussed above. Those data do not provide any parallel analysis of the ambient *concentrations* that petitioners claim is lacking.

Next respondents say that "dispersion modeling for purposes of CEQA is, by its nature, not intended to identify average conditions. It is generally used to determine whether maximum…'peak' pollutant concentrations in the Project area will exceed specific ambient air quality standards." (ROB 36:3-6.) For this it gives just one citation to the administrative record, D.RDEIR-09~09-25-2012~Section 3.2 Air Quality, AR 12504-012505. Their hyperlinked reference highlights certain parts of those pages. They do not offer much support.

The first highlighted statement simply says that "Proposed Project operations would result in offsite ambient air pollutant concentrations that exceed any of the SCAQMD thresholds of significance in Table 3.2-12." The other bit of highlighting points to the footnotes to Table 3.2-12 which contains the thresholds for ambient air quality concentrations. The notes show that some (NO_2 and CO) are "absolute thresholds," one (24-hour average PM_{10}) is an "incremental

threshold," and some (sulfates and annual PM_{10}) have thresholds but the South Coast Air Quality Management District does not require quantitative comparisons to them.

There is substantial evidence to justify doing a "screening analysis" for this purpose. Had the screening analysis shown that there would never be an exceedance of a concentration standard of significance the analysis could have ended there.

But that is not what the screening analysis showed. Instead, it found that the operation of the project could result in exceedances of the standards for NO_2, $PM_{2.5}$ and PM_{10}. D.FEIR-07~02-22-2013~Appendix C2 Dispersion Modeling of Criteria Pollutants, AR 6945, 6978-6980. Likewise, operation of the No Project alternative could result in exceedances of an NO_2 and a PM_{10} standard (but not a $PM_{2.5}$ standard) using the "worst case" screening method described above. *Id*. at AR 6997.

That leads to two concerns.

(1) <u>The composite minuend problem</u>

Having screened -- and having found potential exceedances from the SCIG -- the EIR stopped its analysis. It left the public and decision-makers in the dark about whether there would be exceedances of NO_2, $PM_{2.5}$ and PM_{10} standards in a given year at a given place. By combining concentrations from different years (for screening purposes) the EIR never examined the impact of the SCIG in any given year. It showed there could be an impact, but it did not examine what that impact might be, who might be affected, and for how long.

(2) <u>The problem with the No Project Alternative analysis</u>

The use of a composite minuend also makes it impossible to compare the Project and No Project alternatives over time. Suppose the following:

- the highest value for the No Project alternative occurs in 2016, while the highest value for the Project occurs in 2035;
- the 2016 No Project value is higher than the 2035 Project value;

- for all years after 2016 the highest value for the No Project alternative is lower than the highest value for the Project.

The composite analysis would have the reader of the EIR believe that the No Project alternative is worse than the Project, because the analysis is characterized by the highest value that ever occurs – even if just once in 50 years. This shows nothing about how the two alternatives compare in any given year. Indeed, it is terribly misleading.

Respondents argue it is not really a problem because the EIR shows that "under the No Project alternative, off-site truck trips between the port terminals and Hobart Yard will increase dramatically over time." (ROB 38:18-20.) They suggest that a proper analysis would support a conclusion that the No Project alternative is inferior.[22]

Petitioners say respondents' argument also overlooks the fact that "the TEUs handled at the Project would quadruple from 2016 to 2035, while on-site activity under the No Project Alternative will increase about 10% by 2016 but remain constant thereafter." (PRB 24:6-8.) They suggest the opposite of what respondents suggest would be found by a proper analysis.

Assuming both respondents and petitioners are right, they jointly demonstrate this is a complex problem, and further analysis is needed to state the impacts on ambient air concentrations of both the Project and No Project alternatives.

3. Analysis

"The fundamental purpose of an EIR is "to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment." (§ 21061.) To that end, the EIR "shall include a detailed statement setting

[22] That argument is more relevant to the *mass* emissions analysis than to the *concentration* analysis. For the question as to the latter is not only how much of a pollutant is being emitted in total, but *where* it is being emitted, how it is being dispersed, and most important, what will someone at a given place likely be breathing. It is entirely possible that there would be increased concentrations at some locations under the No Project alternative, and increased concentrations at other locations under the Project alternative. But the EIR does not tell the public and decision-makers.

forth … [¶] … [a]ll significant effects on the environment of the proposed project." (§ 21100, subd. (b)(1).) *Vineyard Area, supra,* 40 Cal. 4th at 428.

"The EIR shall include sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project." Guidelines, §15126.6(d). That must include an analysis of short-term versus long term effects. § 21083(b)(1).

Not every omission of data invalidates an EIR.

> The absence of information from the EIR "'does not per se constitute a prejudicial abuse of discretion. [Citation.]' " (*Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 749 [22 Cal.Rptr.2d 618].) A prejudicial abuse of discretion occurs "'if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.' [Citation.]" (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722 [32 Cal.Rptr.2d 704]; *Galante Vineyards v. Monterey Peninsula Water Management Dist*. (1997) 60 Cal.App.4th 1109, 1117 [71 Cal.Rptr.2d 1]; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946 [91 Cal.Rptr.2d 66].)
>
> In making that assessment, our Supreme Court has cautioned that a reviewing court is not to decide "whether the studies are irrefutable or whether they could have been better." (*Laurel Heights I, supra*, 47 Cal.3d at p. 409.) By the same token, the reviewing court is not to "uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference." (*Id.* at p. 409, fn. 12.) "Our role here, as a reviewing court, is not to decide whether the board acted wisely or unwisely, but simply to determine whether the EIR contained sufficient

> information about a proposed project, the site and surrounding area and the projected environmental impacts arising as a result of the proposed project or activity to allow for an informed decision .... [Citation.]" (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus, supra,* 27 Cal.App.4th at p. 718.)
>
> In sum, the determination of EIR adequacy is essentially pragmatic. Whether an EIR will be found in compliance with CEQA involves an evaluation of whether the discussion of environmental impacts reasonably sets forth sufficient information to foster informed public participation and to enable the decision makers to consider the environmental factors necessary to make a reasoned decision. Preparing an EIR requires the exercise of judgment, and the court in its review may not substitute its judgment, but instead is limited to ensuring that the decision makers have considered the environmental consequences of their action. *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal. App. 4th 1344, 1355-1356.

The standard set forth in *Vineyard Area* applies.

> [A] reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts. *Vineyard Area, supra,* 40 Cal. 4th at 435.

The EIR's "screening analysis" showed there could be significant impacts on the concentrations of pollutants in the air people would breathe were SCIG built. But it made no effort to quantify those concentrations as to place and time. Nor did it provide information that would enable the public and the decision-makers to determine whether the No Project alternative would produce better or worse concentrations than the Project.

This is not a small point. The SCIG has been promoted as a project that will improve air quality significantly. Indeed, the first page of respondents' brief says, "SCIG is an environmental improvement over the existing heavy industrial uses on the site, which will eliminate millions of miles of truck trips from area freeways, with corresponding air quality, health risk and traffic congestion reduction benefits." (ROB 1:19.) Those commenting on the EIR, as it was being developed, expressed considerable concern about the impact of air pollution on those who live near the proposed project. This was one of the major issues in contention.

Thus, on a point of great significance, the EIR simply fails to "set…forth sufficient information to foster informed public participation and to enable the decision makers to consider the environmental factors necessary to make a reasoned decision." *Berkeley Keep Jets, supra,* at 1355. The Port failed to proceed in the manner prescribed by CEQA. For that reason, the EIR is inadequate.

D. The Toxic Air Contaminant Analysis (AQ-7): The Failure to Use a Specific "Age Sensitivity Factor"

1. The nature of a toxic air contaminant analysis

A "toxic air contaminant" analysis is very different from the two analyses discussed above. The regional mass emissions analysis and ambient air quality dispersion analysis are designed to state the amounts of pollutants generated by the project and then measure them against certain regulatory standards.

The toxic air contaminant analysis is designed to estimate potential health effects that would be caused by the project. D.FEIR-08~02-22-2013~Appendix C3 Health Risk Assessment, AR 7024-7025. In fact, there is not just one "toxic air contaminant" analysis; there are three. The EIR evaluates (i) cancer, (ii) chronic non-cancer, and (iii) acute non-cancer risks.

There is another difference. The mass and concentration analyses examine criteria pollutants. The toxic air contaminant analyses look at particulate matter (PM) and a suite of other chemicals that are not "criteria pollutants." (*See, e.g. id.* at AR 7036 (hexavalent chromium, chlorine, cobalt, formaldehyde, manganese, nickel and acetaldehyde) and AR 7063 (ammonia, arsenic, benzene, lead, mercury and many others).)

The toxic air analyses also assume extended exposure to the chemicals at issue: 40 years for workers, 70 years for others. (*Id.*, AR 7061.)

2. Petitioners' challenge

Petitioners claim that the lead agency used "outdated cancer risk factors" in determining the Health Risk Assessment contained in the EIR. (POB 43:13.) As a result, they say, the EIR understates cancer risks to children. Respondents disagree.

The EIR used unit risk factors developed by the California Office of Environmental Health Hazard Assessment ("OEHHA"). D.FEIR-03~02-22-2013~Chapter 2 Volume I Responses to Comments~ Recirculated Draft EIR, AR 4533-4534. However, petitioners observe -and the EIR acknowledges- OEHHA published Technical Support Documents in 2009 and 2012 that "recommend[ed] an adjustment of cancer slope factors to account for the greater sensitivity of children to carcinogens." *Id.* at AR 4534:12-14. Petitioners argue the lead agency should have used those updated risk factors.

3. Respondents' position

In the Response to Comments, the Port noted the suggestion but said it did not use those risk factors because "OEHHA has not yet released a companion Risk Assessment T[echnical] S[upport] D[ocument] that describes how the agency wants the A[ge] S[ensitivity] F[actors] applied, [and] there is no established methodology for applying ASFs to an HRA." *Id.* at AR 4534:18-20.

4. Petitioners' rejoinder

Petitioners say the lack of technical guidance is no excuse. They cite *Berkeley Keep Jets Over the Bay Com. v. Board of Port Commissioners, supra,* 91 Cal. App. 4th at 1365-1370 to assert the lead agency may not ignore newer guidance, even if it is in draft form.

5. Analysis

In *Berkeley Keep Jets* the facts were more extreme. A 1991 "speciation profile" (#508) published by the California Air Resources Board ("CARB") was used to describe toxic air contaminant emissions from jets. However, there was also a 1994 speciation profile (#586) which, according to an "expert in air quality analysis (Dr. J. Phyllis Fox) and the chief of CARB's emission inventory branch (Linda C. Murchison), was the most current, accurate information. Nonetheless, the lead agency used the outdated information based on an inaccurate description of a conversation with another CARB air specialist (Paul Allen). The Court of Appeal found the lead agency mischaracterized the conversation and did not correctly discuss the newer speciation data. It said,

> [T]he use in the final EIR of data extrapolated from CARB's 1991 speciation profile # 508 for measuring aircraft emission of TAC's did not meet the standard of "a good faith effort at full disclosure" required by CEQA. (Guidelines, § 15151.) ""Where comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. *There must be good faith, reasoned analysis in response*."" (*Cleary v. County of Stanislaus* (1981) 118 Cal. App. 3d 348, 357 [173 Cal. Rptr. 390], original italics.) By using scientifically outdated information derived from the 1991 profile, we conclude the EIR was not a reasoned and good faith effort to inform decisionmakers and the public about the increase in TAC emissions that

will occur as a consequence of the Airport expansion. *Berkeley Keep Jets, supra,* at 1367.

That is not our case. Here, there is nothing like the statements of Mr. Allen (correcting the misstatements about his conversation with the author of the EIR) or the assertions of Dr. Fox or Ms. Murchison (stating, flatly, that profile #586 should be used).

The EIR consultants determined they did not have sufficient authoritative information to use the revised unit risk factors. The lead agency is entitled to rely on its experts' opinions and work under these circumstances. *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal. App. 4th 357, 371-72. There is substantial evidence to support that reliance. Petitioners' argument with respect to the health risk assessment portion of the air analysis fails.

E. Petitioners' Other Challenges to the Analyses

Petitioners argue the air quality analyses contain certain other errors and omissions. The question is whether there is substantial evidence in the record to support the EIR's analysis.

1. Petitioners' assertion that "The EIR's Analysis of NO_2 Impacts Contains Fundamental and Unexplained Errors"

Petitioners argue that the EIR is inadequate because its NO_2 analysis "contains fundamental and unexplained errors." In support of this, they offer only one data point. (POB 35:19-36:2.) They refer to the year 2035 and note that average daily mass emissions of NOx from on-site sources will be 100 pounds a day under the No Project alternative, but 236 pounds per day under the Project alternative. Then they argue "[d]espite this evidence, the Port's NO_2 modeling analysis somehow concludes that concentrations of NO_2 will be substantially lower with the Project as compared to the No Project alternative." (POB 35:25-36:1.) They say "the EIR fails to explain this illogical conclusion." (POB 36:2.)

Respondents note that petitioners are mixing *mass* and *concentrations.* The mass emissions are an input into the concentration analysis, but the mass emissions are only a subset of all inputs. The concentration analysis includes off-site sources too. (ROB 29:5-9.)

In addition, as explained above, the concentration analysis includes *peak* emissions. The data to which petitioners point are *average* daily emissions. And, the concentration analysis takes the highest peak regardless of what year it occurs. *Id.* Thus, there is no "illogical conclusion." Petitioners are mixing apples and pears and tangerines.

Petitioners bear the burden of showing that the EIR is not supported by substantial evidence. *Barthelemy v. Chino Basin Municipal Water District* (1995) 38 Cal. App. 4th 1609, 1617. They have not sustained that burden in this regard.

2. The emissions from California Cartage

Petitioners assert two errors in this regard. First, "the Port was using an unsubstantiated emission rate to estimate NO_2 concentrations" regarding California Cartage cargo handling. (POB 36:17-19.) Second, the EIR's modeling assumed without support that activity at that company would fall by 72%, substantially reducing its annual NOx emissions. (POB 37:3-9.)

a) NO_2 Emission Rate

Respondents' brief explains that the emission rate used to estimate the NO_2 concentrations is, indeed, described correctly in the EIR spreadsheets. (ROB 31:20-32:1.) That explanation is found at D.FEIR-15~03-07-2013~Final Responses to Comments On Additional Comment Letters Received On The FEIR Southern California International Gateway Project Env), AR 12100:45-12101:7. That is substantial evidence to support the EIR's conclusion.

b) Reduction of emissions by 72%

Petitioners argue that the EIR assumes the emissions from California Cartage will drop because that company will reduce its activity on site by 72%. (POB 37.) They assert the EIR should have continued to assume 100% of the pre-project emissions from that company.

Respondents state that the EIR had to account for the fact that California Cartage is being offered a site that is only 18% the size of the site it now occupies. (ROB 33:26-35:8.) It said that it chose to do that by assuming the business would be scaled down by 72% and modeling local emissions under that assumption. However, it disclosed that and then conservatively assumed further, that the mass emissions would remain in the study area and included those emissions in the mass air quality analysis.

It is not the province of the court to second-guess the experts' choice of how to display the data. That is particularly true since California Cartage said that it planned to move its business elsewhere if the project was built. H.2-030~11-07-201~Comment Letter California Cartage Company Three Rivers LA Harbor Grain San Pedro Forklift, AR 23311.

Respondents were permitted to rely on their consultants' judgment to display the information from California Cartage in the manner they determined to be reasonable. There is substantial evidence in the record to support that.

3. Petitioners' claim that the Air District did not have sufficient information

Petitioners argue that the lead agency refused to provide the South Coast Air Quality Management District with certain data and that the District was unable to "verify" the Port's modeling efforts. (POB 36:3-16.) Respondents vigorously deny that. (ROB 29:24-31:12.)

There are two strands to this argument; one specific, one generic.

Petitioners point, for example, to D.FEIR-03~02-22-2013 Chapter 2 Volume I Response to Comments, AR 5145. There, the SCAQMD said it "was provided emission calculations spreadsheets, dispersion modeling input and output files, and databases that contain the results of the modeling analysis" but that it could not verify that the modeling analysis correctly corresponds to the emission calculation spreadsheets. "It is not clear how the emission calculations…are translated into the modeling." *Id.* The SCAQMD then provided one example

of what it says are "thousands" of values that were not correlated, preventing them from verifying the validity of the model.

The FEIR labels that comment "R156-27." The response to that comment is contained at AR 5163. That comment tells the SCAQMD the emission rates that were used in the modeling for the example cited. For that one specific example, there is substantial evidence in the record to support the EIR.

However a more generic review of the record shows that the Port's consultant, Environ, was slow to share information with the SCAQMD, and provided much of the modeling data only shortly before the close of the public comment period.

The Draft EIR was released on September 23, 2011. Public comments were due by February 1, 2012. As late as January 2012, the SCAQMD still did not have the modeling files. *See, e.g.* H.7.Vol3 DEIR-RDEIR~SCIG-AR139258~RE modeling files for SCIG project.msg, AR 139258, a January 6, 2012 e-mail from the SCAQMD to the Port ("This is very worrisome that we have still not received the modeling files"); and H.7.Vol3 DEIR-RDEIR~SCIG-AR 139265~Re Call w Environ.msg, a January 12 e-mail from SCAQMD to the Port, AR 139265 ("AQMD staff has been requesting the modeling files and supporting electronic spreadsheet files…since at least November 15. At that time Mr. Cannon indicated the files would be forthcoming right away. Additional requests were made on December 20….To date we still have not been able to receive or review the files.")

It appears that even when files were finally provided, some were still withheld. For example, a January 27, 2012 email from Doug Dougherty[23] to the SCAQMD transmitted two additional files, saying, "I apologize for our confusion as we were not clear on the extent of the modeling files/information that we were instructed to provide you with….We will work to

[23] Mr. Dougherty appears to have worked at Environ. See his e-mail address (ddaugherty@Environcorp.com) on H.7.Vol3 DEIR-RDEIR~SCIG-AR139798~RE SCIG model files.msg at AR139800.

compile the additional post-processing databases used to estimate the criteria pollutants concentrations and have them sent out to you over the next couple of weeks." H.7.Vol3 DEIR-RDEIR~SCIG-AR139798~RE SCIG model files.msg., AR 139798.

Petitioners argue that it is simply not right for the Port and its consultant to withhold important technical information. They cite no case in which an EIR was held to be invalid on that ground. Instead, they refer to one case and to general principles.

Clearly, the SCAQMD had the right to comment on the Draft EIR.

> Every public agency may comment on environmental documents dealing with projects which affect resources with which the agency has special expertise regardless of whether its comments were solicited or whether the effects fall within the legal jurisdiction of the agency. Guidelines, § 15209.

And the right to comment must be supported by full disclosure of the information on which the EIR relies.

> The information contained in an EIR shall include summarized technical data, maps, plot plans, diagrams, and similar relevant information sufficient to permit full assessment of significant environmental impacts by reviewing agencies and members of the public…. Appendices to the EIR may be prepared in volumes separate from the basic EIR document, but shall be readily available for public examination and shall be submitted to all clearinghouses which assist in public review. Guidelines, § 15147.

One case has considered a similar issue, in a slightly different context.

> An expert's opinion "concerning matters within [his or her] expertise is of obvious value, but the public and decision-makers, for whom the EIR is prepared, should also have before them the basis for that opinion so as to enable them to make an independent, reasoned judgment." (*Santiago, supra,* 118 Cal.App.3d at

p. 831.) If Chevron's position becomes the rule—that a project proponent can pick and choose who sees pertinent data—then a stake is driven into the "heart of CEQA" by preventing the information necessary for an informed decision from reaching the decision makers and the public. (See *Laurel Heights Improvement Assn. v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1123 [26 Cal.Rptr.2d 231, 864 P.2d 502] (*Laurel Heights II*).) *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal. App. 4th 70, 88.

As noted, the parties have identified no case that has found an EIR to be defective on this ground. But it is not necessary to reach that far in this case. The Court has already determined that the ambient air analysis is insufficient. If the Port decides to redo that analysis, it will, no doubt, circulate it for comment. In connection with any such effort, it would be wise for the Port's consultant to share with the SCAQMD, in a timely and ungrudging way, the data that underlie the analysis so that the agency with perhaps the greatest expertise in this regard, may comment fully and thoughtfully.

VIII. Air Impact Mitigation Measures

A. Overview

Petitioners and intervenor contend that the EIR erred in its evaluation of mitigation measures that would have required the use of the cleanest available trucks and trains at the SCIG site. Specifically, petitioners argue that both zero emission trucks and Tier 4 locomotives are either currently feasible or will be feasible in the near future; so their use should have been required as mitigation measures for the project's air quality impacts.

In addition, petitioners contest a mitigation measure pertaining to review and implementation of new emissions control technologies, and project conditions relating to zero

emission trucks, Tier 4 locomotives, and the development of a landscaped barrier. They also argue that respondents improperly rejected a series of proposed mitigation measures.

B. Analysis

1. Statute and guidelines

CEQA requires an EIR to "include a detailed statement" of "[m]itigation measures proposed to minimize significant effects on the environment, including, but not limited to, measures to reduce the wasteful, inefficient, and unnecessary consumption of energy." §21100(b)(3).

According to the Guidelines, public agencies "should not approve a project as proposed if there are feasible alternatives or mitigation measures available that would substantially lessen any significant effects that the project would have on the environment." Guidelines, § 15021 (a)(2). "Feasible" is defined as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." § 21061.1, Guidelines, § 15364. As such, mitigation measures identified in an EIR may be found infeasible based on "[s]pecific economic, legal, social, technological, or other considerations." § 21081(a)(3), Guidelines, § 15091(a)(3).

In addition, adopted mitigation measures "must be fully enforceable through permit conditions, agreements, or other legally binding instruments. In the case of the adoption of a plan, policy, regulation, other public project, mitigation measures can be incorporated into the plan, policy, regulation, or project design." Guidelines, § 15126.4(a)(2). The identification of mitigation measures "should not be deferred until some future time." *Id.* at § 15126.4(a)(1)(B).

2. Standard of review

The parties disagree as to the applicable standard of review. Respondents contend that the conclusions in the EIR regarding mitigation measures are supported by substantial evidence. (ROB 42, 44, 49-50.)

Petitioners, however, argue that respondents have employed an erroneous legal standard, thereby failing to proceed in a manner required by law, and that a *de novo* standard of review applies here. (*Vineyard Area, supra*, 40 Cal. 4th at 435.) Petitioners argue that respondents have used the wrong definition of "feasible":

> Respondents assert that it was "infeasible" to require BNSF to use zero-emission drayage trucks and Tier 4 locomotives at the SCIG site by 2020 because neither technology was commercially available *in 2013*, when the Port approved the Project. . . . By focusing on the status of technology only at the time of Project approval, the Port applied an incorrect legal standard in evaluating the feasibility of these proposed measures. (PRB 13:10-21.)

Similarly, intervenor describes respondent's definition of "feasible" as "an instantaneous standard." (IRB 16.)

But that is not how the EIR defines "feasible;" rather, it defines "feasible" precisely as do petitioners and intervenor. For example, the Master Response to comments says,

> Feasible 'means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors.' (CEQA Guidelines § 15364.) D.FEIR-03~02-22-2013~Chapter 2 Volume I Responses to Comments~ Recirculated Draft EIR, AR 3974.

The EIR's analysis is consistent with this definition, as is discussed in more detail below. So, the dispute is not about the *definition* of "feasible." The dispute concerns the time frame in

which certain alternatives will be available. That is a question of fact, so respondents are correct that the substantial evidence standard applies here. *Vineyard Area, supra*, 40 Cal. 4th at 426-27.

3. Zero-emission trucks

a) The dispute

Petitioners and intervenors contend that use of zero-emissions trucks is feasible because these trucks are currently being manufactured, and that sufficient quantities could be manufactured by 2016. Respondents contend that because the large-scale use of these trucks has not been sufficiently proven, this remains an infeasible mitigation measure under CEQA.

b) Analysis

Substantial evidence exists to support respondents' conclusion that a mitigation measure requiring use of zero emission trucks is not feasible.

In the "Master Response to Key Topics," the FEIR specifically addresses the issue of the feasibility of Zero Emission Container Movement Systems, including zero emission trucks. D.FEIR-03~2-22-2013~Chapter 2 Volume 1 Responses to Comments, AR 3957, 3974-3980. It discusses a 2011 report prepared for the Ports of Los Angeles and Long Beach by TIAX, LLC, entitled "Status Report of Zero Emission Technologies*"* AR 3974; report found at H.7/Vol3.DEIR-RDEIR~5-21-2012~ZEDT Technology Report FINAL 6_16_11 (TIAX).docx, AR 146953-146977. The TIAX Report describes a "two-phase demonstration approach to commercialization" – first, a small-scale demonstration (one to three units), followed by a large-scale demonstration (eight to ten units).

The FEIR states that there are two zero emission truck demonstrations underway. The first is a 2012 test with a battery plug-in truck that has logged approximately 250 hours of use at the University of California Riverside Center for Environmental Research & Technology. That model has not seen any commercial drayage service. D.FEIR-03~2-22-2013~Chapter 2 Volume 1 Responses to Comments, AR 3974-75. In addition, a hydrogen fuel cell truck has been used in

two "isolated tests" described in the FEIR. *Id.* at AR 3974. The FEIR discusses the outcomes of these tests:

> Both technologies have been promising in initial use and additional hours of usage are currently being accrued. However, these isolated tests do not provide enough data points to constitute a completed small scale demonstration. A small scale demonstration would consist of approximately one year... of continuous demonstration to fully assess the technical capabilities and reliability of each technology. As stated in the TIAX report [] ". . . the lack of a real-world demonstration over an extended period of time makes it impossible to assess the viability of these technologies in drayage operations. For these reasons, it is not possible in this report to estimate the timing of large-scale commercial viability for this vehicle without further information and testing. *Id.* at AR 3975.

After further discussion, the FEIR concludes that more studies are needed to provide additional data:

> There are many operational concerns, such as charging / fueling and maintenance that need to be examined prior to full deployment into the fleet. Additionally, durability, loss of power potential, and safety need to be monitored through testing before stakeholders commit to large capital investments. The amount of existing data in these areas is extremely limited. *Id.* at AR 3977.

Petitioners do not challenge the conclusions or facts identified in the either of the reports relied upon by respondents, the two-phase demonstration approach, or any of the specific findings in the FEIR. Rather, they focus on a few quotations supporting the general proposition that because zero emission trucks can be built, they are feasible.

For example, petitioners cite a 2012 report prepared by CALSTART which states that "[t]he development of a vehicle or vehicle system (truck and infrastructure power source) that

can move freight through the I-710 Corridor with zero emissions has no major technological barriers." H.6.FEIR-005 CALSTART Preliminary Assessment Technologies Challenges & Opportunities I-710 Zero Emission Freight Corridor Vehicle Systems (June 2012), AR 78452. But the page they cite does not support their assertion that "there is no major impediment to meeting the 2020 timeframe…" (POB 29:19.) Rather, the report says, "[s]mall-scale demonstrations can begin immediately and commercialization of proven designs can certainly be achieved by 2035…Provided there is a strong focus on the commercialization process…commercial viability could occur well before 2035, indeed within the next decade." CALSTART report, *supra* at AR 78452.

As respondents point out, that same CALSTART report also advises:

> the commercialization process for a complex product like a Class 8 truck includes significant engineering and development work, including a demonstration and validation of early prototypes, building a small number of pre-production vehicles, and constructing a business case for moving to full production – over the course of several years.
>
> D.FEIR-03~2-22-2013~Chapter 2 Volume 1 Responses to Comments, AR 3976; H.6.FEIR-005 CALSTART Report at AR 78454.

Petitioners also point to an e-mail from Port staff with a list of assumptions related to zero emission trucks, which includes the statement,

> "[c]urrently, Balqon is capable of manufacturing 3 electric trucks per day, so Balqon could easily manufacture 285 to 400 trucks by 2016."

H.7/Vol2.NOP-DEIR~SCIG-AR119532~SCIG - Zero Emissions Alternative - Assumptions.msg, AR 119534. Petitioners identify another Port e-mail confirming the existence and operation of a fuel cell truck: "a Vision fuel cell drayage truck is street legal (licensed) and

running." H.7/Vol5.FEIR-App ~SCIG-AR169191~Re Vision trucks.msg, AR 169191. Those are fairly weak statements when compared to the extensive studies provided in the EIR.

Still, petitioners argue that because the record establishes that the technology for the zero emission trucks will be available "within a reasonable amount of time," respondents were obligated to require use of the trucks as a mitigation measure.[24]

But this is not a complete recitation or application of the legal standard. Rather, the statute and guidelines define "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." § 21061.1, Guidelines, § 15364.

The parties disagree with regard to whether zero emission trucks will be available (and "feasible") within a "reasonable amount of time." But the EIR's conclusion that zero emission trucks are not a feasible mitigation measure is supported by substantial evidence.

Having said that, other parts of this Opinion find the EIR's analysis of air impacts is deficient. Once the full extent of the impacts of SCIG on air quality is known, when the Port reconsiders mitigation measures then, given the age of the TIAX (2011) and CALSTART (2012) reports, it will, no doubt, again canvass the field to determine if sufficient progress has occurred to make such alternative technology "feasible" within the meaning of CEQA.

4. Tier 4 locomotives

a) The dispute

Petitioners observe that EPA regulations mandate only Tier 4 locomotives be sold in the United States beginning in 2015.[25] Therefore, they argue, the required use of Tier 4 locomotives

[24] Petitioners also point to a POLA Strategic Plan which has a goal of having 100% of trucks serving near-dock rail yards be zero emission by 2020. (POB 28.) But this strategic plan identifies priorities and goals, and does not evaluate feasibility.

[25] Tier 4 is the latest generation of line-haul and switch locomotives permitted by EPA under its program to reduce emissions of certain pollutants, including NOx, PM and CO. Prior generations included Tier 0, Tier 1, Tier 2 and Tier 3. Generally speaking, each generation permitted increasingly lower emissions. *See*, 40 CFR § 1033.101

by 2020 should have been included as a mitigation measure. Respondents dispute this contention, arguing instead that the mitigation measure was infeasible.

b) Analysis

Substantial evidence exists to support respondents' conclusion that a mitigation measure requiring use of Tier 4 locomotives by 2020 is not feasible.

Petitioners and intervenor argue that since the Tier 4 trains are the only locomotives that can be purchased, requiring their use is a feasible mitigation measure. (POB 29-30, IOB 27 [citing SCAQMD comment letter, D.FEIR-15~3-7-2013~Final Responses to Comments on Additional Comment Letters Received on the FEIR SCIG Project EIR, AR 12084.])

Respondents agree that EPA regulations permit only Tier 4 locomotives to be *sold* as of January 1, 2015. However, they note, there is no requirement that Tier 4 locomotives be *manufactured* or that Tier 4 locomotives *replace* existing trains by a date certain. 40 CFR § 1033.101 (ROB 47.)

More important, they point to evidence in the administrative record that raises doubts about the feasibility of employing Tier 4 locomotives because the technology for use at a site like SCIG has not been developed or proven:

> Tier 4 locomotives are expected to utilize a new, untested technology that simply does not currently exist at a size adequate for line-haul locomotive engines. Even under the most optimistic scenario, there will only be a limited number of prototype high-horsepower Tier 4 locomotives operating in California for field testing in 2013. It is infeasible to commit in advance to purchase and deploy locomotives by a date certain when those locomotives have not yet been designed, tested or deployed. C-01~3-8-2013~Final Findings of Fact and Statement of Overriding Considerations, AR 3837.

Indeed, petitioners themselves complained "[t]he Port is missing a huge opportunity to be technology-forcing in the way that U.S. EPA is under the Clean Air Act. The EPA sets emission standards and it is up to industry to meet them within certain time periods." D.FEIR-15~03-07-2013~Final Responses to Comments On Additional Comment Letters Received On The FEIR Southern California International Gateway Project Env, AR 11933.

Petitioners argue that even if there is a delay in manufacturing Tier 4 locomotives, "it does not mean full compliance could not be achieved by five years later when SCIG begins operation." (PRB 14 n. 11.) But petitioners cite no evidence to support any of these assertions.

On the other hand, the administrative record contains evidence that there are other logistical issues to be worked out before Tier 4 locomotives can be used at the Ports. Both parties cite to the "San Pedro Ports Clean Air Action Plan 2010 Update," a voluntary program prepared by the Ports. H.6.FEIR-049 and H.6. FEIRWeb-16~October 2010~POLA and POLB San Pedro Ports Clean Air Action Plan 2010 Update, AR 80946-81457 and AR 84283-84794 ("CAAP")

The CAAP states that "[b]y 2020, with the assistance of the ports' regulatory agency partners and in concert with CARB's stated goals, the ports will support achievement of the goal of accelerating the natural turnover of the line-haul locomotive fleet resulting in a state-wide fleet comprised of at least 95% Tier 4 line-haul engines." (*Id.* at AR 81124 / 84461.) Consequently, petitioners argue, "there is no major impediment to meeting the 2020 timeframe provided in the [CAAP]."). (PRB 14.)

But petitioners ignore other parts of the CAAP which state that this goal "will remain a significant challenge," and that [d]edicating a smaller population of cleaner locomotives to a specific geographic region presents logistical challenges." H.6.FEIR-049 October 2010~POLA and POLB San Pedro Ports Clean Air Action Plan 2010 Update, AR 81125. The CAAP also notes that meeting this goal would "require the rail companies make a significant investment in

Tier 4 locomotives after 2015 and dedicate the majority of those purchases to port service." *Id.* at AR 81125. The report estimates the cost of purchasing a dedicated port locomotive fleet at $2.25 billion, with some upgrades occurring as part of normal fleet turnover. Ultimately, the report concludes that,

> Achieving this goal will require a significant investment by the rail companies and will likely require significant funding assistance from the regulatory agencies. This goal cannot likely be achieved without a coordinated effort by all parties, including regulatory strategies by the agencies, cooperation by the rail companies, and assistance at the local level on individual rail yard projects." (*Id*. at AR 81126.)

Petitioners object to respondents' citation of the cost figures in the CAAP. (PRB 15.) But even ignoring the asserted costs, there is still substantial evidence to support the EIR's conclusion.

Similarly, petitioners argue that "the record contains no evidence that EPA's mandate was technologically unachievable." (PRB 14.) But this is not enough: feasibility requires more than technological ability, and requires consideration of "economic, environmental, legal, social, and technological factors." § 21061.1, Guidelines, § 15364. The Port's decision to refrain from imposing the use of developing -- as-yet unproven -- technology, as a mitigation measure was supported by substantial evidence. It may be (as with the zero emission trucks) that a further canvass of technological developments after further analysis of air emission impacts, will lead to a different set of evidence. But with respect to the EIR as it now stands, there was substantial evidence to support its conclusion.

5. Mitigation measure AQ-9 and project conditions

a) The dispute

Petitioners argue that Mitigation Measure AQ-9, which provides for a periodic review of new technology at least once every five years, is not enforceable because it is only implemented at BNSF's discretion. Petitioners also argue that Project Conditions AQ-11 and AQ-12, which address zero emissions trucks and Tier 4 locomotives, are unenforceable and are thus also inadequate mitigation measures. For similar reasons, Petitioner and intervenor also object to Project Condition AES-1, pertaining to negotiations to create a landscaping buffer zone. (POB 31 n. 20; IOB 28.)

b) Analysis

(1) Mitigation Measure AQ-9

MM AQ-9 is entitled "Periodic Review of New Technology and Regulations." The measure provides as follows:

> The Port shall require the business to review, in terms of feasibility, any Port-identified or other new emissions reduction technology, and report to the Port. Such technology feasibility reviews shall take place at the time of the Port's consideration of any lease amendment or facility modification for the Project site. If the technology is determined by the Port to be feasible in terms of cost, technical and operational feasibility, the business shall implement such technology.
>
> Potential technologies that may further reduce emission and/or result in cost-savings benefits for the business may be identified through future work on the CAAP. Over the course of the lease, the business and the Port shall work together to identify potential new technology. Such technology shall be studied for feasibility, in terms of cost, technical and operational feasibility.

> As partial consideration for the Port agreement to issue the permit to the business, the business shall implement not less frequently than once every five (5) years following the effective date of the permit, new air quality technological advancements, subject to mutual agreement on operational feasibility and cost sharing, which shall not be unreasonably withheld. The effectiveness of this measure depends on the advancement of new technologies and the outcome of future feasibility or pilot studies. C-02~03-08-2013~Mitigation Monitoring Reporting Program, AR 3878.

Petitioners observe that the first event for triggering a review – a lease amendment or facility modification – is unlikely to occur during the 50-year lease. (POB 30.) They also note that the provision requiring implementation of "new air quality technological advancements" at least every five years "subject to mutual agreement on operational feasibility and cost sharing" essentially confers upon BNSF a veto power over any new technologies, since BNSF can simply withhold its agreement. (POB 30, IOB 28.)

Intervenor argues that AQ-9 impermissibly defers mitigation, citing *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 306. (IOB 28.) In *Sundstrom,* the court invalidated an initial study and negative declaration for a use permit for a private sewage treatment system. During the administrative process, hydrological problems had been identified. As a result, the use permit included language requiring a hydrological study. Subject to agency approval, the mitigation measures recommended by the study would be required. The court held that deferring the environmental assessment and determination of mitigation measures was impermissible. The situation here is distinguishable. Mitigation Measure AQ-9 defers review of later-developed emissions control technology to address already-identified impacts; it does not defer assessment of the SCIG's impacts.

Petitioners cite *Woodward Park Homeowners Assn, Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 730, for the proposition that mitigation that lies solely within the discretion of the permittee is not valid, enforceable mitigation. The facts in *Woodward Park* are not entirely on point. In that case, a voluntary highway impact fee was deemed to be an inadequate mitigation measure where the fee was not due until after the city approval of the proponent's conditional use permit; no adverse consequence was identified for failing to pay the fee; and the fee requirement was not in any contract signed by the project proponent.

Nonetheless, the fundamental principles remain. Since the EIR adopts this provision as a mitigation measure, rather than a project condition (see below), it must be enforceable. Guidelines, § 15126.4(a)(2) ("Mitigation measures must be fully enforceable…") A project should not be approved "if there are feasible mitigation measures available which would substantially lessen the significant environmental effects" of a project. § 21002.

Here, the EIR found certain specific technologies not yet "feasible" within the meaning of CEQA. The Court has found that determination to be supported by substantial evidence.

But the EIR did not stop there. Instead, it imposed "mitigation measure" AQ-9 to require future reviews of feasibility. It establishes a process. Is that an adequate "mitigation measure?"

This poses something of a riddle. The mitigation measure is not a specific act (such as installing a filter or a baghouse); it is a *process*. The question is what the law means when it says, in effect, that a mitigation measure which is a process must be enforceable.

Obviously, one could say the *process* is enforceable. That is, if BNSF refuses "to review, in terms of feasibility, any Port-identified or other new emissions reduction technology, and report to the Port" the Port could compel it to do so.

Indeed, in a circumstance in which technology is changing, it is not inappropriate to include conditions that provide for consideration of developments – rather than absolute imposition of an unknown future development. *Compare, Association of Irritated Residents v.*

CARB (2012) 206 Cal.App.4th 1487, 1502. (Court upheld a scoping plan for reduction of greenhouse gas emissions that included a reassessment after five years of voluntary measures taken by dairies to capture methane.) But the aim of CEQA is not simply to produce consideration; it is to implement feasible mitigation measures.

So the more important question is whether a mitigation measure that establishes a process has enough impact -- enough power to enforce mitigation -- to qualify it as an enforceable *mitigation measure.* A process that permits nothing to be done does not enforce mitigation.

Under AQ-9, there are three points at which review may occur: (i) at the time of "any lease amendment or facility modification," (ii) "through future work on the CAAP," and (iii) "not less frequently than once every five years."

However the standard that permits the imposition of mitigation measures differs for each of the three. For the first, the mitigation measure must be implemented if the Port determines it to be feasible. For the second, there is nothing that requires implementation. For the third, there must be "mutual agreement on operational feasibility and cost sharing, which shall not be unreasonably withheld."

There is no explanation offered for setting different standards at different times. The standard most likely to lead to effective mitigation appears to be available to the Port on the happening of something which, according to petitioners, may never occur ("lease amendment or facility modification"). The event that is most likely to occur ("not less frequently than once every five years") is governed by a standard that could stymie any actual mitigation.

If BNSF is willing to have the Port make the determination at lease amendment or facility modification, then it is difficult to understand why it would not be willing to have that standard apply to the five year review or the CAAP work. Whatever the reason, it seems unlikely that this mitigation measure -- as drafted -- will actually result in mitigation. At the very least, there is

substantial doubt, and the Court cannot find that this mitigation measure will actually result in enforceable mitigation.

That is particularly troublesome since the project envisions fifty years of operation. By all accounts, technology is just short of being able to provide significant mitigation. The EIR recognizes that, and seeks to be able to require that mitigation when it becomes available. Yet as drafted, the measure has no real ability to require mitigation. It could leave outdated technology locked into a major project for half a century.

For these reasons, the Court finds that MM AQ-9 is inadequate as a mitigation measure. It does not meet the standard of § 21002 or Guidelines, § 15126.4(a)(2).

(2) Project Conditions AQ-11, AQ-12, and AES-1

A number of "project conditions" were included in the lease between the LAHD and BNSF for the SCIG site. Petitioners and intervenor argue that the conditions, which are related to (i) implementation of zero emission trucks and Tier 4 locomotives, and (ii) establishment of a landscaped area on the west side of the Terminal Island Freeway, are unenforceable and violate CEQA. POB 30-31, IOB 26-28, IRB 16, *see* C-02~03-08-2013~Mitigation Monitoring Reporting Program, AR 3900-3904.

Project Condition AQ-11 (*Id*. at AR 3901-03) concerns the implementation of zero emission technologies. It provides for matching funding to the CAAP Technology Advancement Program to fund zero emission technology demonstrations. It also sets forth criteria for a "phase-in of zero emission drayage trucks and other zero emission technologies" upon specified findings of technical and commercial feasibility, and identifies a goal of 100 % zero emission drayage trucks operating at the SCIG facility by 2020.

Project Condition AQ-12 (*Id*. at AR 3903-04) refers to CAAP measure RL-3. (ROB 43.) Project Condition AQ-12 / CAAP RL-3 identifies locomotive fleet goals, including the goal of 95 percent Tier 4 line-haul locomotives serving the ports by 2020.

Project Condition AES-1, C-02~03-08-2013~Mitigation Monitoring Reporting Program, AR 3900, states that BNSF agrees to "by all means feasible and in good faith, work with the City of Long Beach to obtain long-term access to the land required to construct an area of intensive landscaping on the west side of Terminal Island Freeway between PCH and Sepulveda…" (*Id.*)

Petitioners argue that because these project conditions are unenforceable, they do not satisfy CEQA. Similarly, intervenor argues that AES-1 violates CEQA by deferring mitigation to a future date.

But, as respondents explain, these project conditions were never intended to be enforceable mitigation measures: "the project conditions . . . are not quantifiable or feasible at this time and are not considered mitigation under CEQA to reduce an identified impact." D.FEIR-03~2-22-2013~Chapter 2 Volume I Responses to Comments: Recirculated Draft EIR, AR 4469:3-4. Rather, as the EIR explains: [t]hese project conditions are not required as CEQA mitigation measures but are important because they advance important LAHD goals and objectives." *Id.* AR 4468:41-43.

Noncompliance with CEQA is not a basis for objection to PC AQ-11, AQ-12, or AES-1. The EIR is not deficient in this regard.

(3) Other rejected mitigation measures

Intervenor and petitioners contend that respondents erred in failing to adopt other mitigation measures proposed during the CEQA process. (POB 31, IOB 24-26.) Intervenor's argument that access to SCIG should have been reconfigured is discussed below in the transportation section of this Opinion. Air-related measures are discussed here.

Intervenor contends that the suggestion that schools be equipped with air filtration systems was improperly rejected. (IOB 25.) In a response to a comment from the Long Beach Unified School District, respondents explained that because no impacts to public services, including schools, were identified, no mitigation measures were required. D.FEIR-03~2-22-

2013~Chapter 2 Volume I Responses to Comments: Recirculated Draft EIR, 4525, 4545. Because this issue will likely be revisited if and when the air quality impacts analysis is revised, the Court need not rule on this issue at this time.

Intervenor also objects to the rejection of a proposal to include a landscaped buffer in the Southern California Edison right of way between the SCIG facility and the parks and schools in West Long Beach. (IOB 26.) Citing several comment letters, intervenor contends that the EIR ignored record evidence showing that a landscaped buffer area would mitigate air quality and noise impacts on nearby schools and residences. (*Id.*) But the record shows that the EIR did address several aspects of this proposal.

First, the area is currently occupied with "infrastructure, including cargo-related businesses, the SCE right-of-way, a rail line, and the Terminal Island Freeway." D.FEIR-15~03-07-2013~Final Responses to Comments On Additional Comment Letters Received On The FEIR Southern California International Gateway Project Env, AR 12191. Intervenor does not challenge this assertion.

The EIR also states that the landscaping greenbelt would not mitigate any significant impacts. *Id.* Specifically, it would not move SCIG related sources of noise and air emissions further from sensitive receptors, or address project-related traffic impacts. D.FEIR-03~2-22-2013~Chapter 2 Volume I Responses to Comments: Recirculated Draft EIR, AR 4754. Elsewhere, the EIR describes additional reasons and legal impediments to this. C-01~3-8-2013~Final Findings of Fact and Statement of Overriding Considerations, AR 3838-39. Respondents' position is supported by substantial evidence.

IX. Greenhouse Gases

The parties agree it is important to analyze the emission of greenhouse gases ("GHG"). They also agree that the Guidelines describe what must be done to determine the significance of impacts from GHG emissions:

(a) The determination of the significance of greenhouse gas emissions calls for a careful judgment by the lead agency consistent with the provisions in section 15064. A lead agency should 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. A lead agency shall have discretion to determine, in the context of a particular project, whether to:

(1) Use a model or methodology to quantify greenhouse gas emissions resulting from a project, and which model or methodology to use. The lead agency has discretion to select the model or methodology it considers most appropriate provided it supports its decision with substantial evidence. The lead agency should explain the limitations of the particular model or methodology selected for use; and/or

(2) Rely on a qualitative analysis or performance based standards.

(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. Guidelines, § 15064.4

While this requires the lead agency to use careful judgment and to make a good faith effort to examine the impact of GHGs created by the project, it also vests considerable discretion in the lead agency regarding the methods of analysis.

The EIR devotes a chapter to this. D.RDEIR-10~09-25-2012~Section 3.6 Greenhouse Gas Emissions and Climate Change, AR 12569-12603. That chapter adopts two thresholds of significance:

> …whether the project would:
>
> GHG-1: Generate GHG emissions, either directly or indirectly, that may have a significant impact on the environment
>
> GHG-2: Conflict with an applicable plan, policy or regulation adopted for the purpose of reducing the emissions of GHGs. *Id*. at AR 12591.

In essence, the Port exercised its discretion to include quantitative analyses (GHG-1) pursuant to §15064.4(a)(1) and (b)(1) and (2) and a qualitative analysis (GHG-2) pursuant to §15064.4(a)(2) and (b)(3).

The quantitative analyses examine:

- GHG emissions associated with the construction and operation of the project beginning in the first year of construction and running through 2066. (The EIR examines GHG emissions in the years selected for analysis of air impacts.) D.RDEIR-10~09-25-2012~Section 3.6 Greenhouse Gas Emissions and Climate Change, AR 12592-12597.
- GHG emissions associated with the operation of the project under the No Project Alternative. D.FEIR-05~02-22-2013~Chapter 3 Modification to the DEIR and RDEIR, AR 6512-6513.
- A comparison of project's GHG emissions with the existing environmental setting (baseline), as described in § 15064.4(b)(1). D.RDEIR-10~09-25-2012~Section 3.6 Greenhouse Gas Emissions and Climate Change, AR 12592-12597.

Neither petitioners nor intervenor challenges the *accuracy* of the quantitative analyses.

For these quantitative analyses, the Port selected a conservative "significance threshold:"

> Where there are no established significance thresholds, the Port has conservatively established that any increase is potentially significant and is treated accordingly. Therefore, significant impacts would occur for the Proposed Project construction and operation activities. *Id.* at AR 12598:4-7.

The Attorney General (joined by petitioners) makes two principal claims: one challenging the quantitative analyses (GHG-1); the other addressed to GHG-2.

A. <u>The Challenge to the Quantitative Analysis (GHG-1): The Omission of Hobart</u>

The Attorney General argues that the EIR's quantitative analysis of GHG emissions is fundamentally wrong (and without substantial evidence to support it) because it omits any emissions that might emanate from the continued use of Hobart. As discussed above, the

omission of a discussion (and here a calculation) of the continued use of Hobart renders the Environmental Impact Report deficient. The writ must be granted for this reason.

B. The Challenge to the "Consistency" Analysis (GHG-2): The Failure to Discuss the Project's Consistency with Certain GHG Reduction Plans

Intervenor also argues that the EIR is "missing…any actual analysis of the Project's consistency with…plans and policies [aimed at reducing GHG emissions]" (IOB 17:7-9.)

Respondents argue that the EIR need not discuss *consistencies* with various plans; only *inconsistencies*. They cite Guidelines, §15125, which provides:

> (d) The EIR shall discuss any inconsistencies between the proposed project and applicable…regional plans. Such regional plans include, but are not limited to, the applicable air quality attainment or maintenance plan or State Implementation Plan… [and] plans for the reduction of greenhouse gas emissions…

They also cite a recent case from the First District Court of Appeal.

> Here, the EIR stated that, with the exception of the designation of the Ridgecrest A tank site as open space under the Countywide Plan, the Project is consistent with applicable land use policies. Specifically, the EIR acknowledged the Ridgecrest A tank's land use and open space impact, identified a mitigation measure of providing replacement open space, and stated the Project is otherwise consistent with applicable plans. Nevertheless, the trial court faulted the EIR for failing to mention "the specific elements or policies of the Countywide Plan that would be affected" by the Ridgecrest A tank.
>
> The trial court's ruling is tantamount to requiring the EIR to provide a detailed discussion of the Project's consistency with the plan. CEQA includes no such requirement. (*Long Beach, supra*, 176 Cal.App.4th at p. 919 [lead agency's

> "responses explained that no inconsistency exists, with the result that it is not required to discuss the [applicable] general plan in the FEIR"].) Here, the EIR concluded the Project as mitigated was consistent with the Countywide Plan, and it adequately responded to the Marin County Department of Parks and Open Space's letter. CEQA requires nothing more. (*Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1568 [135 Cal. Rptr. 3d 380] ["EIR provided a satisfactory response to a public comment on general plan conformity" because the response "contain[ed] a similar level of detail as the comment"].) *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal. App. 4th 614, 632-633 (emphasis added).

That is all true, but respondents' argument is somewhat beside the point. Intervenor is not arguing that a discussion of consistency is required under Guidelines, § 15125(d). Rather, she argues that it is necessary to discuss the project's consistency with various documents because *the EIR identified those items as a threshold of significance*. (IRB 6:4-15.) Intervenor specifically refers to AR 12600, (D.RDEIR-10~09-25-2012~Section 3.6 Greenhouse Gas Emissions and Climate Change) where the EIR says, "Impact GHG-2: The proposed Project would not conflict with State and local plans and policies adopted for the purpose of reducing GHG emissions."

Intervenor is right. The EIR identifies "consistency" as one of two thresholds of significance. D.RDEIR-10~09-25-12~Section 3.6 Greenhouse Gas Emissions and Climate Change, AR 12590- 12591, at 12591, line 28-35. Thus, it must assess consistency.

Respondents argue that even if the EIR must address consistency, Guidelines, § 15064.4(b)(3) does not require consideration of *all* governmental documents regarding GHG emissions. Rather, it must consider "… [regulations or] requirements…. adopted by the relevant public agency through a public review process." *Id.*

Strictly speaking, Executive Order EO-S-3-05 does not appear to meet that description.[26] Nor does the AB 32 Scoping Plan. Indeed, the Final Statement of Reasons for Regulatory Action adopted by the California Natural Resources Agency for these Guidelines considered the matter and noted,

> …the third factor in subdivision (b) [of Guideline §15064.4] directs consideration of the extent to which a project complies with a plan or regulation to reduce GHG emissions. That section further states, however, that to be used for the purpose of determining significance, a plan must contain specific requirements that result in reductions of GHG emissions to a less than significant level. This clarification is necessary because of the wide variety of climate action plans and GHG reduction plans that are currently being adopted by public agencies. ARB, for example, recently adopted its statewide Scoping Plan. That plan may not be appropriate for use in determining the significance of individual projects, however, because it is conceptual at this stage and relies on the future development of regulations to implement the strategies identified in the Scoping Plan." Final Statement of Reasons for Regulatory Action, Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB97, p.26-27 Exhibit A to Respondents' Request for Judicial Notice.

But intervenor does not rely on Guidelines, § 15064.4. Again, she says that the EIR itself identified consistency with a number of plans and programs as a threshold of significance. Thus, whether Guidelines, §15064.4 requires a discussion of them is beside the point. The EIR itself invoked them as critical guideposts. Once the EIR did that, it cannot rely on § 15064.4 to relieve the Port of the obligation to measure the project's impacts against those thresholds of significance.

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[26] Whether an EIR for a regional transportation plan must include an analysis of the plan's consistency with the GHG emission reduction goals reflected in that Executive Order is to be decided by the California Supreme Court in *Cleveland National Forest Foundation v. San Diego Association of Governments.* S223603.

Indeed, the problem goes deeper than that. For the EIR says, when assessing GHG-2, that "[t]he project *is consistent* with key legislation, regulations, plans and policies described in Section 3.6.3 Applicable Regulations." D.RDEIR-10~09-25-2012~Section 3.6 Greenhouse Gas Emissions and Climate Change, AR 12600, lines 4-7 (emphasis supplied.)

Section 3.6.3 is an expansive discussion of many documents, including, but hardly limited to, Executive Order EO-S-3-05, the Scoping Plan, and the Green LA Action Plan which includes a goal of reducing GHG emission to 35% below 1990 levels by 2030. H.6 DEIR-181, Green LA An Action Plan to Lead the Nation in Fighting Global Warming (May 2007), AR 65831, 65840.

Thus, even if Guidelines, § 15064.4(b)(3) does not necessarily require quantitative consideration of those documents, the EIR has affirmatively represented that it is consistent with them. Yet it contains no logic train showing that is so. It does not inform the public or decision makers of the reasons it believes the project is consistent with all such "key legislation, regulations, plan and policies."

C. <u>The Allegation that the EIR is Misleading</u>

That leads to the more troubling charge made by intervenor: that the discussion of consistency with GHG emissions is misleading.

The problem is this: the EIR first finds, as "Impact GHG-1," that the project will result in a significant increase in GHG emissions. D.RDEIR-10~09-25-2012~Section 3.6 Greenhouse Gas Emissions and Climate Change, AR 12592:10-11. But then it asserts, as "Impact GHG-2" that "[t]he proposed Project would not conflict with State and local plans and policies adopted for the purpose of reducing GHG emissions."

Intervenor says the EIR "fails as an informational document because it is affirmatively misleading." (IRB 7:2.) Essentially, she argues that all of the relevant GHG plans "are grounded

in the need to *reduce* emissions." (IRB 7:5.) A project that will increase GHG emissions cannot be in harmony with State and local plans and policies that require a decrease in GHG emissions.

Indeed, the numerical analysis underscores this. The discussion of GHG-1 shows that the SCIG will have GHG emissions in excess of baseline beginning sometime after 2023.[27] Respondents say that "the vast majority of GHG emissions result from off-site goods movement activities and continued operation of existing businesses relocated from the Project site, emissions that would occur whether the Project is built or not." (ROB 92:12-14.)

Respondents argue that it is, therefore, more relevant to compare the Project and No Project alternatives. The EIR provides those data. They show the following:

Year	**No Project [28]**	**Project[29]**	**Difference**	**Percentage Difference**
2023	107,389	85,979	21,410	20%
2035	191,911	184,595	7,316	4%
2046	192,374	184,632	7,742	4%
2066	192,374	184,632	7,742	4%

Thus, the percentage decrease in GHGs resulting from implementation of SCIG (as compared to the No Project Alternative) is less than the 30% reduction from "business as usual" discussed in the 2008 Climate Change Scoping Plan. See *Center for Biological Diversity et al. v. Department of Fish and Wildlife* (2015) 62 Cal. 4th 204, 216-218. After 2023 it is substantially less.

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[27] Table 3.6-4 shows emissions below baseline in 2023 and above baseline in 2035. D.RDEIR-10~09-25-2012~Section 3.6 Greenhouse Gas Emissions and Climate Change, AR 12595.

[28] Data taken from Table 5-12, D.FEIR-05~02-22-2013~Chapter 3 Modification to the DEIR and RDEIR, AR 6512-AR 6513.

[29] Data taken from Table 3.6-4, D.RDEIR-10~09-25-2012~Section 3.6 Greenhouse Gas Emissions and Climate Change, AR 12594-12597.

There is simply no explanation of how such a small reduction in GHG emissions is consistent with the "key legislation, regulations, plans and policies" described in Section 3.6.3, Applicable Regulations" D.RDEIR-10~09-25-2012~Section 3.6 Greenhouse Gas Emissions and Climate Change, AR 12600, lines 4-7. To take only two examples, it does not appear to accord with the need to reduce emissions below "business as usual" by 30%, nor does not appear to comport with the Los Angeles goal of reducing GHG by 35% below 1990 levels.

The bare statement of consistency would seem to be misleading to the public and to decision makers, for it seems to say that even though GHGs will increase above baseline after 2023, readers of the EIR should not be concerned because the project still complies with all of the legislation, regulations, plans and policies laid out in Section 3.6.3. On its face, that appears to be inaccurate. If it is a correct statement, some more explanation is needed. If it is not a correct statement, then a fuller discussion is needed of Impact GHG-2.

At oral argument, respondents undertook to argue that SCIG was consistent with some of these plans and policies. It pointed out that SCIG was included in the California Goods Movement Action Plan. H.6.FEIR-009~CARB Good Movements Action Plan (January 2007), AR 78663. The implication was that its inclusion in that Plan is evidence of its consistency with that and all other climate actions plans.

SCIG is listed in the California Goods Movement Action Plan as a "preliminary candidate action" infrastructure project. *Id.* at AR 78744. However the report does not thereby deem that to be consistent with the state's GHG objectives. To the contrary, the report says,

> It is important to note that these candidate actions will require more rigorous analysis pursuant to the evaluation criteria relative to the specific goods movement corridor and statewide benefits that are expected to be achieved. Similarly project-by-project environmental impact review as required by the California Environmental Quality Act must be conducted and required mitigation

must be implemented. It is expected that project proponents demonstrate the benefits of the respective projects… *Id*. at AR 78742-78743.[30]

At oral argument, respondents also cited the Southern California Association of Governments' "Regional Transportation Plan 2012-2035." H.6.RDEIR.037~~SCAG Regional Transportation Plan 2012-2035 Sustainable Communities Strategies Towards a Sustainable Future (2012) AR 89536, 89624-89625. Page AR 89624 mentions SCIG as a "key rail project" but does not discuss its impact on GHGs either alone or in concert with the five other key rail projects listed. It merely says, "…the State has established GHG-reduction goals under California Assembly Bill 32. Clean goods movement activities can contribute to these goals." That is hardly a sufficient response to the criticism discussed above.

The parties noted that the California Supreme Court now has before it the case of *Cleveland Nat'l Forest Foundation v. San Diego Assn. of Governments, supra.* Its decision in that case may shed further light on the arguments made by the parties. But on the record as it stands now, and under current authority, the Court finds that the EIR's GHG discussion is deficient for the reasons stated above.

As to GHG-1 and GHG-2 the EIR is deficient because it omits to consider Hobart. Even if the EIR were not required to consider Hobart, as to GHG-2 there is still the further problem that there is not substantial evidence to support its conclusion that the project is consistent with the plans, policies and regulations cited as thresholds of significance.

[30] At oral argument, respondents also referred to pages AR 78757 and 78761 in that same report. With respect to them, the report notes the potential benefits of SCIG, but contains the same caution (as quoted above) on AR 78757.

X. Noise Impacts

A. Overview

Petitioners contend the EIR's analysis of noise impacts is deficient in several respects. Specifically, they contend the EIR (i) is required to but does not analyze "single-event" maximum noise impacts in Long Beach; (ii) contains an unsubstantiated analysis of operational noise levels; (iii) proposes insufficient sound wall mitigation measures; (iv) inadequately analyzes rail corridor noise impacts, and (v) improperly analyzes cumulative noise impacts. The Court addresses each in turn.

B. Single-Event Noise Impacts in Long Beach

1. Petitioners' arguments

Petitioners contend that the EIR fails to address "single-event" maximum noise levels associated with SCIG. Essentially they claim that the EIR understates the noise problem by relying on *average* noise levels and ignoring the *highest* noise levels created by the project. This, they say, presents a misleadingly benign view of the noise impacts and ignores the EIR's determination of a threshold of significance.

In their opening brief petitioners contend the EIR should have addressed noise standards contained in "applicable planning documents." (POB 44:16). In their reply brief, they assert, more specifically that NOI-6 incorporates as thresholds of significance sections 8.80.150(B)(5) and 8.80.170(B)(3) of the Long Beach Municipal Code noise ordinance. (PRB 26-27.) Conflicts with that ordinance "constitute adverse impacts that a public agency must analyze and mitigate." (PRB 26:15-17.)

Starting from that premise, they argue that the EIR should have included an analysis of single-event maximum noise levels (L_{max}) "created by impact-generating activities associated with SCIG site operations and by vehicle passbys (*e.g.*, trucks and trains)." (POB 44:9-10.)

Instead, they contend, the EIR uses other noise metrics - such as L_{50}, CNEL, and SEL – that use averaging methodologies, do not take into account single-event maximum noise levels and ultimately obscure the project's noise impacts.

Petitioners argue that because the EIR "never justifies the basis for its omission or its reliance on other noise metrics, such as L_{50}," informed decision-making and informed public participation is precluded, and a prejudicial abuse of discretion has occurred. (POB 45:15-16).

Finally, petitioners assert that the SEL analysis of sleep-disturbance and classroom speech-disruption impacts in the EIR is an inadequate study of single-event noise impacts from the SCIG.

2. Respondents' arguments[31]

Respondents disagree that they were required to undertake a consistency analysis with "applicable planning documents" generally. Rather, respondents contend that a lead agency has discretion to apply standards from local jurisdictions, but "is not inflexibly required to do so." (ROB 73.)

Respondents also argue that their decision to use the L_{50} sound metric is supported by substantial evidence, in part, because it is based on a Port of Long Beach environmental protocol.

Finally, respondents argue that the sleep-disturbance and classroom speech-disruption analysis in the EIR contains a sufficient analysis of single-event noise impacts from the project.

3. A word on terminology

The terms used in the world of acoustic analysis are not in common parlance. Fortunately, the EIR provides an excellent glossary. D.RDEIR-13~09-25-2012~Chapter 3.9 Noise, AR 12676.

[31] Respondents also contend that petitioners failed to exhaust their administrative remedies as to the argument that the Long Beach noise ordinance required use of the L_{max} standard. However the Attorney General's petition alleges that the EIR "fails to adequately analyze the direct, indirect and cumulative impacts of the SCIG Project on the local community, including impacts to…noise." Petition for Writ of Mandate in Intervention, paragraph 58.

For present purposes, it is important to note the difference between L_{max} and L_{50}. L_{max} is "the maximum…noise level…during the measurement period." *Id.* It is, in effect, the loudest sound measured. L_{50} is the noise level that is exceeded 50% of the time during the period measured. It is the median sound level. So, in simple words, L_{max} is the loudest, and L_{50} is the "average" sound level.

4. Analysis

a) Consistency with an "applicable planning document"

Petitioners make a generic argument that "conflicts with applicable planning documents…constitute adverse impacts that a public agency must analyze and mitigate." (POB 44:16-18.)

Petitioners cite Sections X (land use) and XII (noise) of Appendix G of the Guidelines. They are portions of a sample "Environmental Checklist Form."[32] Petitioners argue that the inclusion of those sections in the form supports the proposition that "under CEQA, conflicts with applicable planning documents, particularly those adopted for the purpose of avoiding or mitigating environmental impacts, constitute adverse impacts that a public agency must analyze and mitigate." (POB 44, PRB 26.)

However, the introductory paragraph of Appendix G states that the questions on the checklist are "sample questions. . . intended to encourage thoughtful assessment of impacts, and do not necessarily represent thresholds of significance." (Guidelines, Appendix G, first paragraph.) The two questions in Appendix G do not bear the heavy weight petitioners place on them.

Nor does the case cited by petitioners, *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903. There, the issue before the court was whether substantial evidence existed

[32] The "NOTE" that appears immediately under the heading of this document says, "The following is a sample form …"

to support a fair argument that a project conflicted with applicable land use policies, thereby requiring preparation of an EIR instead of a mitigated negative declaration. *Id.* at 930. In our case, that ship sailed, as it were, some time ago, when the Port decided to prepare an EIR.

In this regard, petitioners have not shown that respondents failed to proceed in a manner required by law.

b) NOI-6 and incorporation of Long Beach Municipal Code noise ordinance

Both sides agree that NOI-6 incorporates the Long Beach noise ordinance standards. They disagree, however, as to the sufficiency of the EIR's discussion of compliance with that standard.

Because petitioners are challenging respondents' conclusions and determinations, and the amount of information presented in the EIR, the Court applies a substantial evidence standard of review to this argument. *Vineyard Area, supra*, 40 Cal. 4th at 426-27.

Impact NOI-6 provides as follows:

> Impact NOI-6: Construction and operation of the proposed Project have a significant noise impact if ambient noise levels would be increased by three dBA or more, *or maximum noise levels allowed by the Long Beach Municipal Code would be exceeded.* D.RDEIR-13~9-25-2012~Chapter 3.9 Noise, AR 12712:9-12 (emphasis added).

The Long Beach Municipal Code noise ordinance establishes daytime and nighttime exterior and interior noise standards. H.6.DEIR-209~Long Beach Noise Ordinance Chapter 8, Tables A and C, AR 67514-17. With respect to exterior noise limits, Section 8.80.150(B) provides,

> B. No person shall operate or cause to be operated any source of sound at any location within the incorporated limits of the city or allow the creation of any

noise on property owned, leased, occupied or otherwise controlled by such person, which causes the noise level when measured from any other property, either incorporated or unincorporated, to exceed:

1. The noise standard for that land use district as specified in Table A in Section 8.80.160 for a cumulative period of more than thirty minutes in any hour; or
2. The noise standard plus five decibels for a cumulative period of more than fifteen minutes in any hour; or
3. The noise standard plus ten decibels for a cumulative period of more than five minutes in any hour; or
4. The noise standard plus fifteen decibels for a cumulative period of more than one minute in any hour; or
5. The noise standard plus twenty decibels or the maximum measured ambient, *for any period of time*. (*Id.* at AR 67514 (emphasis added).)

With respect to interior noise limits, Section 8.80.170(B) provides,

B. No person shall operate, or cause to be operated, any source of sound indoors at any location within the incorporated limits of the city or allow the creation of any indoor noise which causes the noise level when measured inside the receiving dwelling unit to exceed:

1. The noise standard for that land use district as specified in table C for a cumulative period of more than five (5) minutes in any hour; or
2. The noise standard plus five decibels (5dB) for a cumulative period of more than one minute in any hour; or

3. The noise standard plus ten decibels (10 dB) or the maximum ambient, *for any period of time*. (*Id.* at AR 67517 (emphasis added).)[33]

Under Impact NOI-6, exceedance of the "maximum noise levels allowed by the Long Beach Municipal Code" is a significant noise impact. So, the exterior and interior noise limits described in Sections 8.80.150 and 8.80.170 should have been used in the EIR to determine whether an impact is significant. (*Id.*, AR 12712:9-12.) This was not done.

Respondents assert that the EIR was not required to "use standards adopted by other local jurisdictions." (ROB 73:14.) That may be so, but here the EIR embodied the Long Beach ordinance as a threshold of significance – NOI-6. D.RDEIR-13~09-25-2012~Chapter 3.9 Noise, AR 12712. Since the Long Beach ordinance was elevated from just a "standard adopted by [a] local jurisdiction…" to a "threshold of significance" the EIR was compelled to take it seriously.

Next, respondents change the subject somewhat by arguing that the EIR used the L_{50} metric. They argue that is the same as the Long Beach ordinance's L_{eq} metric. Whether that is so is beside the point. Neither measures maximum noise levels. L_{50} is the noise level that is exceeded 50% of the time (the median); L_{eq} is a noise level averaged over some measurement period (the average or mean.) D.RDEIR-13~09-25-2012~Chapter 3.9 Noise, AR 12676. Neither is a "single event" noise that occurs "for any period of time" as used in the Long Beach ordinance.

Respondents seek to argue that Long Beach itself uses the L_{eq} standard in its noise ordinance. For that it does not cite the ordinance. Rather it cites at January 2006 document entitled "Environmental Protocol, Port of Long Beach Planning Division." (H.6.DEIR-

[33] Both the exterior and interior noise limit ordinances contain provisions for increasing the allowable sound limits in the event that the ambient sound level exceeds the noise standard. (*Id.,* sections 8.80.150(C) and 8.80.170(C), AR 67514 and 67517.)

158~~Environmental Protocol – Port of Long Beach Planning Division, AR 63284.) There are several things wrong with that argument.

First, the document is not from the City of Long Beach (which adopted the noise ordinance); it is from the Port of Long Beach.

Second, the document itself is labeled "Administrative Draft – Confidential Communication" *Id.* at AR 63235 and "Confidential Communication – Do not Cite, Quote or Reference." *Id.* at AR 63236 and the header of every page after that. Every page, including the one cited by respondents, is watermarked "DRAFT."

Third, the reference to L_{eq} is equivocal at best. That section of this document discusses how the author of an EIR should describe an environmental setting generally. It does not say that the Long Beach noise ordinance should be read to utilize *only* that measure for noise violations.

Indeed, it is often the case that a set of environmental standards includes more than one measure. For example, as discussed at length above, air standards are measured by mass and concentration, and concentrations are averaged over different periods, such as one-hour average, 24-hour average, annual average, and so on. It would not be surprising that the Long Beach ordinance uses L_{eq} to judge whether there has been a violation of those parts of the ordinance that consider the amount of noise that occurs over, *e.g.* thirty, fifteen, five or one minutes. But that would not apply to the provision that looks to a different case – noise that occurs "for any period of time."

Fourth, it is noteworthy that the *City* of Long Beach is one of the entities challenging this portion of the EIR. It is arguing that its noise ordinance has not been properly addressed in the EIR. Citation to a draft document from 2006 from the *Port* of Long Beach seems a weak response to that direct challenge. The City of Long Beach contends that respondents misinterpret the City of Long Beach noise ordinance. That matters.

In sum, the EIR set a threshold of significance in NOI-6 and then failed to examine it adequately. It performed an analysis of average noise impacts, and failed to examine maximum noise impacts. In doing so, it did not provide substantial evidence to support its conclusion that the NOI-6 threshold was exceeded at only a very limited number of receptors, a limited number of times.

For this reason, the noise analysis contained in the EIR is deficient.

c) The SEL and CNEL arguments

Finally, respondents argue that the EIR sufficiently addresses single-event noise impacts because it utilizes the SEL (Sound Exposure Level) and CNEL (Community Noise Equivalent Level) metrics. (ROB 74.)

(1) The SEL

Respondents argue that the EIR considered single-event noise sleep-disturbance impacts and classroom speech-disruption impacts using the Sound Exposure Level ("SEL") metric. (ROB 74.) They note that the EIR concludes that the impacts for NOI-4, NOI-5, NOI-8, NOI-9, NOI-12 and NOI-13 are all less than significant. D.RDEIR-13~9-25-2012~Chapter 3.9 Noise, AR 12724, AR 12726, AR 12744, AR 12748, AR 12750, and AR 12751.

That may be so, but the SEL is different from the L_{max}. The glossary defines SEL as "a measure of cumulative noise exposure for a noise event expressed as the sum of the sound energy over the duration of a noise event." D.RDEIR-13~9-25-2012~Chapter 3.9 Noise, AR 12676. As explained elsewhere in the Administrative Record, "unlike L_{max} … SEL increases with the duration of a noise event, which is important to people's reaction…" H.6.DEIR-339~~Transit Noise and Vibration Impact and Assessment, *etc*., AR 74920.

SEL simply does not measure the same things as the standards used in the Long Beach noise ordinance. D.RDEIR-13~9-25~Chapter 3.9 Noise, AR 12676; H.6.DEIR-209~Long Beach Noise Ordinance Chapter 8, AR 67514-15. The Long Beach noise ordinance does not use the

SEL metric, and respondents have not explained how the SEL can be used to apply the Long Beach noise ordinance standards.

The SEL analysis addresses only one potential source of single-event noise (train horn soundings) in two contexts (sleep-disturbance potential and classroom speech-disruption potential). That highlights the narrowness of the EIR's analysis of single-event noise impacts. There is no other analysis of other sources of single-event noise occurrences associated with the operation of a railyard. Consequently, to the extent that the EIR analyzes single noise events, the rather limited discussion of the SEL in two contexts does not cure the omission described above.

(2) The CNEL

The same is true of the CNEL, which is defined in the glossary as "the *average* A-weighted noise level, *during a 24-hour day,* adjusted to account for more noise sensitive time periods during the evening and the nighttime." D.RDEIR-13~9-25-2012~Chapter 3.9 Noise, AR 12676. Indeed, respondents elsewhere argue that CNEL will not necessarily be increased significantly by single-noise events. (ROB 81:12-13.)

Everything that was just said about SEL applies with equal or greater force to the CNEL.

5. Summary

In conclusion, the EIR's analysis of single-event noise impacts from the SCIG project is inadequate. Further, to the extent the EIR contains analysis of single-event noise impacts, the analysis is too limited, evaluating only the effect of train horn soundings on sleep and classrooms; and use of the SEL is inconsistent with the noise limits identified in the Long Beach noise ordinance.

The analysis of single-event noise impacts in the EIR is insufficient and its conclusion is not supported by substantial evidence.

C. Operational Noise Data

1. The dispute

Petitioners argue that the EIR's study of operational noise is based upon unsubstantiated data. (POB 46.) In response to this argument, respondents point to data in the EIR, Appendix F1, and respondents' responses to comments. (ROB 75:3-10.)

2. Analysis

Petitioners argue that POLA does not "reveal the source" of the data that comprise Table 3.9-16. (POB 46; D.RDEIR-13~9-25-2012~Chapter 3.9 Noise AR 12716.) Table 3.9-16 summarizes the predicted noise levels from on-site sources and includes offsite train horns, trains, an air compressor building, RMG cranes, servicing facilities, parking lots, hostlers with and without trailers, heavy trucks, and container impacts. *Id.* Petitioners contend that the EIR does not explain how these predicted noise levels were derived.

Because this argument relates to the "the amount or type of information contained in the EIR, the scope of the analysis, or the choice of methodology," it is subject to a substantial evidence standard of review. *Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 986-87.

In several responses to comments on the RDEIR, POLA provided specific information as to the derivation of these data. POLA identified the figures, tables, and pages in Appendix F1 (the noise technical study) in which the location of the monitoring stations is shown. D.FEIR-03~2-22-2013, Chapter 2 Volume I Responses to Comments: Recirculated Draft EIR, AR 4485-4486. The responses also stated the standards applied in locating the monitoring stations, including consistency with ASTM standards, and locations "selected to represent the nearest noise sensitive receivers in the vicinity of the Project Site." *Id.* at AR 4486.

In response to another comment, POLA stated that as part of the FEIR, Appendix F1 had been revised to include "(1) a list of construction equipment noise assumptions and, (2) the input and output files associated with the construction noise analysis." *Id.* at AR 4488.

In response to yet another comment, POLA identified the sections of the RDEIR and Appendix F1 where on-site operational activities and assumptions are discussed; described the methodology used (the Federal Rail Administration's computation procedures); and stated that the data are available for review at the lead agency's office. *Id.* at AR 4491.

Petitioners argue the Federal Transit Administration guidance manual cited by respondents at ROB 75 identifies higher dBAs for air compressors, cranes, and trucks than appear in Table 3.9-16 of the EIR. (PRB 27-28.) The specific figures identified by petitioners appear in Table 12-1 of the guidance manual under the heading "Typical Noise Level (dBA) 50 ft from Source." H.6.DEIR-339~~Transit Noise and Vibration Impact and Assessment FTA-VA-90-1003-06 May 2006 Office of Planning and Environment Federal Transit Adm, AR 75093.

Respondents state that operational noise activities and assumptions were calculated using the manual's "computational procedures for railroad operations." D.FEIR-03~2-22-2013, Chapter 2 Volume I Responses to Comments: Recirculated Draft EIR, AR 4491. The first sentence of the relevant section of the guidance manual (Section 12.1.2) states, "[t]he noise levels generated by construction equipment will vary greatly depending on factors such as the type of equipment, the specific model, the operation being performed, and the condition of the equipment." *Id.* at AR 75092.

Consequently, petitioners' charge that the "EIR systematically understates SCIG's predicted noise levels" (PRB 27) is most accurately described as a disagreement with respondents' experts.

Respondents adequately identified the sources and methodology for the calculation of the operational noise data, and made available the data that underlie Appendix F1. D.FEIR-09~2-22-2013~Appendix F1 SCIG Final EIR Noise Technical Study, AR 7147-7275.

There is substantial evidence to support the EIR's operational noise study.

D. Mitigation Measures NOI-1 and NOI-3

Petitioners contend that the sound wall mitigation measures identified in MM NOI-1 and MM NOI-3 are designed to mitigate the impacts of NOI-6. (POB 46:14-20; D.RDEIR-13~9-25-2012~Chapter 3.9 Noise, AR 12753.) Since NOI-6 was not fully analyzed, it cannot be said that these mitigation measures are sufficient.

Petitioners are correct. As discussed above, the EIR failed to examine the impact of maximum noise events in Long Beach. Therefore, it cannot be said that these two mitigation measures are adequate.

Nonetheless, respondents argue, motor vehicles, train horns, nonemergency signaling devices, and other federally-regulated activities are exempt from regulation under the Long Beach noise ordinance. They argue that petitioners' argument must fail because there is no inconsistency with the Long Beach noise ordinance. (ROB 76.)

But NOI-6 was measuring impacts based on the noise levels contained in the ordinance. It was not determining whether the railroad could be cited for violating them. Indeed, the entire noise analysis (related to the Long Beach ordinance) consisted of determining what noise would be generated by SCIG and comparing it to the Long Beach ordinance. Nowhere did the EIR say that the ordinance should not be considered in determining impacts. Sounds that may be exempt from regulation may well have impacts that must be addressed in a CEQA analysis. That is the underlying premise of the EIR itself.

E. Rail Corridor Noise

1. Petitioners' argument

Petitioners also contend that the EIR does not adequately analyze project-related operational rail noise impacts along the Alameda Corridor in the City of Los Angeles. Specifically, petitioners challenge the conclusion in the EIR that SCIG project rail corridor noise will not increase ambient Community Noise Equivalent Level ("CNEL") by 3 dBA or more, the significance threshold. Petitioners also contend that the EIR fails to analyze the project's cumulative noise impacts along the Alameda Corridor.

2. Respondents' argument

Respondents contend (i) the EIR properly relies upon expert analysis that quantifies increases in CNEL along the Alameda Corridor due to train horn soundings, and (ii) that cumulative noise impacts along the Alameda Corridor have been adequately analyzed.

3. Analysis

Because this argument relates to the "the amount or type of information contained in the EIR, the scope of the analysis, or the choice of methodology," it is subject to a substantial evidence standard of review. *Native Plant Society, supra,* 177 Cal.App.4th 957, 986-87.

Petitioners focus on the EIR's discussion of Impact NOI-3. That identifies as a threshold of significance an increase of 3 dBA in Los Angeles as measured by CNEL. The EIR then concludes that threshold will not be exceeded. D.RDEIR-13~9-25-12~ Chapter 3.9 Noise, AR 12715-16.

Petitioners challenge that conclusion, essentially because they assert train horn soundings were not considered sufficiently. (POB 48:11-22.) They note the EIR anticipates eight roundtrip trains per day traveling to and from SCIG, generating 16 train horn soundings per day. The soundings are described as producing levels as high as 107 dBA at 100 feet and 90 dBA at 500 feet. *Id.*, D.RDEIR-13~09-25-2012~Chapter 3.9 Noise, AR 12716:10-32. Petitioners argue that

"no analysis" supports the claim that CNEL noise levels will not exceed 3 dBA, and that the noise study in Appendix F1 does not evaluate rail corridor noise due to SCIG. (POB 48, PRB 29.)

The specific conclusion they challenge is that the increase in CNEL for receptors R28, R29, and R32 will remain below significant levels:

> These soundings are not expected to occur more than once in any one hour period. When compared to the number of existing train operations, horn soundings, and ambient background noise, future locomotive horn noise from SCIG train traffic, although still discernible, would not be expected to result in a CNEL increase greater than 3 dB at the nearest residential receptors R28, R29 and R32. D.RDEIR-13~9-25-12~ Chapter 3.9 Noise, AR 12716:27-32.

In opposition, respondents argue that the experts considered that this impact is measured in CNEL: "a 24-hour average of hourly L_{eq} noise levels…" They say it was perfectly reasonable for the experts who "quantified the amount by which they expected CNEL along the Alameda Corridor to increase," to conclude that these single-noise events would not change the result of their analysis – that the impacts would remain below the threshold of significance. (ROB 81.)

That, indeed, provides substantial evidence to support the EIR's conclusion, and POLA was entitled to rely upon the opinions of its experts. Those who construct the kind of detailed noise analysis contained in the EIR become familiar with the inputs and the sensitivity of the results to changes in inputs. It is appropriate to rely on their opinion in this very limited regard – particularly where a short term horn sounding is being input into a calculation of a twenty-four hour average impact.

> The drafters of an EIR may . . . rely upon the credible opinions of experts concerning environmental impacts. [Citation] [The party challenging the EIR] has the burden on appeal of demonstrating that these sources are so 'clearly

inadequate or unsupported' as to be 'entitled to no judicial deference.' [Citation.] *City of Maywood v. Los Angeles Unified School Dist.* (2012) 208 Cal.App.4th 362, 424 (citing *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1467-1468).

F. Cumulative Noise Impacts

Petitioners also contend that the EIR's discussion of cumulative noise impacts is inadequate. (POB 49.) Under CEQA, cumulative impacts are "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." Guidelines, § 15355.

Here, petitioners object to the EIR's conclusion that the SCIG will not make a cumulatively considerable contribution to a significant noise impact in the City of Los Angeles. This conclusion is found in the section discussing Cumulative Impact NOI-3. It first asks,

> [w]ould operation of the proposed Project contribute to a cumulative increase in noise levels by 3 dBA or more in CNEL to or within the 'normally unacceptable' or 'clearly unacceptable category,' or any 5 dBA or greater noise increase, in the City of Los Angeles? D.RDEIR-15~9-27-2012~Chapter 4.1 Cumulative Analysis, AR 12875.

Then the EIR responds,

> [p]roject-related increases in operational noise would exceed 3 dBA on a number of roadways in Los Angeles, but none of those roadways has sensitive uses. Rail operations would not result in increases that exceed noise guidelines." *Id.* at AR 12875:27-29.

Petitioners contend that POLA's use of the 3 dBA standard ignores the project's contributions to cumulative noise conditions. Petitioners cite *Gray v. County of Madera* (2008)

167 Cal.App.4th 1099, 1122-23 and *Los Angeles Unified School District v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1025 for the proposition that where existing conditions include high noise levels, a noise increase that is relatively small may result in cumulatively considerable conditions.

In *Gray*, the Court of Appeal held that an EIR used an incorrect methodology where it concluded that a 3 to 5 dBA increase in sound was required before noise impacts could be considered significant without any consideration of cumulative noise impacts. In *Los Angeles Unified School District*, the court held that a noise increase of 2.8 dBA could be significant where the existing noise level around the school exceeded a safe level.

Here, by contrast, the 3 dBA threshold identified in Impact NOI-3 is specifically related to areas that are within the "normally unacceptable" or "clearly unacceptable" category of CNEL noise levels. D.RDEIR-15~9-25-2012~ Chapter 4.1 Cumulative Analysis, AR 12875:11-13. In other areas, the threshold of significance is 5 dBA.

Unlike the situations in *Gray* and *Los Angeles Unified School District*, the significance threshold in the EIR takes into account the existing conditions – *i.e.*, smaller noise increases are considered significant for areas that are already experiencing high noise levels. Unlike those cases, 3 dBA is not a stand-alone, objective standard. Consequently, the situation here is more akin to *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1072 (cumulative water use impact to be "derived from an examination of the tolerable impact of an individual project" on the basinwide amount of water.)

Petitioners also argue that the conclusion in the EIR that rail operations will not result in exceedances of noise guidelines is "likely inaccurate." (POB 49; PRB 29.) Petitioners point to the existing CNEL noise levels at R29 (71.3 dBA) and R32 (69.3 dBA), which are currently classified as "conditionally acceptable" and "normally unacceptable." (POB 49:5-7.) But petitioners are only identifying the current conditions at those receptors; they do not identify any

evidence of predicted, project-related noise increases at R 29 and R32 that would exceed noise guidelines.

Consequently, substantial evidence exists to support the EIR's rail corridor noise analysis.

XI. Transportation Impacts

A. Overview

Petitioners contend the EIR's "Transportation/Circulation" impacts analysis is deficient in several respects. Petitioners argue that indirect effects of non-drayage truck traffic have not been adequately analyzed and that a mitigation measure prescribing the drayage route for trucks visiting SCIG is not enforceable. Petitioners also contend that the EIR's analysis of San Gabriel Avenue is misleading, and that traffic impacts related to displaced businesses are inadequately analyzed.

B. Analysis

1. Statute and guidelines

As discussed above in the section regarding Hobart, CEQA requires analysis of indirect impacts. See Guidelines, §§ 15126.2, 15064 and 15358.

Where mitigation measures are implemented to mitigate impacts, both the statute and Guidelines require those mitigation measures to be enforceable. § 21081.6(b); Guidelines, § 15126.4(a)(2).

2. Indirect transportation impacts: non-drayage truck routes

a) Petitioners' argument

Petitioners contend the EIR does not disclose and analyze all SCIG-related truck trips. (POB 50:2-52:18; PRB 31:4-32:4.) Specifically, petitioners argue that the EIR omits analysis of

some truck trips caused by the SCIG project, such as "trips to and from fueling stations, chassis and container storage yards, container inspection facilities, fumigation facilities, truck maintenance garages and truck storage areas." (POB 50:14-17.) All of these trips are outside the SCIG drayage circuit analyzed in the EIR. (*Id.* 50:20-22.)

b) Respondents' argument

Respondents contend the traffic analysis includes all truck trips caused by SCIG, "including drayage of containers to and from the SCIG facility and maritime terminals, and idling and on-site activity associated with truck trips calling on the SCIG facility," and no analysis of truck trips between points other than SCIG and the Ports is required. (ROB 83:27-28, 84:6-7.)

Respondents state that drayage trucks coming to the SCIG facility will not be owned or operated by BNSF, but by third parties located in various places. (*Id.* 84:12-15.) They conclude that analysis of these offsite truck activities is not necessary because they would occur with or without the SCIG project, and that CEQA only requires the analysis of activities that would not occur "but for" the project, which is the drayage route. (*Id.* 84:12-21.) The SCIG project will not create any new traffic, respondents argue, "but only changes the portion of the trucks' journey that used to go from the port to Hobart." (*Id.* 84:20-21.)

c) Analysis

(1) Standard of review

Because petitioners are challenging the scope of the truck traffic analyzed in the EIR, the Court applies a substantial evidence standard of review to this argument. *Vineyard Area, supra,* 40 Cal. 4th at 426-27.

(2) Ancillary trips

Neither side has cited authority involving a project similar to the SCIG rail yard. In support of their argument that the EIR need only analyze effects caused by the proposed project,

respondents cite *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 875 and *Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1094. (ROB 84:24-26.)

In *Friends of the Eel River,* an EIR analyzing a water agency's proposal to increase its withdrawals from the Russian River was not required to analyze impacts on the Eel River, despite the existence of an agreement between the agency and PG&E to divert Eel River water into the Russian River, and the existence of a proposal before the Federal Energy Regulatory Commission to curtail Eel River diversions to protect endangered species. The court pointed to the facts that the proposed project would not make any changes to the Eel River, and noted that "an EIR is required to identify and focus on direct and indirect environment impacts caused by a project. Significant impacts typically involve changes in the existing environment caused by a project. (Guidelines, § 15126.2, subd. (a).)" (*Id.*)

In *Watsonville*, an EIR for a proposed general plan was not required to analyze groundwater overdraft, where overdraft was a pre-existing problem in the area and the proposed general plan would not exacerbate the problem. The court noted that "[t]he FEIR was not required to resolve the overdraft problem, a feat that was far beyond its scope." 183 Cal.App.4th at 1094.

Petitioners cite *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 431 and *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829. (POB 52:4-8.) But those cases do not address the issue of whether pre-existing, ancillary truck trips need to be analyzed here.

In *Citizens to Preserve the Ojai,* an EIR for an oil refinery expansion project was inadequate when it entirely excluded onshore effects of offshore emissions from its *cumulative* air quality impact analysis; it did not consider whether those emissions should be regarded as a direct or impact of the project.

In *Santiago,* an EIR for a mining project was inadequate where the EIR contained no description of the facilities that would be constructed to deliver water to the project, and no analysis of the effect of supplying water for the project itself.

At oral argument, petitioners also cited *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184. That court discussed Guidelines, § 15126.2(a), and commented that the "'project area'... cannot be so narrowly defined that it necessarily eliminates a portion of the affected environmental setting." *Id*. at 1216. However, that case concerned urban decay and cumulative impacts from two new, large shopping centers located less than four miles from one another. Because the shopping centers were new, the impacts would have caused a change in the existing environment.

Petitioners also cite Guidelines, § 15144, which provides that an "an agency must use its best efforts to find out and disclose all that it reasonably can," and Guidelines, § 15003(c), which provides that "[t]he EIR is to inform other governmental agencies and the public generally of the environmental impact of a proposed project."

Clearly, an EIR must be informative. However, as seen in *Friends of the Eel River* and *Watsonville,* a lead agency need not analyze every conceivable, potentially-related impact of a proposed project. Guidelines, § 15064(d) and § 15358(a)(1) support respondents' contention that they need only analyze those impacts that are *caused by the* project, not every possibly related effect that has something to do with the proposed project.[34]

Undoubtedly, SCIG will cause transportation-related impacts to occur in the form of ancillary trips to service centers and businesses that support trucks, such as maintenance centers, parking lots, and refueling stations. However, these trips would occur whether or not SCIG is

[34] At least one DEIR comment letter suggests that the trips from the truck drivers' homes should also be analyzed in the EIR. D.FEIR-04~2-22-2013~Chapter 2 Volume II Responses to Comments Draft EIR, AR 5831, cited at POB 50:17.

built because those trips support the operation of the drayage trucks. And petitioners do not identify any changes in these ancillary or support activities that SCIG will cause. Simply arguing that there will be related, localized impacts is not enough.

In reply, petitioners argue that even if respondents are correct that the non-drayage truck trips would be the same with or without SCIG and do not need to be analyzed, "the EIR still must analyze impacts on the particular neighborhoods through which the SCIG drayage trucks will travel." (PRB 31:17-20.)

Guidelines, § 15064(d)(3) specifically exempts from analysis indirect impacts that are speculative. Here, the EIR explains that analysis of truck trips beyond those to and from the ports and the SCIG site would be speculative because the trucks are not owned or controlled by BNSF, but by third parties located in different areas. Neither the Port nor BNSF have any control over where the trucks go after they leave SCIG for these ancillary services. F-20~4-18-2013~ Coalition for a Safe Environment Appeal Council file No.13-0295-S5 Staff Report, AR 20685. There is substantial evidence that any analysis of these truck trips would be speculative.

Respondents' decision to limit the truck traffic analysis in the EIR to drayage trips is supported by substantial evidence. However, should a further analysis of Hobart indicate that *additional* truck trips will be generated, their non-speculative Transportation effects will, of course, have to be analyzed.

(3) Mobile fuel trucks

As a related argument, petitioners contend that the EIR's traffic analysis is deficient because it omits mobile fuel truck trips. (POB 52:2-3 and 51:19-52:18; PRB 31:20-28.)

Petitioners' argument fails. Fuel trucks are included as part of the EIR's analysis. The project description specifically includes "fuel truck deliveries" under the general category of "visitors and vendors" to SCIG, and the traffic detail spreadsheet includes 16 to 40 "Visitor/Vendor" visits to the site per day. D.RDEIR-06~9-25-2012~Chapter 2 Project

Description, AR 12401:16-20; H.7 Vol2NOP-DEIR SCIG~AR118581~SCIG Traffic Draft Detail Sent to Port ver. 2 .xls, AR 118589-118595; ROB 85:23-26. Consequently, it appears that the fuel trucks were, indeed, included in the traffic counts.

3. Mitigation Measure AQ-8

a) The dispute

MM AQ-8 in part requires drayage trucks arriving at the SCIG facility to use dedicated truck routes. Petitioners contend that is unenforceable, and therefore inadequate, as a mitigation measure. C-02~3-8-2013~ Mitigation Monitoring Reporting Program, AR 3877; POB 52:9-18.

Respondents argue that MM AQ-8 satisfies CEQA's requirement that mitigation measures be enforceable.

b) Analysis

A claim that a mitigation measure is inadequate is subject to the substantial evidence standard of review. *Laurel Heights Improvement Assoc. v. Regents of the University of California* (1988) 47 Cal.3d 376, 408 ("That an EIR's discussion of mitigation measures might be imperfect in various particulars does not necessarily mean it is inadequate"); *see also A Local & Regional Monitor v. City of Los Angeles* (1993) 12 Cal.App.4th 1773, 1809 ("A court's task is not to weigh conflicting evidence and determine who has the better argument when the dispute is whether adverse effects have been mitigated or could be better mitigated").

As discussed above, CEQA requires that mitigation measures be "fully enforceable." (§ 21081.6(b).) An agency must make a binding commitment to implement adopted mitigation measures.

In *Federation of Hillside and Canyon Assns. v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, the Court of Appeal found that transportation-related mitigation measures were inadequate where there was "great uncertainty" as to whether mitigation measures would be funded, where the mitigation measures were adopted but not required to be implemented as a condition of

development, and where no provisions ensuring enforceability were adopted. A similar result was had in *Woodward Park Homeowners Assn., Inc. v. City of Fresno* which is discussed above.[35]

Here, in relevant part, MM AQ-8 provides as follows:

> BNSF will be required to specify in their drayage contracts that all drayage trucks calling on the SCIG facility shall use dedicated truck routes and GPS devices . . . . BNSF will be required to install Radio-Frequency Identification (RFID) readers to control access at the gate to the SCIG facility. Truck logs and throughput volume will be provided to the LAHD Environmental Management Division for tracking and reporting. C-02~3-8-2013~ Mitigation Monitoring Reporting Program, AR 3877.

In accordance with MM AQ-8, BNSF drayage contracts will include this paragraph:

> Truck travel to and from port terminals to the SCIG railyard shall occur along designated truck routes. Use of these truck routes shall be monitored and enforced through the use of GPS devices installed in the trucks. Failure to comply with the truck route requirement could result in penalties such as fines, suspension, or termination of the driver or motor carrier. D.FEIR-03~2-22-2013~Chapter 2 Volume I Responses to Comments: Recirculated Draft EIR, AR 4493:28-32.

While BNSF is responsible for the implementation of MM AQ-8, compliance will be monitored by both the Environmental Management division and the Real Estate division of the LAHD. C-02~3-8-2013~ Mitigation Monitoring Reporting Program, AR 3862, 3877.

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[35] The Court then "assumed for the sake of argument that the language in the resolution regarding a deposit constituted an enforceable obligation" and found other defects in the mitigation plan. *Woodward Park, supra,* at 730.

Petitioners contend that measure AQ-8 does not satisfy CEQA's standard for enforceable mitigation measures. First, petitioners object that the designated truck routes are only designated in the EIR and MM AQ-8. PRB 32:6-12; D.RDEIR-06~9-25-2012~Chapter 2 Project Description, AR 12402:12-24. Second, petitioners contend that AQ-8 does not detail how the GPS monitoring will be used to enforce the designated truck routes. (POB 12-15; PRB 32:16.) Third, petitioners object to the language to be included in BNSF's drayage contracts, arguing that simply providing that failure to use the routes "*could* result in penalties such as fines, suspension, or termination" (emphasis added) is inadequate to ensure enforcement. (PRB 32:13-15.)

But petitioners have not cited any authority that would support a conclusion that the failure to include these details makes MM AQ-8 impermissibly "unenforceable" under CEQA. In *Federation of Hillside Canyon,* the mitigation measure at issue would have required the cooperative efforts of various public agencies, including the lead agency city, and the city's portion of the cost exceeded the city's anticipated revenues. 83 Cal.App.4th at 1256. No such situation exists here. The designated truck routes do not require cooperation by multiple agencies, and no funding-based impediment has been identified.

MM AQ-8 is required as part of the SCIG project and has been incorporated into its approvals. It requires GPS monitoring to ensure that the designated routes are in fact being used. BNSF's drayage contracts will specify that the designated routes must be used. Further, use of the designated truck routes will be a part of the ongoing monitoring program by the LAHD. This is consistent with the statute and the Guidelines, which allow mitigation measures to be adopted as conditions of project approvals, or incorporated into a plan or regulation.

Respondents contend that POLA was entitled to "make reasonable assumptions about the Project," and the use of designated truck routes. They point to a response to comments in the FEIR, which cites *Environmental Council of Sacramento v. City of Sacramento* (2006) 142

Cal.App.4th 1018, 1036, and § 21080(e). ROB 85:13-14; D.FEIR-03~02-22-2013~Chapter 2 Volume I Responses to Comments~ Recirculated Draft EIR, AR 4493:9-20.

Environmental Council of Sacramento holds that an agency is entitled to make "reasonable assumptions based on substantial evidence about future conditions without guaranteeing that those assumptions will remain true." 142 Cal.App.4th at 1036. Indeed, § 21080(e) defines "substantial evidence" to include "a reasonable assumption predicated upon fact..."

In their response to comments, respondents identify several possibilities for GPS tracking systems, but state that the exact nature of the monitoring system will be determined when the SCIG facility opens, based upon the technology available at that time. D.FEIR-03~2-22-2013~Chapter 2 Volume I Responses to Comments: Recirculated Draft EIR, AR 4493:21-25.

This is reasonable, and substantial evidence supports the conclusion that MM AQ-8 is an enforceable and valid mitigation measure.

4. San Gabriel Avenue

a) Petitioners' arguments

Petitioners contend the EIR's traffic analysis is deficient with respect to San Gabriel Avenue. They assert there is (i) inadequate analysis of impacts to residents and employees of, and visitors to, the Century Villages at Cabrillo; (ii) an incorrect designation of San Gabriel Avenue as a "freeway segment;" and (iii) an incorrect calculation of traffic density. (POB 52:20-54:16; PRB 32:20-34:9.)

b) Respondents' arguments

Respondents argue that Century Villages at Cabrillo residents and visitors will not be affected by SCIG truck traffic because there is a designated turn lane from the Terminal Island Freeway onto Pacific Coast Highway ("PCH"). Respondents also argue that San Gabriel Avenue

was properly analyzed as a freeway segment, based on the Highway Capacity Manual. Finally, they assert that petitioners misunderstand the traffic density calculation.

c) Analysis

Because Petitioners are challenging the scope of the analysis of traffic on San Gabriel Avenue in the EIR, the Court applies a substantial evidence standard of review to this argument. *Vineyard Area, supra,* 40 Cal. 4th at 426-27.

(1) San Gabriel Avenue

According to the EIR, San Gabriel Avenue is a one-lane road that will be used by trucks traveling to the SCIG site as they exit the Terminal Island Freeway and turn onto PCH. D.FEIR-03~2-22-2013~Chapter 2 Volume I Responses to Comments Recirculated Draft EIR, AR 4934:10-12. At oral argument, it was made clear that San Gabriel Avenue is a two lane road, with one lane in each direction. Trucks traveling northbound on the Terminal Island Freeway will exit using an off-ramp that loops onto San Gabriel Avenue southbound to a westbound merge onto PCH. H.2-057~05-08-2013~Comment Letter Century Villages at Cabrillo submittal, AR 23779. At full capacity, an average of 5,542 trucks is anticipated to arrive at and depart the SCIG site per day. D.FEIR-02~2-22-2013~Chapter 1 Introduction, AR 3939:17.

Century Villages at Cabrillo is a 27-acre supportive housing community providing shelter and services to families and individuals who are homeless and at risk of being homeless. H.2-057~05-08-2013~Comment Letter Century Villages at Cabrillo submittal, AR 23778. It serves at least 1,000 residents on any given night and over 2,000 individuals a year. *Id.* The sole entrance to the Villages is located on San Gabriel Avenue near the entrance to PCH. *Id.* at AR 23779. An additional, 81-unit apartment complex is currently under development at the site. D.FEIR-03~2-22-2013~Chapter 2 Volume I Responses to Comments, AR 4923, 4927.

Petitioners argue that the EIR does not sufficiently analyze the impact of SCIG project traffic on San Gabriel Avenue on local residents, particularly individuals residing at and utilizing the services at the Century Villages at Cabrillo. (POB 53:4-5.) They are correct.

Respondents do not specifically analyze traffic on San Gabriel Avenue in the Transportation chapter of the EIR, even though it is a key part of a designated route for trucks traveling to the SCIG rail yard. Respondents assert that "motorists can travel to and from the Villages without ever encountering Project trucks" but only cite a map showing existing and anticipated truck routes in support of this statement. ROB 87:9-10; D.RDEIR-14~9-25-2012~Section 3.10 Transportation/Circulation, AR 12783.

In the EIR, however, respondents acknowledge that San Gabriel Avenue will be used by SCIG traffic: "The inbound trucks utilizing the northbound SR-103 connection to the westbound Pacific Coast Highway (SR-1) would negotiate the right turn at the intersection of San Gabriel Avenue at the SR-103 ramps." D.FEIR-03~2-22-2013~Chapter 2 Volume I Responses to Comments: Recirculated Draft EIR, AR 4933:44-4934:2.

The EIR also notes that San Gabriel Avenue turns into one lane from two: "San Gabriel Avenue is a one lane road which merges with the freeway off-ramp prior to PCH." *Id.* at AR 4934:10-12.[36]

These statements appear to contradict respondents' assertion that Villages residents will not encounter SCIG project-related trucks. Only at oral argument did respondents acknowledge the fact that there would be a "bottleneck" on San Gabriel Avenue. There was no way that could be determined from the EIR.

In fact, there is *no* discussion in the EIR of the use of San Gabriel Avenue by Villages' residents, clients, and employees. If anything, the traffic analysis seems to dismiss the need to analyze traffic impacts along San Gabriel Avenue because the area is not densely populated:

[36] The Court takes this to mean one lane in each direction; the reference being to one southbound lane.

> San Gabriel Avenue is a one lane road which merges with the freeway off-ramp prior to PCH. . .[T]here are not many trips anticipated to be on San Gabriel Avenue south that would merge with the SR-103 off-ramp traffic (San Gabriel Avenue serves a small residential area to the north). *Id.* at AR 4934:11-16.

Similarly, respondents emphasize that all truck queuing lanes will be located within the northwest corner of the SCIG site, far from San Gabriel Avenue. (ROB 86:28-87:4.) That may be so, but it does not address the impacts created by trucks driving to the queuing lanes via San Gabriel Avenue. (*See* PRB 32:25-33:4.)

At oral argument, petitioners stated that there will be two trucks a minute using San Gabriel Avenue, and this was not disputed by respondents. An analysis that does not include a discussion of the impact of that truck traffic on the Villages is inadequate.

The response to comments cites Tables 3.10-8 and 3.10-29. D.FEIR-03~2-22-2013~Chapter 2 Volume I Responses to Comments: Recirculated Draft EIR, AR 4489:20-24. However those tables do not include an analysis of the San Gabriel Avenue-Highway 103 intersection. The nearest intersection contained on those tables is Highway 103 and Pacific Coast Highway ("SR-1").

Consequently, there is not substantial evidence supporting respondents' determination that there will be no impact on San Gabriel Avenue from more than a thousand trucks a day traveling to SCIG from Highway 103. Nor is there substantial evidence to support a decision not to analyze the impact of San Gabriel Avenue traffic on area residents, including the Villages.

(2) "Weaving"

Petitioners also challenge respondents' designation of San Gabriel Avenue, the transition between northbound Terminal Island Freeway and westbound PCH, as a "Freeway Segment." (POB 53:9-26; PRB 33:19-24.) Petitioners say this analysis obscures impacts to San Gabriel Avenue, and that traffic congestion in the form of trucks waiting to travel westbound could block

access to San Gabriel Avenue. POB 53:13-16; D.FEIR-03~2-22-2013~Chapter 2 Volume I Responses to Comments: Recirculated Draft EIR, AR 4925-26. Petitioners argue that the transition should be evaluated as an intersection, not a freeway ramp. *Id.* at AR 4925-4926.

In response, respondents assert that the freeway segment "weaving" analysis was appropriate because the connection between the Terminal Island Highway and Pacific Coast Highway is "free-flow (no impediment such as stop sign or yield sign) movement with a merge" and that "intersection analysis methodology" would not account for free-flow traffic. *Id.* at AR 4934:3-4. Respondents also cite the EIR's use of the Highway Capacity Manual ramp weaving analysis, as well as Travel Demand Modeling in preparing their traffic analysis. *Id.* at AR 4489.

There is no stop sign at the connection of Terminal Island Highway and Pacific Coast Highway, so respondents' decision to employ a "weaving" analysis, as opposed to an "intersection" analysis, consistent with the Highway Capacity Manual, appears to be supported by substantial evidence.

While petitioners may believe that this framework understates traffic impacts, petitioners do not challenge the underlying studies, or the applicability of the Highway Capacity Manual.

Petitioners do argue that the Highway Capacity Manual "warns that use of a 'freeway analysis' is improper" for urban streets like San Gabriel Avenue. (Petitioners' Response to Respondent's and Real Party's Opposition to New Hearing Argument, etc.; filed 12/17/2015, 2:5-7.) But the excerpt from the Highway Capacity Manual they cite simply states that the weaving methodology "does not specifically address" a number of subjects, including "[w]eaving segments on urban streets." H.10.SUPP-13 Highway Capacity Manual 2000, Chapter 24 (Freeway Weaving), AR 183902**.** Unfortunately, no definition of "urban streets" is provided in this excerpt, so it is unclear whether this even applies to San Gabriel Avenue. Nothing in the parties' briefs assists the Court on that point.

When the standard is "substantial evidence" the Court does not choose between competing theories of such esoteric matters as how best to analyze traffic flow. There is substantial evidence to support the EIR's conclusion and that is all that is necessary.

(3) Traffic density calculations

Petitioners also contend that the EIR's density calculations resulted in underestimating the number of trucks that will use San Gabriel Avenue. They read Table 3.10-30 of the EIR to say that there will be only 16.8 passenger car equivalents per hour transitioning from the Terminal Island Freeway to PCH during the afternoon rush hour. (POB 54:1-14, citing D.RDEIR-14~9-25-2012~Section 3.10 Transportation/Circulation, AR 12807; PRB 33:25-34:3.) That, they say, is wholly inconsistent with the fact that all trucks entering SCIG will have to use that route; 2771 trucks per day. (POB 54:7.)

Respondents say petitioners have misread the EIR and that the chart to which they refer relates to traffic *density* rather than the number of cars per hour. (ROB 88:28-89:14.) As respondents contend, the relevant column on Table 3.10-30 is labeled "Density."

There is some confusion, however, for the text under the word "density" says "pc/hr/ln" D.RDEIR-14~09-25-2012~Section 3.10 Transportation/Circulation, AR 12807. Elsewhere the administrative record defines "density" as "pc/mi/ln." *See, e.g.* D.RDEIR-25~09-25-2012~ Appendix G SCIG Transportation Appendix, AR 15098. Those appear to be different units of measure.

It may be that the label ("pc/hr/ln") is a typographical error. Or, the problem may be more fundamental. Respondents' brief asserts that the density of 16.8 is supported by substantial evidence in the "SCIG Transportation Appendix. D.RDEIR-25~09-25-2012~ Appendix G SCIG Transportation Appendix, AR 14113-15098. Specifically, their opposition brief cites pages AR 15091 – 15098, and their hyperlinked reference to those pages contains highlighting that respondents assert constitutes substantial evidence.

However nothing highlighted (nor anything else on those pages found by the Court) contains the number 16.8 that is found on the table in the EIR. The Court simply cannot discern any evidence to support the number found on Table 3.10-30. Respondents say that some calculation leads from another number (375 pce trips, *see* ROB 89:11) to the 16.8 figure. But the number 375 does not appear on the cited pages either.[37]

Drawing on the material cited by the parties, the Court is unable to find substantial evidence to support the questioned datum in Table 3.10-30. There may well be an explanation of the sort offered in respondents' brief. (ROB 89:1-14) But it is in neither the EIR nor any reference made by the parties to the Administrative Record, so the public and decision-makers cannot follow the path of analysis on a point of some significance – the impact of thousands of trucks on an intersection used by at least some of the parties to the litigation. That is a deficiency in the EIR. There is not substantial evidence in the record to support this density calculation. Were this relatively small point the only problem with the EIR, it might not be prejudicial. But together with the other deficiencies identified in this Opinion, it is a matter to be taken into account.

5. Traffic impacts for displaced businesses

a) Petitioners' arguments

Petitioners argue that the EIR fails adequately to analyze and mitigate the traffic impacts related to businesses that will need to be relocated because of SCIG. (POB 54:18-55:12; PRB 34:10-35:4

[37] Of the pages hyperlinked by respondents, AR 15095 through 15098 relate to the "PM Peak Period." The Court cannot find on them anything that would constitute substantial evidence (or any evidence) of either the inputs, calculations or outputs cited in respondents' brief.

b) Respondents' arguments

Respondents contend that the EIR contains as much analysis as was possible of traffic impacts related to displaced businesses. Three businesses were offered alternate sites: ACTA, California Cartage, and Fast Lane. For those three, the EIR included in its traffic analysis impacts based upon their future locations. As for the other displaced businesses, respondents contend that they do not know where those businesses will ultimately relocate, so any traffic analysis would be speculative, and thus not required by CEQA.

c) Analysis

Because petitioners are challenging the scope of the analysis of impacts created by displaced businesses, the Court applies a substantial evidence standard of review. *Vineyard Area, supra,* 40 Cal. 4th at 426-27.

The SCIG project will require the acquisition of additional land. Some of the property will be acquired by BNSF and other acreage will be leased by BNSF from LAHD. D.FEIR-03~2-22-2013~Chapter 2 Volume I Responses to Comments: Recirculated Draft EIR, AR 3980:19-22.

Eight businesses will be displaced by the SCIG project: California Cartage, ACTA Maintenance Yard, Fast Lane Transportation, Total Intermodal Services, Three Rivers Trucking, Flexi-Van, San Pedro Forklift, and LA Harbor Grain Terminal/ Harbor Transload. D.FEIR-02~2-22-2013~Chapter 1 Introduction, AR 3922.

Of these eight businesses, the EIR assumed that California Cartage, Fast Lane Transportation and the ACTA Maintenance Yard would be relocated; these three businesses are located on LAHD-owned land. D.FEIR-02~2-22-2013~Chapter 1 Introduction, AR 3920:34-37; D.FEIR-03~2-22-2013~Chapter 2 Volume I Responses to Comments: Recirculated Draft EIR, AR 3982:20-22.

Petitioners argue that the EIR does not analyze traffic impacts or contain mitigation measures associated with the future operations of Fast Lane, California Cartage or Three Rivers, and that this omission of relevant information violates CEQA. (POB 54:22-23; 55:7-9.)

The trips anticipated to be generated at the alternate sites offered to Fast Lane and California Cartage have been included in Table 3.10-23 in the Transportation chapter, and in the Project Description chapter. D.RDEIR-14~9-25-12~Section 3.10 Transportation/ Circulation, AR 12797; D.RDEIR-06~9-25-2012~Chapter 2 Project Description, AR 12384-12386; D.FEIR-05~2-22-2013~Chapter 3 Modification to the DEIR and RDEIR, AR 6429-32. Based on Table 3.10-23, which compares trip generation at the current (baseline) and future California Cartage and Fast Lane sites, the EIR concludes that the alternate business sites represent "an incremental change over the Baseline conditions." D.RDEIR-14~9-25-12~Section 3.10 Transportation/Circulation, AR 12797:12-13.

Petitioners do not identify any deficiencies in the calculations contained in this table. Consequently, substantial evidence supports the conclusion that traffic impacts associated with the future locations of Fast Lane and California Cartage will not create significant new impacts requiring mitigation.

Petitioners also object to the EIR's assumptions as to the future operations of ACTA, California Cartage and Fast Lane Transportation. (PRB 34:24-44:2.) Those assumptions were stated to be the following.

> The ACTA maintenance yard was analyzed at the identical level of activity in future years as the baseline year. The activities at Fast Lane and Cal Cartage alternate locations were analyzed at reduced levels corresponding to the fraction of acreage available at the alternative locations relative to each business' baseline site. D.FEIR-03~2-22-2013~Chapter 2 Volume I Responses to Comments: Recirculated Draft EIR, AR 3980:35-39.

Elsewhere, however, the EIR assumes that only California Cartage's operations would be diminished. D.FEIR-05~2-22-2013~Chapter 3 Modification to the DEIR and RDEIR, AR 6431.

At the time the FEIR was prepared, it was not known if those three businesses would move to the alternate sites offered by LAHD: "[d]espite request from LAHD, none of the businesses has confirmed an interest in or commitment to move to any of the offered sites." D.FEIR-03~2-22-2013~Chapter 2 Volume I Responses to Comments: Recirculated Draft EIR, AR 3982:33-35. California Cartage, however, has apparently provided "some information related to truck parking but none related to transloading operations" at the alternative site. D.RDEIR-06~9-25-2012~Chapter 2 Project Description, AR 12386:17-19.

Given the lack of specific information, the assumption that businesses would relocate to the sites offered to them satisfies CEQA's requirement that an EIR make a "good faith effort at full disclosure." Guidelines, § 15151.

Petitioners also argue that respondents were required to analyze the traffic impacts of the businesses that were not offered alternate locations, including Three Rivers. (PRB 34:10-17, POB 55:8.) Petitioners argue that since respondents acknowledge these businesses will stay in the port area, CEQA's disclosure requirements required an analysis of the related traffic impacts. The EIR explains that LAHD is not required to provide relocation assistance to businesses located on LAHD property operating under LAHD revocable permits or expiring leases, and that no alternate locations were offered to these properties. D.FEIR-03~2-22-2013~Chapter 2 Volume I Responses to Comments: Recirculated Draft EIR, AR 3981:31-40. Nevertheless, it appears that LAHD did attempt to collect information from some of these businesses. In 2009,

> LAHD sent requests for information to certain tenants and businesses on the project site to determine potential sites they would move to as part of their own business plans; however, no responses with site-specific-information were received. Accordingly, the EIR does not include an analysis of specific locations

> to which tenants would move because that would be speculative under CEQA. (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 797; Guidelines § 15144.) Instead, it provides a qualitative description of the environmental issues that would be involved in any such relocations, pointing out that tenants would likely move to properly zoned sites in the general port area and that CEQA analyses of potential impacts would be performed by the agencies having jurisdiction over those sites. D.FEIR-03~2-22-2013~Chapter 2 Volume I Responses to Comments: Recirculated Draft EIR, AR 3983:9-14.

Consequently, "[a]ll other displaced businesses which were not offered alternative locations were assumed to move to another, unknown location somewhere in the South Coast Region." *Id.* at AR 3980:38-40.

The FEIR does note that these other businesses were included in its mass emissions (RDEIR Section 3.2.4.3) and GHG emissions (RDEIR Section 3.6.4) analyses, but comments that "health risk, noise, and traffic impact analyses require knowledge of the specific locations where these businesses would relocate." *Id.* at AR 3983:18-22.

Since it is not known where the other displaced businesses will ultimately locate within the South Coast region, the EIR's conclusion that any site-specific analysis would be "speculative under CEQA" (*id.* at AR 3983:14) is sufficient. No further analysis of significant environmental effects (and determination of appropriate mitigation measures) was possible or required. Consequently, the Port's decision to limit the analysis to mass air emissions and greenhouse gas impacts is sufficient and supported by substantial evidence.

(1) <u>The additional argument made by the business entities</u>

Four parties make an additional argument. Those entities are Fast Lane Transportation, Inc.; California Cartage, Inc.; Three Rivers Trucking, Inc.; and San Pedro Forklift. (In this section of the Opinion, they are collectively referred to as the "Business Entities.") However, the

additional argument focuses on access to Fast Lane's current business location; not on any of the other Business Entities.

As part of the SCIG project, a portion of Fast Lane's operations will be relocated, causing it to function on two parcels instead of one. They are (i) a newly-relocated 4.5-acre site (the "Alternate Site"[38]) and (ii) the site of its existing operations, albeit reduced in size to 24.5 acres (the "Remainder Site"). D.RDEIR-06~9-25-2012~Chapter 2, Project Description, AR 12384.

At the November 17, 2015 hearing, counsel for the Business Entities argued vigorously that the EIR traffic analysis was inadequate with respect to the *Remainder* Site.

Respondents objected. They said this was not fair argument since it was not addressed in the briefs. The Business Entities argued that they had raised this point in both the administrative proceedings and in a footnote in petitioners' opening brief.

When further debate ensued, the Court permitted limited, additional briefing – addressing both the procedural objection and the substantive argument.

In their post-hearing opposition brief, respondents argue that petitioners only "raised the issue of traffic impacts of trucks traveling to the *Alternate Sites* (*see* POB, 54-55; PRB, 34-35), "[but not] ….of trucks traveling to the *Remainder Site."* (Respondents' and Real Party's Opposition to New Hearing Argument etc. [filed December 14, 2015] ["ONHA"] at 1:17-19.) Consequently, respondents argue that the Court should not even consider this subject, because it was raised "for the first time in this lawsuit" at oral argument. (ONHA 1:2-3.) On the merits, they argued the Business Entities did not exhaust their administrative remedies and the EIR contains substantial evidence to support its conclusions.

In reply, the Business Entities contend that they did brief the matter and that they have satisfied all exhaustion requirements. (Business Entities' Reply to BNSF and the Port's

[38] The parties and documents sometimes refer to the "Alternate" site; sometimes to the "Alternative" site. They mean the same.

Opposition to New Hearing Argument ["BER"] 1:11-16.) Substantively, they argue that the EIR is deficient with regard to its analysis of (i) truck trip generation impacts on Farragut Avenue via the Anaheim Street / E "I" Street-W 9th Street intersection [39] ("Anaheim/E. 'I' Street Intersection") (BER 6:24-7:11) and (ii) the level of service and volume/capacity ratio at that same intersection. (BER 7:12-9:2.)

(2) The failure to brief the matter

Petitioners' Opening Brief states generally that the impacts of the relocation of the Business Entities were inadequately analyzed. (POB 54:18-55:12.) But that discussion focuses on the relocation sites - the *Alternate* Sites – and not the *Remainder* Site. Similarly, their reply brief raises relocation-related issues regarding the *Alternate Sites*. (PRB 34:10-35:4.) Neither brief discusses impacts to the *Remainder* Site.

The Business Entities point to Footnote 39 in petitioners' opening brief. That cites some portions of the administrative record. [40] However, the two sentences preceding that footnote read,

> The Final EIR fails to provide mitigation for the additional and redirected trip generation on public roadways. The businesses will continue to generate truck trips, including trips to and from the assumed *relocation* sites identified in the EIR. The omission of thousands of new truck trips to and from the *relocation* sites of these businesses violates CEQA's core information purpose." (POB 55:9-12; emphasis supplied.)

Consequently, respondents are correct that this issue was not briefed.

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[39] The somewhat clumsy reference to "E 'I' Street – W 9th Street" reads as "East 'I' Street – West 9th Street."

[40] Petitioners' citations are generally to pages of the administrative record that discuss the "Sepulveda Driveways," not the Anaheim / E "I" Street Intersection. One document cited by them (H.2-018~01-31-2012~Comment Letter Fast Lane Transportation Inc., at AR 22847), discusses the Anaheim Street intersection with respect to the relocation site. As to that, see below.

A court is not required to address an issue raised for the first time at oral argument. (*Padilla v. Rodas* (2008) 160 Cal.App.4th 742, 753, n.2, citing *H.N. & Frances C. Berger Foundation v. City of Escondido* (2005) 127 Cal. App. 4th 1, 15 ("An appellant abandons an issue by failing to raise it in the opening brief."). *See also Save the Sunset Strip Coalition v. City of W. Hollywood* (2001) 87 Cal.App.4th 1172, 1181 n. 3 (court need not consider new arguments raised on reply).)

The Court finds the argument was waived. The parties negotiated and adhered to an extended briefing schedule with ample page limits. It was simply not fair for the Business Entities to surprise respondents with this un-briefed issue at oral argument in November.

However, the Court has considered the briefs that were submitted after the hearing. As an alternate ground of holding, it finds that the EIR contains substantial evidence to support its findings as to this issue.

It is important to be clear what the issue is. The cognizable argument made by the Business Entities is that the EIR did not adequately analyze the traffic impact created by reducing Fast Lane's access to its existing physical facility. Essentially, the SCIG project will close the entrance that leads from Pacific Coast Highway to Fast Lane's facility. Instead, traffic to and from Fast Lane will be required to use the Anaheim / E "I" Street Intersection.

(3) <u>The matter was raised during the Administrative Proceedings</u>

The Business Entities include a long list of citations to the administrative record which discuss or refer to relocation of the various business entities, including but not limited to Fast Lane. (BER 2:7-5:4.) Most of those comments were focused on the Alternate Sites.

But in discussing that Alternate Site, the Business Entities sometimes raised the Anaheim/E. 'I' Street Intersection. For example,

> Presumably, the access to the relocation site will be from the south (Anaheim Street) and not a major state highway from which we currently access our facility. The rerouting of access will require serious evaluation because redirecting at least 120,000 round truck trips (as identified in the DEIR) creates challenging circulation issues, not only at the relocation site, but the intersections of those routes leading to the relocation site such as the southbound Anaheim Street exit of Terminal Island Freeway at East "I" Street, the intersection of Anaheim Street and East "I" Street, and the intersection of Farragut Avenue and Grant street. It's not clear these circulation have been adequately studied in Chapter 3.10, "Traffic / Circulation." H.2-018~1-31-12~ Comment Letter Fast Lane Transportation, Inc., at AR 22847 (Cited in BER at 3:23-26).

So, the Business Entities did raise questions about traffic impacts at this intersection during the administrative process. That these comments were raised in the context of access to the Alternate Site is not dispositive, for it is the same intersection at issue: the Anaheim/E. 'I' Street Intersection.

(4) The substantive issue

The parties agree that Farragut Avenue and the intersection of Anaheim Street / E "I" Street – W 9th Street, will be the primary access route for both the Alternate Site and the Remainder Site once the SCIG project removes almost all of Fast Lane's direct access to the PCH. ONHA 3:12-14, BER 7:3-7; D.RDEIR-12~9-25-12~Chapter 3.8 Land Use, AR 12667-68. The Business Entities, however, contend that the EIR does not include a sufficient analysis of (i) truck trip generation or (ii) level of service or volume/capacity ratios.

(5) Standard of review

Because this is a challenge to the adequacy of the analysis in the EIR, the substantial evidence standard of review applies. *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546-47.

(6) Truck trip generation

The Business Entities state that it is "unclear what analysis was given to the hundreds of trucks that each day used the Fast Lane entrance at PCH and will now be routed through Fast Lane's secondary entrance of using Farragut Avenue via the Anaheim Street / E "I" Street-W 9th Street intersection." (BER 6:24-7:1.)

First, they question whether the EIR accounts for the trucks traveling not only to the Alternate Site, but also to the Remainder Parcel via the Anaheim/E.'I' Intersection. (BER 7:3-8.) In footnote 7 they discuss Tables 3.10-12 and 3.10-23 in the DEIR and the RDEIR/FEIR. (BER 7 n.7.) These tables contain truck trip generation figures and are based upon data in the EIR's Transportation Appendix, Appendix G. D.RDEIR-14~9-25-2012~Section 3.10, Transportation / Circulation, AR 12797; D.RDEIR-25~9-25-12~SCIG Transportation Appendix G, AR 14113-15098.

Table 3.10-12 says the baseline (2010) business peak hour trip generation for Fast Lane at its PCH entrance is 115 trucks in the morning, 110 trucks at midday, and 115 trucks in the evening. D.RDEIR-14~9-25-2012~Section 3.10, Transportation / Circulation, AR 12781.

Table 3.10-23 includes the post-project business peak hour trip generation. D.RDEIR-14~9-25-2012~Section 3.10, Transportation / Circulation, AR 12797. There, Fast Lane's trip generation is predicted to be 140 in the morning, 120 at midday, and 135 in the evening. *Id.* (These trips are listed under the headings "Entrance" and "Alternate Site.")

Respondents agree that "traffic will shift to using Fast Lane's 'Alternate Site' access route." (ONHA, 3:20-22.) Using the example of inbound truck trips and pointing to data in Appendix G, they argue that a comparison of 2035 No Project Conditions to the 2035 Project Conditions shows a net increase of 175 inbound movements, a figure which covers the majority of Fast Lane's projected peak morning trip generation (195 inbound truck trips). ONHA, 5:8-13; D.RDEIR-25~9-25-12~SCIG Transportation Appendix G, AR 14752, 14797.

In addition, the text in the EIR makes it clear that Fast Lane will be divided into two sites, and that both sites will be accessed primarily through the same route. D.RDEIR-06~9-25-2012~Chapter 2, Project Description, AR 12384; D.RDEIR-12~9-25-12~Chapter 3.8 Land Use, AR 12667-68; D.RDEIR-14~9-25-2012~Section 3.10 Transportation / Circulation, AR 12784-85. So, it appears that the data in Appendix G used to generate Table 3.10-23 include all projected Fast Lane traffic.

Moreover, since the Fast Lane trip generation figures contained in Table 3.10-23 are greater than those in the baseline in Table 3.10-12, it does not seem reasonable to assume that all this traffic would be going just to the 4.5-acre Alternate Site and not the 26.5-acre Remainder Site as well.

While some additional explanation might have been helpful, under a substantial evidence standard of review, reasonable inferences may be drawn to support the agency's findings. *Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042, 1050.

The Business Entities do not contend that the figures in Tables 3.10-22 or 3.10-23 are inaccurate, nor do they challenge any aspect of the underlying traffic study data contained in Appendix G. They do not point to a single citation in the record that would support any contrary conclusion at all. A mere assertion that something is "not clear" is not a sufficient basis to find the EIR inadequate.

The Business Entities also argue that the use of the 2035 projections was improper, because the "problems raised by the business entities are problems TODAY, not at the project's completion." (BER, 6:17-19, emphasis in original.) But there is no explanation of why this distinction is relevant, and the Business Entities do not point to any other evidence in the record indicating that construction impacts (or other near-term consequences) were inadequately addressed by the EIR.

Substantial evidence exists in the record to support the EIR's analysis of truck trip generation at the Anaheim/E. 'I' Street Intersection.

(7) Level of service and volume/capacity ratios

The Business Entities also disagree with the EIR's analysis of the Level of Services and the Volume/Capacity ratio at the Anaheim/E. 'I' Street Intersection.

The Business Entities express incredulity that volume capacity ratios in the RDEIR are better than they were in the DEIR. Specifically, they state that it "defies logic how volume capacity ratios could *improve* from the DEIR to the RDEIR at the Anaheim Street/E "I" Street-W 9th Street intersection with no mitigation unless Fast Lane and Cal Cartage were assumed in the Project and not analyzed as part of it." (BER 8:4-6.)

But the relevant inquiry here is whether the EIR's conclusions as to the level of service and the volume/capacity ratios are supported by substantial evidence. Here, there appears to be substantial evidence in the record for the RDEIR's conclusions.

The methodology employed for the EIR's traffic studies is described in the RDEIR and is based on the data in Appendix G. D.RDEIR-14~9-25-2012~Section 3.10, Transportation/Circulation, AR 12763-12766; D.RDEIR-25~9-25-12~SCIG Transportation Appendix G, AR 14113-15098. City-specific methodologies were used to assess operating conditions at intersections. D.RDEIR-14~9-25-2012~Section 3.10, Transportation/Circulation, AR 12764. The analysis of the study sections, including the Anaheim/E. 'I' Street Intersection, is discussed in TRANS-2. *Id.* at AR 12801-02; *see also* ONHA 4:2-5:2. The Business Entities do not identify any contrary evidence in the record to bolster their contention that the EIR's traffic analysis and project description are not supported by substantial evidence.

It is understandable that the traffic study figures are not identical in the DEIR and the RDEIR. The traffic studies were redone for the RDEIR. As set forth in Appendix H of the RDEIR, the re-analysis used several new assumptions, including (i) a new CEQA baseline (2010

instead of 2005), (ii) a new operations period for the SCIG (50 years instead of 30), and (iii) a change in the 2009 Cargo Demand Forecast (lower in the RDEIR than in the DEIR). D.RDEIR-28~9-25-12~Appendix H, Summary of Changes in the Recirculated Draft, p. H-2, AR 15159**.** What matters is whether the conclusions in the RDEIR are supported by substantial evidence, not whether there were changes between the DEIR and the RDEIR.

Finally, the Business Entities argue that the EIR is deficient because it did not require any mitigation measures. (BER 8:7-15.) But the EIR concluded that the level of service at the Anaheim/E. 'I' Street Intersection would degrade only from an "A" to "B" (D.RDEIR-14~9-25-2012~Section 3.10, Transportation/Circulation, AR 12802), and that the traffic levels at that intersection would not exceed a threshold of significance. A less than significant impact does not require mitigation. *Id.* at AR 12803. While the Business Entities clearly disagree with the analysis and conclusions in the EIR, that is simply not enough to overcome substantial evidence in the administrative record.

XII. Cumulative Impacts

A. Overview

Intervenor and petitioners contend that the EIR contain an inadequate discussion of the project's cumulative impacts. (IOB 19:17-23:19; IRB 12:4-15:22; POB 56:20-57:17.) They raise three primary arguments. First, intervenor argues that the EIR does not adequately analyze the cumulative impacts of SCIG and the planned "ICTF Modernization and Expansion" project (the "ICTF Expansion Project"). Second, intervenor contends that the cumulative impacts chapter inadequately analyzes non-cancer health impacts, such as asthma and respiratory problems. Third, petitioners and intervenor argue the chapter improperly fails to consider operations at Hobart.

B. ICTF Modernization and Expansion Project

1. Intervenor's argument

Intervenor contends that the EIR does not contain an adequate analysis of the cumulative impacts of SCIG when considered in conjunction with the ICTF Expansion Project being undertaken by the Union Pacific Railroad. (IOB 20:5-6.)

As required by Guidelines, § 15130(b)(1)(A), the EIR contains a list of present or reasonably foreseeable future projects (approved or proposed) that could contribute to cumulative impacts in combination with SCIG. D. RDEIR-15~9-25-12~Chapter 4.1 Cumulative Analysis, AR 12821-12840.[41] That list includes 170 projects.

Among the projects listed is the "Union Pacific Railroad ICTF Modernization and Expansion Project." It is described in Table 4-1 as follows: "UP proposal to modernize existing intermodal yard four miles from the Port." D.RDEIR-15~9-25-2012~Chapter 4 Cumulative Analysis, AR 12828, Table 4-1 Item #46.

The ICTF yard is hardly just another project. In simple words, ICTF is to the Union Pacific Railroad, what SCIG is to the BNSF Railway Company. It is the Union Pacific's facility for handling intermodal cargo coming from the Ports; it is the other "near dock intermodal rail yard."

ICTF already exists. It is just north of and adjacent to the SCIG site. D.RDEIR-15~9-25-12, Chapter 4 Cumulative Analysis, AR 12822, Figure 4-1; IOB 21:15; D.FEIR-03~2-22-2013~Chapter 2 Vol. I Responses to RDEIR Comments, AR 4744. But plans are afoot to double its capacity.

A description of the ICTF Expansion project is contained in the administrative record:

> The proposed Project would increase the capacity to handle containers at the ICTF from the current annual average of 725,000 to an estimated 1.5 million

[41] An EIR may, alternatively, contain a summary of projections contained in certain kind of planning documents. *Id.* at Guideline § 15130(b)(1)(B).

annual average by modernizing existing equipment and equipment operating methods. The truck traffic is currently estimated to be about 1.1 million one-way truck trips per year, and the proposed Project will increase the number of truck trips to about 2.268 million one-way truck trips per year. In addition, the proposed Project will increase the number of annual rail trips from 4,745 to about 9,490. H.7~Vol2.NOP-DEIR, SCIG-AR119026~ICTF NOP-IS.pdf , AR 119034.

Intervenor notes, "the draft EIR included a detailed analysis of the combined SCIG/ICTF projects' impacts, yet this analysis was missing from the recirculated draft EIR." (IOB 22:5-6.)

2. Respondents' argument

Respondents argue that the EIR contains sufficient "particularized discussion" of the ICTF Expansion Project. They note it is discussed specifically with regard to visual, light and glare, risk, land use, noise, vibration, and traffic-related cumulative impacts. (ROB 101:23-102:6.)

Respondents also contend that CEQA does not require any type of quantified cumulative impacts analysis. (ROB 102:7 *et seq*.)

As for the SCIG-ICTF analysis that was removed from the RDEIR, respondents state that by the time the RDEIR was prepared, the delays in the ICTF Expansion Project had rendered the DEIR's analysis outdated, and insufficient information was available to prepare an updated quantified analysis. (ROB 102 n.29.)

C. Cumulative Non-Cancer Health Risks

1. Intervenor's argument

Intervenor also asserts that the cumulative impacts section inadequately analyzes cumulative non-cancer health risks from toxic air contaminants. (IOB 22:27-28.) Specifically, intervenor contends that the hazard indices used are inadequately explained (IOB 23:4-1-19) and

that the conclusion in the EIR that the significance threshold will not be exceeded is unsupported. (IRB 15:8-10.)

2. Respondents' argument

Respondents argue that the EIR sufficiently describes and quantifies the existing and cumulative non-cancer impacts based on data in the Air Quality section of the EIR. (ROB 103:28-104:5.) Respondents also contend that the health hazard index issue has not been administratively exhausted.

D. Hobart

1. Petitioners' and intervenor's argument

Petitioners and intervenor argue that Hobart should have been included in the cumulative impacts analysis. (POB 57:10-17, IRB 13:21-14:25.) They contend, first, that Hobart should have been included because the past and present operations at Hobart contribute to the cumulative impacts on area residents. Then they argue that it is reasonably foreseeable that BNSF will expand Hobart in the future, and that an analysis of those future cumulative impacts is also required.

2. Respondents' argument

Respondents argue that Hobart, being 20 miles away from SCIG, is "outside the geographic scope of cumulative impacts designated by POLA in the EIR." (ROB 105:2-3.) Respondents also argue that because there is no "reasonably foreseeable potential future project" at Hobart, Hobart did not need to be included in the cumulative analysis. (ROB 105:8-10.)

E. Analysis

1. CEQA requirements

CEQA defines cumulative impacts as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." Guidelines, §15355. The Guidelines explain:

> (a) The individual effects may be changes resulting from a single project or a number of separate projects.
>
> (b) The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.

The discussion of cumulative impacts in an EIR

> shall reflect the severity of the impacts and their likelihood of occurrence, but the discussion need not provide as great detail as is provided for the effects attributable to the project alone. The discussion should be guided by the standards of practicality and reasonableness. Guidelines, § 15130(b).

An EIR is required to discuss the cumulative impacts of a project when the project's incremental effect is "cumulatively considerable." Guidelines, § 15130(a).

> "Cumulatively considerable" means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." *Id*. at § 15065(a)(3).

One of two things is "necessary to an adequate discussion of significant cumulative impacts." Either, "a list of past, present and probable future projects producing related or

cumulative impacts, including, if necessary, those projects outside the control of the agency" or "a summary of projections contained in an adopted local, regional or statewide plan, or related planning document, that describes or evaluates conditions contributing to the cumulative effect." *Id.*, at §§ 15130(b)(1)(A) and (B).

To say they are "necessary" is not to say they are also sufficient.

A "good faith and reasonable disclosure of such impacts is sufficient." *Fairview Neighbors v. County of Ventura* (1993) 18 Cal.App.4th 729, 749. Where a project's cumulative impact is determined not to be significant – either because the combined impact of the proposed project and effects of other projects is not significant, or because the project's contribution to a significant cumulative impact will be rendered less than cumulatively considerable – this should also be discussed in the EIR, identifying facts and analysis supporting the lead agency's determination. Guidelines, §15130(a)(2) and (a)(3).

An agency analyzing cumulative effects has the responsibility to do so "to afford the fullest possible protection to the environment within the reasonable scope of [the Guidelines'] language." *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 74. In *San Franciscans for Reasonable Growth,* the court explained:

> [I]t is vitally important that an EIR avoid minimizing the cumulative impacts. Rather, it must reflect a conscientious effort to provide public agencies and the general public with adequate and relevant detailed information about them. *Id*. at 79.

The cumulative impacts section of an EIR need not be extensive as long as all the relevant information is in the EIR. *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners (*1993) 18 Cal.App.4th 729, 749.

> The issue is whether the Board reasonably and in good faith discussed the cumulative impacts in detail sufficient for its purpose so that the public could

discern from the FEIR the "analytic route the . . . agency traveled from evidence to action." (*Topanga Assn. for a Scenic Community, supra,* 11 Cal.3d at 515.) *Al Larson,* 18 Cal.App.4th at 749.

2. The ICTF Expansion Project

As noted above, the ICTF Expansion Project is identified in Table 4-1 as one of 170 cumulative projects. D.RDEIR-15~9-25-2012~Chapter 4 Cumulative Analysis, AR 12828, Table 4-1 Item #46. The table describes the status of the project as "under preparation," with a DEIR expected at the end of 2012, and construction anticipated from 2013 through 2015. *Id*. However, at the time the opposition brief was filed, a DEIR for the ICTF Expansion Project had not yet been released. (ROB 102 n. 29.)

The ICTF facility and the ICTF Expansion Project are mentioned throughout the cumulative analysis. In many respects, these mentions are brief but sufficient.

With respect to aesthetics (AES-1), the current ICTF facility is identified as being part of the nighttime viewshed, and the ICTF Expansion project is identified as a new construction project that "would add newer, taller cranes and intensify container stocking operations," with the result that "the effect of the cumulative projects will continue to be an intensification of the view." D.RDEIR-15~9-25-2012~Chapter 4 Cumulative Analysis, AR 12841.

In the cumulative light or glare analysis (AES-2), the ICTF facility is mentioned as a source of current nighttime glare which (with other sources) "represents a significant cumulative impact." The EIR then analyzes the light or glare impacts of the SCIG project and finds they would not make a cumulatively considerable contribution to a significant cumulative impact. *Id.* at AR 12842-12843.

In the risks section (RISK-5), the ICTF Expansion project is identified as a project that is likely to transport, use, and dispose of large quantities of hazardous materials and wastes, and

would, therefore, be required to adopt policies for these activities. It concludes there would be no "residual cumulative impacts." *Id*. at AR 12867-12868.

ICTF and the ICTF Expansion Project construction and operations are also identified in the discussion of cumulative noise impacts (NOI-6, NOI-10, and NOI-11). *Id*. at AR 12873-12878. The draft EIR had contained a quantification of the cumulative impacts which was omitted from the recirculated draft and final EIRs. However, the discussion of the cumulative noise impacts contained in the final EIR examines impacts that exceed certain quantitative levels; *viz*. 3 dBA, 5 dBA or 10 dBA, depending on context. In some cases, the EIR finds significant cumulative impacts from both ICTF and from SCIG (*e.g*., *id.* at AR 12876), in others it does not, (*e.g*., *id.* at AR 12875).[42]

Similarly, there is an extensive cumulative impacts analysis of "transportation and circulation" which uses certain models, including regional models. *Id.* at AR 12878-12929. Neither petitioners nor intervenor specifically contends that analysis is inadequate.

In the land use analysis (LU-4) in the cumulative impacts section, the ICTF is described as "a major railyard" (*id.* at AR 12872), and the ICTF Expansion Project is described as a project that

> [c]an be expected to have secondary impacts related to air quality, traffic and noise. Although most of these impacts would be reduced by mitigation measures and project controls, residual impacts would likely remain. As a consequence, past, present and reasonably foreseeable future projects would result in significant secondary impacts to surrounding land uses. *Id*. at AR 12872-12873 (emphasis added).

[42] This is discussed in more detail, as to certain particular noise impacts in the section on Noise Analysis, above.

This underscores the one major omission from the cumulative impacts analysis: an adequate discussion of cumulative air impacts. This is particularly true with respect to AQ-4, the pollutant concentration analysis.

The cumulative impact section of the EIR devotes only three scant paragraphs to AQ-4, and does not mention the ICTF Expansion Project at all.

The EIR begins the cumulative impacts analysis by describing (in very conclusory terms) "Impacts of Past, Present and Reasonably Foreseeable Future Projects Including the Proposed Project." *Id.* at AR 12846, lines 5-6. It disclaims an ability to know "if cumulative exceedance of the thresholds would happen for any pollutant without performing dispersion modeling of the other projects" but "indicates" the following:

NOx: "likely to exceed the thresholds"

PM_{10} and $PM_{2.5}$: "could exceed the thresholds"

CO: "unlikely to exceed the thresholds" (*Id.* at lines 12-14.)

The paragraph concludes, "[c]onsequently, operation of the past, present and reasonably foreseeable future projects, including the proposed Project, would result in a significant cumulative air quality impact related to exceedances of the significance thresholds for NOx, PM_{10} and $PM_{2.5}$." *Id*. at lines 14-17.

As discussed above in the section on Air Quality, the EIR's discussion of the pollutant concentration analysis is seriously deficient in that it consists of only a cursory, screening analysis that does not indicate when and where concentrations of concern would occur. Nonetheless, the cumulative impacts analysis relies on that "screening" analysis and concludes the SCIG would result in a cumulatively considerable contribution of only NO_2, PM_{10} and $PM_{2.5}$. It does not discuss the other pollutants considered in the air quality section of the EIR.

Respondents argue that SCIG will *reduce* air emissions by replacing trucks with rail traffic, thereby eliminating pollution caused by trucks driving to Hobart. But there is no cognate,

intuitive argument for thinking that pollution will be reduced by doubling the size of the ICTF. It would seem more likely that emissions would increase.

Perhaps so; perhaps not. But there is absolutely no discussion of that in the cumulative impact assessment. This is important, since an increase in air pollution from the ICTF will be emitted "next-door" to SCIG, and presumably have a significant impact on those living in the vicinity of both facilities.

Respondent argues that that CEQA does not require quantified analyses. It cites *Association of Irritated Residents v. County of Madera* (2003) 107 Cal. App. 4th 1383, *Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal. App. 3d 612, *Citizens for Open Government v. City of Lodi* (2012) 205 Cal. App. 4th 296, *Fairview Neighbors v. County of Ventura* (1999) 70 Ca1.App.4th 238 and *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729.

But in each of those cases there was a discussion of the potential cumulative impact at issue, appropriate to the subject under consideration. For example, in *Association of Irritated Residents,* the EIR explained that the groundwater impacts were likely to be localized and that there were no public water supplies within approximately ten miles of the project site. In *Schaeffer Land Trust,* there was discussion of the traffic impacts appropriate to the level of detail addressed in the EIR – there, an amendment to a general plan; with the understanding that a further, project-specific review would be done whenever a given project moved past the conceptual stage.

Al Larson, too, was examining an EIR for a master plan rather than a specific project. The level of discussion was adequate for the task at hand and impacts would be considered in more detail as specific projects came under consideration.

In *Citizens for Open Government,* the EIR contained a table showing how much farmland would be taken out of production by the development – the point in contention.

The key point is that the discussion of cumulative impacts must be appropriate to the matter under review. The discussion need not be as detailed as the other chapters of the EIR; and where the EIR is addressed to a master plan or a general plan amendment (and there will be further environmental analysis for specific projects that follow from that general planning) then the cumulative impacts analysis can be more general.

But fundamentally, a good faith and reasonable disclosure of cumulative impacts is required for a project-specific EIR. The authors of the cumulative impacts analysis had a duty to "use [their] best efforts to find out and disclose all that [they] reasonably can." *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal. App. 3d 61, 74. "[I]t is vitally important that an EIR avoid minimizing the cumulative impacts. Rather, it must reflect a conscientious effort to provide public agencies and the general public with adequate and relevant detailed information about them. *Id.* at 79. See also, *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal. App. 3d 421, *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859.

Here, the ICTF Expansion Project warrants particular attention. The authors of the Draft Environmental Impact Report appear to have thought so too. In the draft of Chapter 4, "Cumulative Analysis," the authors included a 55-page section entitled "Combined Analysis of SCIG and ICTF Facilities." D.DEIR-21~9-23-2011~Chapter 4 Cumulative Analysis, AR 16051-16106. It analyzed, more closely, air, noise and traffic impacts from the combination of SCIG and ICTF.[43]

The RDEIR deleted that analysis. It explained,

> [b]y the time the RDEIR was prepared, however, progress on environmental review of the ICTF expansion project had slowed and fallen behind the SCIG

[43] The first paragraph of the Combined Analysis did not concede that it was *required*: "[T]his analysis is not required under CEQA and is provided as additional information only because of the close proximity of the two proposed projects." D.DEIR-21~9-23-2011~Chapter 4 Cumulative Analysis, AR 16051.

> Project, creating a circumstance that rendered quantified cumulative SCIG / ICTF expansion analysis impracticable for the RDEIR. (ROB 102, fn. 29.)

It may well be the case that the delays in the ICTF Expansion Project environmental review process rendered some of calculations in the Combined Analysis inaccurate, and thus not appropriate for inclusion in the RDEIR. *See, e.g.,* D.DEIR-21~9-23-2011~Chapter 4 Cumulative Analysis, AR 16053 and 16054 (emissions projections for both projects in 2013-2046). But when the Combined Analysis was removed from the DEIR, so too was the acknowledgment that the ICTF Expansion Project was not just another land use project in the area.

The SCAQMD objected to the removal of the SCIG-ICTF quantitative analysis. F-22~04-18-2013~South Air Quality Management District Appeal Council File No. 13-0295-S6 Staff Report, (FEIR comment letter, Comment F6-13), AR 20953. In response to this comment, POLA simply stated that

> The RDEIR adequately addressed cumulative impacts and there is no requirement under CEQA that the EIR analyze quantitatively the combined impacts of SCIG and ICTF. The information needed to analyze the proposed ICTF has not been provided as the environmental analysis of that document is ongoing. *Id*. at AR 20964.

See also D.FEIR-03~2-22-2013~Chapter 2 Volume 1 Responses to Comments: Recirculated Draft EIR, (Matsumoto RDEIR comment letter LBUSD), AR 4506 and 4528 (cited at IOB 21:23-24).

The fact that environmental analysis is "ongoing" and that CEQA does not require quantified analyses, does not mean that all meaningful information on a subject can be omitted from an EIR's cumulative impacts analysis. POLA's statement that it had not been provided information regarding the ICTF is also questionable, given that POLA is part of the Joint Powers

Authority overseeing the ICTF Expansion Project. H.6.FEIR-042~~Parsons San Pedro Bay 2006 Rail Study Update (December 2006), AR 80779; H.7.Vol2.NOP-DEIR~SCIG~AR 119026-119128~ICTF NOP-IS, AR 119031.

In *San Franciscans for Reasonable Growth,* the lead agency abused its discretion when it approved the construction of an office building without considering other projects under environmental review in a cumulative impacts analysis where the information "could have been ascertained by the [Planning] Commission from its own records," meaning that "[t]here was no practical or reasonable barrier to their disclosure and inclusion in the analyses." 151 Cal.App.3d at 74.

Similarly, in *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859, the Court noted,

> Despite the Agency's argument to the contrary, it was both reasonable and practical to include the Eel River curtailment proposals pending before FERC in the Agency's cumulative impacts analysis. At the time the EIR was prepared, the proposals before FERC had progressed to the point that an environmental impact statement, the federal equivalent of an EIR (Guidelines, § 15363), <u>had been initiated</u>. Based on this fact alone, we can conclude the possible curtailment of Eel River diversions was a reasonably foreseeable future project, which should have been included in the EIR's discussion of cumulative impacts. *Id.* at 870.

The *Friends of the Eel River* court did not say the Environmental Impact Statement had been prepared; merely "initiated." Here, the EIR for the ICTF had been "initiated." Indeed, it appears that an air model had already been constructed and used for the analysis that was contained in SCIG's Draft EIR. POLA could have provided some additional information as to the anticipated cumulative impacts of that project, even as it was still undergoing review.

The EIR's Cumulative Analysis identifies the potential cumulative impacts of the ICTF Expansion Project in such general terms that the "big picture" - two large railyard expansions located next to one other – is missing from the analysis. Where there are cumulative impacts, "good faith and reasonable disclosure of such impacts" is required. *Fairview Neighbors*, 18 Cal.App.4th at 749. In failing to provide this larger perspective, POLA did not interpret the applicable guidelines "so as to afford the fullest possible protection to the environment within the reasonable scope of their language." *San Franciscans for Reasonable Growth*, 151 Cal.App.3d at 74.

The Cumulative Impacts section of the EIR failed to consider (or show it considered) the cumulative impacts on air quality from the operation of SCIG and ICTF combined. In this respect, it is inadequate. Whether the standard of review is "substantial evidence" or "de novo" the result is the same. There is no substantial evidence to support the EIR's conclusion regarding the impacts on air quality of the combined operation of ICTF and SCIG.

3. Non-cancer health risks

The parties disagree as to the adequacy of the analysis under Cumulative Impact AQ-7. D.RDEIR-15~9-25-2012~Chapter 4 Cumulative Analysis, AR 12848-12849. Intervenor argues that the analysis here contains only conclusory statements, devoid of analysis and explanation, as to the hazard indices and significance thresholds for non-cancer health risks. (IOB 23:5-6; D.RDEIR-15~9-25-2012~Chapter 4 Cumulative Analysis, AR 12848, lines 16-20.)

In opposition, respondents cite to Table 3.2-35, in the Air Quality chapter of the EIR as the source of its conclusions as to non-cancer health risks from air contaminants. (ROB, 104 fn. 30; D.RDEIR-09~9-25-12~Chapter 3 Air Quality, AR 12557.) They argue that "[t]he Project's maximum residential chronic non-cancer index level is 0.03, and maximum residential acute non-cancer index level is 0.06, on a scale where 1.0 is considered a significant impact. (ROB,

104 fn.30) They suggest that these levels are so far below 1.0 that there can be no realistic possibility of a significant impact even when a cumulative analysis is done.

There are two things wrong with respondents' argument. First, as intervenor observes, the same table on which respondents rely shows that the chronic hazard index for occupational and recreational receptors is 0.4 and the acute hazard index for those receptors is 0.5. D.RDEIR-09~9-25-12~Chapter 3 Air Quality, AR 12557. Thus, respondents' argument that the numbers are so low as to be negligible may be true for residential receptors; but that is not the case for occupational and recreational receptors. Indeed, if ICTF has emissions equal to SCIG, it is not unlikely that the hazard index could rise to a level of significance.

Second, the Air Quality chapter of the EIR does not discuss any anticipated impacts from the ICTF Expansion Project and the Cumulative Analysis section adds none. *Id.* at AR 12463-12568.

There is not sufficient evidence, then, to support the conclusion that "there is no significant cumulative impact on non-cancer risks." D.RDEIR-15~9-25-2012~Chapter 4 Cumulative Analysis, AR 12848, lines 19-20. For there is no evidence that the ICTF was considered in that conclusion, and the data in the Air Quality chapter suggest that a combination of toxic air contaminants from SCIG combined with ICTF could well be significant for occupational and recreational receptors. The failure to include a discussion of the ICTF Expansion Project in this analysis is inconsistent with the "good faith and reasonable disclosure of impacts" required under CEQA. *Fairview Neighbors,* 18 Cal.App.4th at 749.

Respondents also contend that the issue of "whether the data provided in the EIR's discussion of cumulative health risk impacts refer to the 'combined hazard indices for the Project and other past, present and reasonably foreseeable future projects'" was not exhausted administratively and cannot be adjudicated now. (ROB 103:23-27.) But the Attorney General need not exhaust her arguments in the administrative process. § 21177(d).

4. Hobart

Because Hobart was not analyzed at all in the cumulative impacts analysis, the Court applies a *de novo* standard of review to the argument that it should have been included. *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82-83.

Intervenor and petitioners contend that Hobart should have been included on the list of projects for cumulative analysis because past and present operations at Hobart contribute to noise, air quality, and other significant cumulative impacts on community residents, and because it is reasonably foreseeable that BNSF will expand Hobart to accept greater cargo volumes in the future. Intervenor also argues that Hobart should have been analyzed with respect to non-cancer health risks, under AQ-7.

In opposition, respondents contend that because Hobart is 20 miles away, it is outside the geographic scope of cumulative impacts designated in the EIR. In support of this, they cite *City of Long Beach v. Los Angeles Unified School District* (2009) 176 Cal.App.4th 889, 907, where the Court of Appeal held that "selection of the geographic area affected by the cumulative impacts falls within the lead agency's discretion." (Citing Guidelines, § 15130(b)(3) and *Ebbetts Pass Forest Watch v. Department of Forestry & Fire Protection* (2004) 123 Cal.App.4th 1331, 1351.)

It may prove to be the case that distance renders Hobart irrelevant to a proper cumulative impacts analysis. On the other hand, it may not be the case, especially since Hobart is in the same air basin as SCIG. But, as discussed above, the EIR is deficient because it does not assess impacts from Hobart. *A fortiori*, it is impossible to know if there are cumulative impacts. Thus, the cumulative analysis chapter is deficient.

Put another way, there is not substantial evidence to support a conclusion that Hobart's distance from SCIG makes it irrelevant to a cumulative impacts analysis. The EIR is deficient in that respect.

XIII. Alternatives Analysis

A. Overview

Intervenor contends that the EIR's alternatives analysis is inadequate for two primary reasons. First, she argues that the EIR never meaningfully considered any feasible alternative with fewer impacts, analyzing only the "No Project" and "Reduced Project" alternatives in the EIR. Second, intervenor identifies two specific alternatives as inadequately analyzed: a flyover access ramp and storage tracks within the SCIG facility.

Petitioners join intervenor's arguments.

B. Analysis

1. Statute and guidelines

An analysis of alternatives to the proposed project must be included in an EIR. § 21100(b)(4). In a legislative policy declaration, § 21002 provides,

> The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects. The Legislature further finds and declares that in the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof.

An EIR is required to "describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project." Guidelines, § 15126.6(a)

An alternatives analysis is to be governed by a "rule of reason" requiring analysis of "only those alternatives necessary to permit a reasoned choice." Guidelines, § 15126.6(f). The alternatives considered should be ones that "would avoid or substantially lessen any of the significant effects of the project." *Id.* Only the alternatives that "could feasibly attain most of the objectives of the project" need to be analyzed in detail. *Id*. Feasibility may take into account numerous factors, including: "site suitability, economic viability, availability of infrastructure, general plan consistency, other plans or regulatory limitations, jurisdictional boundaries . . . , and whether the proponent can reasonably acquire, control or otherwise have access to the alternative site." Guidelines, § 15126.6(f)(1). The EIR should "identify any alternatives that were considered by the lead agency but were rejected as infeasible during the scoping process and explain the reasons underlying" that determination. Guidelines, § 15126.6(c). The analysis of a "no project" alternative is required. Guidelines, § 15126.6(e).

2. Inclusion of only No-Project and Reduced Project alternatives

a) The dispute

Intervenor and petitioners argue that the alternatives analysis is inadequate because it only considered the required no project alternative, and a reduced project alternative that would never be adopted. Respondents contend that a reasonable range of alternatives was identified and analyzed in the EIR, and that the rejection of other alternatives is supported by substantial evidence.

b) Analysis

Intervenor argues that respondents "crafted alternatives that were doomed to fail and that made SCIG appear inevitable." (IOB 31:24-25.) Intervenor also objects to the EIR's analysis of the reduced project alternative, asserting that respondents improperly "deferred to BNSF's conclusions regarding the infeasibility of the Reduced Project alternative." (IOB 31:10-13.)

Because intervenor is challenging respondents' conclusions and determinations, and the amount of information presented in the EIR, the Court applies a substantial evidence standard of review. *Vineyard Area*, *supra*, 40 Cal. 4th at 426-27.[44]

The alternatives analysis in the EIR is considerably more comprehensive than intervenor suggests. The FEIR states that a total of 14 alternatives were considered, and twelve of them were eliminated "because they could not feasibly meet the basic objectives of the Project and/ or because they would not avoid or substantially lessen any of the significant effects of the proposed Project." C-01~3-8-2013~Final Findings of Fact and Statement of Overriding Considerations, AR 3844. These twelve rejected alternatives (nine alternative sites, two alternative layouts, and one alternative access plan) are discussed in more detail in the RDEIR.

Four of the alternative sites were outside the Los Angeles or Long Beach Ports. D.RDEIR-16~9-25-2012~Chapter 5 Alternatives, AR 12942-12945. Five were located inside the Ports. *Id*. at AR 12945-12948. The lead agency also considered two different layouts of the SCIG facility, and one option for different access to the SCIG site. *Id*. at AR 12950-51.

To identify some of the alternate sites the RDEIR used the results of the 2004 San Pedro Bay Ports Rail Market Study – Part 2. (*Id*. at AR 12942:41-43; H.6.DEIR-277~~San Pedro Bay Ports Rail Market Study TM 1b Draft Report for Review Only, AR 72910, 72939 [start of Part 2].) Generally, the alternate sites were eliminated for a variety of reasons, including, *e.g.*, that they were too small or unsuitably shaped, or no longer available due to planning designations, or

[44] Petitioners concede this. See n.4 supra.

because of biological or other increased environmental impacts, or because of need for mitigation fill credits. D.RDEIR-16~9-25-2012~Chapter 5 Alternatives, AR 12943-51.

In addition, in a section entitled "Assessment of Other Goods Movements Concepts," the RDEIR includes a discussion of the construction of on-dock or inland port / remote railyard as alternatives to the construction of a near-dock railyard; the Zero Emissions Container Movement System ("ZECMS"); and the idea of a flyover access ramp. *Id.* at AR 12951-12957. The RDEIR explains that these "concepts" are not CEQA alternatives because they "either do not eliminate the need for a near-dock intermodal facility or they address other aspects of the goods movement chain than handling intermodal rail traffic." *Id.* at AR 12951.

As discussed above, CEQA requires alternatives to be analyzed, but that analysis is subject to a "rule of reason." Guidelines, § 15126(f). A "range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives" must be analyzed. *Id.* § 15126.6(a). There is, however, no required minimum number of alternatives that must be analyzed in an EIR. "There is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason." *Id.*, *see also Mount Shasta Bioregional Ecology v. County of Siskiyou* (2012) 210 Cal.App.4th 184 (for power plant project, no error where only the No Project alternative was analyzed in depth in the EIR; three other alternatives were properly rejected in the scoping phase.)

Here, given the size and nature of the SCIG project, it is hardly surprising that there were few feasible alternatives. Under Guidelines, § 15126.6(c), a lead agency is required to identify alternatives rejected as infeasible, and "briefly explain the reasons" for the decision. This requirement is satisfied here, as the EIR includes a 15-page discussion of twelve alternatives that were ultimately rejected, as well as the "goods movement concepts" of on-dock or inland railyard, ZECMS, and a flyover access ramp. D.RDEIR-16~9-25-2012~Chapter 5 Alternatives, AR 12942-12957.

The EIR identifies the specific reasons the alternative sites, configurations, and access points would not be feasible. Nothing more was required. Further, the alternative sites outside the ports had been previously identified in a separate study, the San Pedro Bay Ports Rail Market Study; intervenor does not identify any deficiencies in respondents' reliance upon that study, nor does intervenor dispute any of the specific findings in the EIR as to the alternatives rejected as infeasible. Consequently, the EIR's decision to proceed with analysis of two alternatives is supported by substantial evidence.

Intervenor also objects to the EIR's analysis of the reduced project alternative, asserting that that respondents "deferred to BNSF's conclusions regarding the infeasibility of the reduced project alternative." (IOB 31:10-19.) It is true that the discussion of the reduced project alternative in the FEIR includes BNSF's representations that "the proposed Project is the minimum size that can be operated efficiently and economically" and that BNSF would "not build the Reduced Project at this time" due to financial considerations. C-01~3-8-2013~Final Findings of Fact and Statement of Overriding Considerations, AR 3852.

But the lead agency examined the facts underlying these representations. It considered, for example, that the reduced project alternative would require BNSF to build or install *e.g.*, the same number of track modules and mast lighting, build the same truck queuing space, and install the same gate checkpoint system and power supply – all of which means the construction costs "would not be materially less for the Reduced Project Alternative than for the proposed Project." *Id.* at AR 3852. The costs would be the same but the income would not.

Ultimately, the lead agency found the reduced project to be infeasible because it would not accomplish fundamental project goals and objectives. It identified four project objectives that would not be satisfied: (1) providing an additional near-dock intermodal rail facility that would help meet the demands of current and anticipated cargo; (2) reducing truck miles by provide a near-dock intermodal facility; (3) maximizing the direct transfer of cargo from port to

rail; and (4) constructing a near-dock intermodal facility to allow for the most efficient transfer of marine containers between truck and rail. *Id*. at AR 3853; *See also* D.RDEIR-16~9-25-2012~Chapter 5 Alternatives, AR 12992-13084 (reduced project alternative) and AR 13084-13137 (comparison of no project and reduced project alternatives with project).

Thus, the conclusions regarding the reduced project alternative demonstrate independent analysis and determination by the authors of the EIR. While some of these conclusions may take BNSF's statements into account, the EIR did not simply adopt BNSF's representations as the basis for its conclusions.

3. Flyover Access Ramp

a) The dispute

The parties disagree about a flyover ramp that would provide alternative access to the SCIG site. As discussed above, flyover ramp access is considered and rejected in Section 5.2 of the Alternatives chapter. D.RDEIR-16~9-25-2012~Chapter 5 Alternatives, AR 12957. A subsequent proposal for a reconfigured flyover ramp suggested in an RDEIR comment letter from City Fabrick was also rejected.

Intervenor and petitioners contend that the both versions of the flyover ramp were inadequately analyzed in the EIR, and that the rejections are not supported by substantial evidence. Respondents contend that under CEQA, no analysis of the flyover ramp was required. Respondents also contend that substantial evidence exists to support the conclusion that a flyover ramp would not benefit the environment.

b) Analysis

In the RDEIR, the concept of a flyover access ramp between the Terminal Island Freeway and the SCIG site was considered:

> A flyover would provide the same traffic benefits as the proposed Project but at a significantly greater cost and possibly greater environmental impacts, as trucks

would produce greater emissions climbing the flyover grade than they would on the at-grade additional lane. *Id.*

Subsequently, in a RDEIR comment letter, City Fabrick suggested that the flyover ramp could be reconfigured to "increase…the distance between designated truck routes and the existing community," and "reduce truck movement's noise, visual, and air pollution" on Long Beach area students. D.FEIR-03~2-22-2013~Chapter 2 Volume I Responses to Comments: Recirculated Draft EIR, AR 4741.

In response to City Fabrick's comment letter, respondents stated that the proposed flyover ramp would not reduce project-related traffic impacts, and could cause other additional environmental impacts. *Id*. at AR 753-54. Petitioners and intervenor assert that this response ignores the fact that the alternative access was to address air quality and noise emissions, not traffic impacts. (PRB 58:14-18; IRB 18:1-6.)

The flyover access ramp is a single component of the SCIG project, not an alternative to the project or its location. Guidelines, §15126.6(a). An EIR is not required to analyze alternatives to separate components of a project. In *Big Rock Mesa Property Owners Assn. v. Board of Supervisors* (1977) 73 Cal.App.3d 218, 227, the Court of Appeal held that an EIR was not deficient for failing to describe alternatives to the amount of grading and options for an access road: rather, the court interpreted the requirements regarding alternatives "as applicable only to the project as a whole, not to the various facets thereof." *See also, A Local and Regional Monitor v City of Los Angeles* (1993) 16 Cal.App.4th 630, 642 n.8., and *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal. App. 4th 957, 993. Here, although a full alternatives analysis of the flyover access ramp was not required, the EIR discussed the concept and explained the reasons for its rejection. This is sufficient.

Intervenor and petitioner argue that insufficient evidence exists to support respondent's conclusion that a flyover access ramp (in either configuration) would not result in reduced

environmental impacts. However, because respondents were never even required to analyze the flyover access ramp as an alternative under CEQA, the Court need not address these arguments.

4. Location of storage tracks

a) The dispute

In two responses to comments, the FEIR misstates the location of the storage tracks, describing them as being located within the SCIG site when they are located outside the site. Intervenor contends this error undermined the alternatives analysis by foreclosing consideration of on-site storage tracks.

In opposition, respondents argue that because the storage tracks are a project component, not an alternative, the option of relocating the storage tracks within the SCIG site did not need to be analyzed. In any event, respondents contend that they adequately responded to City Fabrick's comments, and that the despite the two errors in the FEIR, the EIR accurately identifies and analyzes the storage tracks as being located offsite.

b) Analysis

There is no dispute that the two responses to comments saying the storage tracks are onsite are incorrect. D.FEIR-03~2-22-2013~Chapter 2 Volume I Responses to Comments: RDEIR, AR 4471, 4750. However, the relocation of the storage tracks was never an alternative that was required to be analyzed. Like the proposed flyover access ramp, the storage tracks are a component of the SCIG project, not an alternative to the project or its location. Respondents have cited evidence that the storage tracks will be used for only about 10 per cent of the trains coming into the railyard. ROB 112:24-113:2; H.10.Supp-14~SCIG Linehaul Locomotive Movements and Duty Cycle Modeling, AR 183945-46.

Despite the misstatements in the Responses to Comments, the prior references to the tracks in the earlier iterations of the draft, recirculated draft and final EIR were correct. For example, the Recirculated Draft EIR project description includes three sets of tracks: loading,

service, and storage. D.RDEIR-06~9-25-2012~Project Description, AR 12387-88. The storage tracks are described as

> "[t]wo parallel 4,000-foot-long storage tracks [that] would run along the eastern edge of the railyard, parallel to the existing ports-owned San Pedro Branch tracks, from one of the south lead tracks to the north lead tracks." *Id*. at AR 12388:3-5.

The same language appears in the Draft EIR, D.DEIR-07~09-23-2011~Chapter 2 Project Description, AR 15349:1-3. Lest there be any doubt about their location, the RDEIR depicted the storage tracks on Figure 2-3a. D.RDEIR-06~9-25-2012~Project Description, AR 12380. More detailed images showing the storage tracks were contained in H.10.Supp-14~~SCIG Linehaul Locomotive Movements and Duty Cycle Modeling, AR 183950-183963.

It was only in the response to comments, published at the very end of the process that an error was made in two places in a lengthy document. Intervenor's contention that those two inaccurate statements undermines the EIR as an informational document (IRB 19:9-21) ignores the fact that the correct location of the storage tracks was evident throughout the entire process of publishing notice, circulating both a draft EIR and a recirculated draft EIR, and holding public hearings.

Errors which are insubstantial or de minimis are not prejudicial under CEQA. *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal. 4th 459, 487 n.10; *Environmental Protection Information Center v. Johnson* (1985) 170 Cal. App. 3d 604, 623n. 11. *See* § 21005(b). The Court finds the errors in the response to comments to be insubstantial or de minimis.

In any event, respondents did analyze and respond to a proposal to move the storage tracks. The parties disagree as to whether City Fabrick's suggestion to move the storage tracks south of Pacific Coast Highway actually constituted a proposal to move the storage tracks onto the SCIG site. (IOB 35:20-22; ROB 111:17-112:13.) Either way, respondents explained that

moving the tracks would not lessen any significant effects. D.FEIR-03~2-22-2013~Chapter 2 Volume I Responses to Comments: RDEIR, AR 4752:23-34. Nothing more was required.

XIV. Petitioners' Due Process Arguments Are Not Well Taken

A. The Issue

Two sets of petitioners raise some final issues regarding the May 8, 2013 appeal hearing before the Los Angeles City Council. One set includes East Yard Communities for Environmental Justice, Coalition for Clean Air, and Natural Resources Defense Council (N14-0309).[45] The Court refers to them here collectively as "East Yard." Counsel for these parties filed a brief on the "due process issues."

The other set of petitioners includes Coalition for a Safe Environment, Apostolic Faith Center, Community Dreams and California Kids IAQ (N14-0308). Their petition raised some of the due process issues briefed by East Yard and at oral argument their counsel said they joined the East Yard brief. Their petition also purported to state claims under Government Code § 1090. (Petition for Writ of Mandate, N14-0308, Second and Third Causes of Action.) However, no party has briefed or argued any issue arising under Government Code §1090 and those claims are deemed waived.

East Yard has briefed two issues. First, they claim the Los Angeles City Council did not provide due process in the hearing of the appeal taken from the decision of the Board of Harbor Commissioners. Second, they say that City Council Member Joe Buscaino should have recused himself from voting on the appeal, since he had previously stated a public position on SCIG. Respondents dispute both arguments.

[45] Although N14-0309 includes three other petitioners (Century Villages at Cabrillo, Elena Rodriguez, and Evelyn Deloris Knight) at oral argument counsel stated that they did not join this argument.

B. Analysis

1. The Issue Is Moot

The Court has determined that the EIR is flawed and that the Port's decision must be set aside. That moots the issue of whether petitioners were afforded due process during the administrative proceedings and whether Council Member Buscaino should have recused himself.

2. If Not Moot, The Argument is Not Well Taken

However the issue may arise again if the Port undertakes to revise and reissue an EIR for SCIG or if an appellate court reverses this Court's determinations. Thus, the Court addresses the merits of petitioners' argument.

a) The procedural issues regarding the appeal to the City Council

It is important to be clear about the precise decisions at issue here. First the Board of Harbor Commissioners voted to:

> (1) approve and transmit for approval by the City Council a Site Preparation and Access Agreement to the BNSF Railway Co. B-02~03-21-2013~Resolution and Board Order 13-7125 re SPAA & Permit 901, AR 25-26, 31;
>
> (2) approve and transmit for approval by the City Council Permit #901 *Id*.; and
>
> (3) certify the EIR, make certain related findings, adopt the Mitigation Monitoring and Reporting Program, and approve the project. B-01~03-07-2013~Resolution 13-7451 adopted by Board of Harbor Commissioners re Final Environmental Impact Report re Southern California International Gate, AR 5-6.

The first paragraph of the Site Preparation and Access Agreement recited, in part,

> A. City is the owner of that certain property located in the City and County of Los Angeles, California, described on Attachment 1 (the "Premises")…

> B. City desires to have Developer construct and operate, and Developer desires to construct and operate an intermodal rail facility to be entitled the "Southern California International Gateway" or "SCIG" on lands that include the Premises. B-02~03-21-2013~Resolution and Board Order 13-7125 re SPAA & Permit 901, AR 34.

Similarly, the Permit recited, in part,

> WHEREAS, City desires to have Tenant operate and maintain an intermodal rail facility on properties that include the Premises hereinafter defined and located at the Port of Los Angeles which facility shall be entitled the "Southern California International Gateway" or "SCIG" … and
>
> …
>
> 1.3 WHEREAS, City desires to issue to Tenant and Tenant desires to accept from City this Permit, granting Tenant use and possession of the Premises… *Id.* at 65. ("Tenant" is defined as the BNSF Railway Co. *Id.* at 62.)

The effect of this was to recommend that the City Council grant a lease (the "permit") to the BNSF Railway to use public land, and to allow it to enter onto the land prior to the commencement of the lease to build improvements (the SCIG) on public property (the Site Preparation and Access Agreement).

Thus, the City was deciding what to do with public land. It was not acting on a private landowner's request for a permit to do something with his or her land.[46]

Several parties appealed to the Los Angeles City Council, including East Yard Communities for Environmental Justice, the Coalition for Clean Air and the Natural Resources

[46] Although the Site Preparation and Access Agreement said the land is owned by the City, at oral argument on March 25, 2016 respondents' counsel stated that the Port, not the City owns the land. Indeed the EIR states "The Project would be located…primarily on LAHD land in the City of Los Angeles." D.FEIR-02~02-22-2013~Chapter 1 Introduction, AR 3913. Which public entity owns the land is not important to this analysis.

Defense Council. The latter three appealed the last of the three numbered actions listed above; *viz*. the certification of the EIR. East Yard Communities' etc. Reply Brief [on Due Process Issues] ("EYRB") p.4:13-17. The appeal is found at F-18~04-18-2013~Coalition Clean Air East Yard Communities for Environment Justice NRDC Appeal Council File No. 13-0295-S1 Staff Report, AR 20423. It became Item 9 on the City Council's calendar.

On May 8, 2013, the City Council took several actions. It first voted on Item 9 to deny petitioners' appeal of the Board of Harbor Commissioners' certification of the Environmental Impact Report. (AR G-17~05-08-2013~Video of City Council Public Hearing re Appeal re Certification of Final EIR, at 3:42:49.[47] Then the City Council voted on a series of motions under Item 10 to adopt the Los Angeles Harbor Department's determination that the EIR was prepared in accordance with CEQA and to approve the Site Preparation and Access Agreement and Permit 901. B-03~05-08-2013~Motion of Los Angeles City Council including Motion 10-A, 10-B (as Amended), 10-D and 10-E, AR 115-116.[48]

Petitioners contend they were denied due process by the Los Angeles City Council in the hearing of their appeal. The entire premise of petitioners' argument is that this was a CEQA appeal and "a CEQA appeal requires a hearing." EYRB 6:1. They cite virtually no law in support of that statement.

The Guidelines state, "CEQA does not require formal hearings at any stage of the environmental review process. Public comments may be restricted to written communications." Guidelines, §15202(a).

Given that, East Yard argues that an appeal under § 21151(c) occurs *after* the environmental review process is completed. EYRB 5:6-25. But neither of the cases they cite address this point except in the most oblique fashion (if at all.) *Save Our Peninsula Com. v.*

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[47] The City Council resolution on this separate vote does not otherwise appear to be in the Administrative Record.

[48] The City Council made certain amendments which are not material to this discussion. See *Id.* at AR 115-123.

Monterey County Board of Supervisors (2001) 87 Cal. App. 4th 99; *Gentry v. City of Murrieta* (1995) 36 Cal. App. 4th 1359.

Indeed, another case they cite (for a different point), *Vedanta Society of Southern California v. California Quartet, Ltd.* (2000) 84 Cal. App. 4th 517 suggests the opposite. The holding of that case seems to establish that if a non-elected body certifies an EIR and there is an appeal, the environmental review process is not complete (and the EIR is not certified) unless and until the elected body affirmatively votes to certify the EIR. That would bring the appeal within the ambit of Guidelines, § 15202(a); no public hearing is required.

East Yard next argues that the appeal must be a *de novo* review. From this, they assume that there must be a hearing of a specific kind. They cite *Vedanta, supra*. But that case only holds that when there is an appeal, pursuant to § 21151, the elected body conducting the appeal must reach a decision; a tie vote is not sufficient to "affirm" a prior decision by a non-elected body. It does not say what hearing rights must be afforded to a litigant during the appeal to the elected body; nor does the other case they cite, *Academy of Our Lady of Peace v. City of San Diego* 835 F. Supp. 2d 895 (S.D. Cal. 2011).

As noted, the Guideline entitled "Public Hearings" does not require formal hearings to be held. Guidelines, §15202(a). Similarly, the Guideline entitled "Administrative Appeals" does not support petitioners' position. It simply says,

> (a) Where an agency allows administrative appeals upon the adequacy of an environmental document, an appeal shall be handled according to the procedures of that agency. Public notice shall be handled in accordance with individual agency requirements and Section 15202(e).
>
> (b) The decision making body to which an appeal has been made shall consider the environmental document and make findings under Sections 15091 and 15093 if appropriate.

Guidelines, § 15185.

It is common for a City Council to set time limits on presentations made by speakers on matters before it. At oral argument counsel for East Yard agreed that was a common practice at the local governmental level; she could not cite any law that prohibited such a practice. Counsel for the City of Los Angeles said this hearing was handled according to the City Council's normal procedures and was conducted in the same fashion as other hearings of this kind. If there was any difference, it was given more time than other, similar hearings.

It is difficult to see what "de novo" adds to East Yard's position. If the non-elected body need not give a hearing to petitioners (Guidelines, §15202(a)) and the elected body considering the appeal pursuant to § 21151(c) is undertaking the matter de novo, then the elected body is starting over. If the original proceeding did not require a hearing, then the "do over" at the elected body level would seem not to require a hearing.

This view is fortified by § 21083.1 which states the intent of the Legislature "that courts…shall not interpret [CEQA] or the…guidelines…in a manner which imposes procedural or substantive requirements beyond those explicitly stated in [CEQA] or…the…guidelines." East Yard points to nothing that explicitly imposes the procedural requirements it posits.

Nor do more general principles support petitioners. When a government undertakes to determine how to use municipal property, the decision is quasi-legislative, not quasi-judicial. *Oceanside Marina Towers Assn. v. Oceanside Community Development Com*., (1986) 187 Cal. App. 3d 735, 745 ("decisions of public entities as to the location of public improvements are legislative in character"). See also, *Beverly Hills Unified School District v. Los Angeles County* (2015) 241 Cal. App. 4th 627, 670-671 (decision on location of transit station is legislative, not adjudicative); *Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist*. (2013) 215 Cal. App. 4th 1013, 1058 (Board of Education decision exempting high school projects from City's zoning and land use laws not quasi-adjudicatory).

Similarly, when a government decides to enter into a contract with a private entity for a public purpose, the decision is quasi-legislative. *SN Sands Corp. v. City and County of San Francisco* (2008) 167 Cal. App. 4th 185, 191 ("A public entity's '"award of a contract, and all of the acts leading up to the award, are legislative in character"'" *Marshall v Pasadena Unified School District* (2004) 119 Cal. App. 4th 1241, 1253.)

Quasi-legislative determinations do not require the kind of hearing petitioners' claim. *Horn v. County of Ventura* (1979) 24 Cal. 3d 605, 612-613; *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal. App. 4th 498, 526-527.

But even if there were some requirement that public participation be less limited, it is incumbent to consider the entire process. This was not some local planning issue which slipped under the radar. It has been a highly visible project that has attracted considerable attention.

As the Court described at the outset of this opinion, it began in 2005 with the Notice of Preparation and two scoping meetings. Even that innocuous first step generated 35 oral and 48 written comments. F-09~02-28-2013~SCIG FEIR Final Board Report, AR 20044. The hearings on the draft EIR attracted 329 oral and 143 written comments. *Id.* at AR 20044-45. The recirculated draft EIR was the subject of another 165 oral and 784 written comments. *Id.* at AR 20045. The hearing before the Board of Harbor Commissioners on March 7, 2013 reportedly lasted eight hours. Respondents' and Real Party in Interest's Joint Brief In Opposition to Petitioners' Due Process Claims ("RODP"), 3:12.

When the matter was appealed to the Los Angeles City Council, petitioners attached to their appeals, extensive recitations of the matters they disputed. H-8.12~03-13-2013~13-0295-S1_130313 Notice of Appeal - Coalition for Clean Air, et al, AR 20290. The City Council also had before it the Port's staff report on that appeal. F-15~04-18-2013~SCIG Appeal Cover Letter, AR20259-20261; F-18~04-18-2013~Coalition Clean Air East Yard Communities for Environment Justice NRDC Appeal Council File No. 13-0295-S1 Staff Report, AR 20414-

20532. It conducted a three hour hearing. The City Council took comments from Port staff, petitioners, and approximately 50 public speakers. See RODP 3:26-4:3 and the sources cited in that brief.

There was ample process. All material points were before the decision makers. The Los Angeles City Council was not required by law to extend this hearing indefinitely to allow unlimited presentations.

b) Council Member Buscaino was not required to recuse himself

Council Member Buscaino's vote on the appeal was a quasi-legislative decision, as discussed above. Petitioners' premise their argument on this being a quasi-adjudicative decision. Since the premise of their argument fails, so too does their argument that Mr. Buscaino should have recused himself.

The cases cited by petitioners involved all involved quasi-adjudicative decisions, under review pursuant to Code of Civil Procedure §1094.5: *Nasha LLC v. City of Los Angeles* (2004) 125 Cal. App. 4th 470, 482 ("brought pursuant to section 1094.5"); *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal. App. 4th 81, 90 (trial court empowered under section 1094.5(e) to admit evidence); *Clark v. City of Hermosa Beach* (1996) 48 Cal. App. 4th 1152, 1159 (action brought under 1094.5); *BreakZone Billiards v. City of Torrance* (2000) 81 Cal. App. 4th 1205, 1220 ("mandamus pursuant to…1094.5").[49] Cases such as those are governed by § 21168.

But this case is not. As both the Attorney General and respondents recognize, it is governed by 21168.5. (IOB 5:10; ROB 17:11; IRB 12:3.) That governs cases "in which, by law a hearing is [not] required to be given, [and] evidence is [not] required to be taken." *Compare* §

[49] Two other cases cited by petitioners involve review of a land use decision affecting an individual, which is governed by CCP 1094.5 and §21168. *Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal. App. 4th 1012 (conditional use permit); *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal. App. 4th 577 (conditional use permit).

21168 and § 21168.5. *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal. 4th 559, 566-567 (describing difference between quasi-adjudicative and quasi-legislative); *Marina County Water District v. State Water Resources Control Board* (1985) 163 C.A. 3d 132, 139.

Indeed, in the Petition for Writ of Mandate filed by East Yard et al., the First Cause of Action is entitled "Writ of Mandate, California Civil Code (sic) Section 1085. That is where petitioners state their claim regarding the Los Angeles City Council appeal hearing. (East Yard Verified Petition for Writ of Mandate, filed June 7, 2013 [Los Angeles Superior Court] and January 24, 2014 [Contra Costa Superior Court], p. 34.) Section 1085, of course, governs cases in which no hearing is required by law.

Since this is a quasi-legislative matter, it was proper for Council Member Buscaino to sit. The fact that he had previously taken a position on the matter is not germane. "[T]he rules against prejudgment of adjudicatory facts do not apply to quasi-legislative decisions." *Beverly Hills Unified School District v. Los Angeles Metropolitan Transportation Authority* (2015) 241 Cal. App. 4th 627, 671.

Courts do not inquire into the motives of legislators. *City of Santa Cruz v. Superior Court* (1995) 40 Cal. App. 4th 1146, 1150-1152. More to the point, it is expected that an elected official may have a viewpoint on matters of important public concern. That does not preclude him from voting on them.

City of Fairfield v. Superior Court of Solano County (1975) 14 Cal. 2d 768 was a case involving a quasi-adjudicative decision of public notoriety. Even though quasi-adjudicative, our Supreme Court said,

> In a city of Fairfield's size, the council's decision on the location and construction of a shopping center… are matters of concern to the civic-minded people of the community, who will naturally exchange views and opinions concerning the

> desirability of the shopping center with each other and with their elected representatives.
>
> A councilman has not only a right but an obligation to discuss issues of vital concern with his constituents and to state his views on matters of public importance…
>
> Many of the alleged statements on these community matters that plaintiffs seek to adduce were made during the election campaign of Campos and Jenkins. Campaign statements, however, do not disqualify the candidate from voting on matters which come before him after his election. In *Wollen v. Fort Lee* (1958) 27 N.J. 408 [142 A.2d 881], the court stated: "[It] would be contrary to the basic principles of a free society to disqualify from service in the popular assembly those who had made pre-election commitments of policy on issues involved in the performance of their sworn . . . duties. Such is not the bias or prejudice upon which the law looks askance. . . . The contrary rule of action would frustrate freedom of expression for the enlightenment of the electorate that is of the very essence of our democratic society" (citations omitted). *Id.* at 780-781

Fairfield cited with approval *Todd v. Visalia* (1967) 254 Cal. App. 2d 679, 691-2. (Council members allegedly had "votes swayed" by discussions of public issue outside the hearing room; not disqualifying.) See also, *Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116, 136-137 which quotes with approval *City of Vernon v. Board of Harbor Commissioners* (1998) 63 Cal. App. 4th 677, disapproved on other grounds, *Save Tara* at 131 n.10. *City of Vernon* observed,

> If having high esteem for a project before preparing an environmental impact report (EIR) nullifies the process, few public projects would withstand judicial scrutiny, since it is inevitable that the agency proposing a project will be

favorably disposed toward it. In any event, the mental processes of local legislators and commissioners are irrelevant to the validity of their vote. *Id.* at 688.

In short, Council Member Buscaino was acting as a legislator. The Court will not inquire into his motives. Nor will his vote be impugned because he participated in public discussion of a public issue with his constituents, and committed to vote for the project when "legislation" regarding it came before him.

XV. Order

Pursuant to § 21168.9 the following determinations, findings and decision shall be voided:

- The Los Angeles Board of Harbor Commissioners' March 7, 2013 certification of the Environmental Impact Report for the Southern California International Gateway Project, State Clearinghouse Number 2005091116, as memorialized in the March 8, 2013 Notice of Determination, A-01~03-08-2013~Notice of Determination-Board of Harbor Commissioners, AR 1 and Resolution No. 13-7451, B-01~03-07-2013~Resolution 13-7451 adopted by Board of Harbor Commissioners re Final Environmental Impact Report re Southern California International Gate, AR 4 et seq.
- The Los Angeles Board of Harbor Commissioners' March 7, 2013 adoption of (i) the Findings of Fact and Statement of Overriding Considerations and (ii) the Mitigation Monitoring and Reporting Program, all in connection with the Environmental Impact Report for the Southern California International Gateway Project, State Clearinghouse Number 2005091116, as memorialized in the March 8, 2013 Notice of Determination, A-01~03-08-2013~Notice of Determination-Board of Harbor Commissioners, AR 1 and Resolution No. 13-7451, B-01~03-

07-2013~Resolution 13-7451 adopted by Board of Harbor Commissioners re Final Environmental Impact Report re Southern California International Gate, AR 4 et seq.

- The Los Angeles Board of Harbor Commissioners' approval of the Site Preparation and Access Agreement and Permit No. 901 with the BNSF Railway Company, as memorialized in the March 8, 2013 Notice of Determination, A-01~03-08-2013~Notice of Determination-Board of Harbor Commissioners, AR 1 and the March 20, 2013 Order No. 13-7125, B-02~03-21-2013~Resolution and Board Order 13-7125 re SPAA & Permit 901, AR 26 et seq.
- The Los Angeles City Council's May 8, 2013 (i) adoption of the determination by the Los Angeles Harbor Department that the project and the proposed 50-year Permit were assessed in an EIR prepared in accordance with the California Environmental Quality Act, and (ii) approval of the Site Preparation and Access Agreement and Permit 901 with the BNSF Railway Company for the construction, operation and maintenance of the SCIG facility, all as evidenced by B-03~05-08-2013~Motion of Los Angeles City Council including Motion 10-A, 10-B (as Amended), 10-D and 10-E, AR 116 et seq. and A-02~05-09-2013~Notice of Determination-Los Angeles City Council, AR 2.

In addition, respondents and real parties in interest shall suspend any and all project activities pursuant to or in furtherance of these determinations, findings and decisions until respondents have taken all actions necessary to bring the determinations, findings and decisions into compliance with CEQA.

Nothing in this Order directs any public agency to exercise its discretion in any particular way.

These matters were consolidated for hearing but not for entry of judgment. Therefore, petitioners and intervenor are collectively to prepare a form of judgment and a form of writ that may be entered in each case. They shall submit the proposed judgment and the proposed writ to respondents on or before April 14, 2016 and seek from them approval as to form prior to submission to the Court. If petitioners and intervenors cannot agree on one form of judgment or one form of writ, then they may submit more than one form to respondents. The parties shall meet and confer and shall have until April 28, 2016 to submit to the Court for e-signing either an agreed form of judgment and an agreed form of writ or, if necessary, competing versions. They shall be submitted to the complex litigation e-mailbox in the usual way.

The Court is mindful that each of the petitions contains a prayer, and no two prayers are exactly alike. In addition, the parties have not briefed the form of relief to which petitioners are entitled. There may, therefore, be some disagreement with respect to the wording of the writ or the judgment or both. If that is so, the Court will, upon receiving competing versions of these documents, either resolve the dispute in chambers or set a time for hearing argument on that limited subject.

In addition, one or more parties may believe that the Court's Order does not provide the proper technical remedy for the matters determined in this Opinion. If that is the source of difficulty in framing a form of order or writ, the parties should so advise the Court.

Date: March 30, 2016

Hon. Barry Goode
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Barry P. Goode
Judge, Superior Court