

1 DAVID PETTIT (State Bar No. 67128)  
dpettit@nrdc.org  
2 MELISSA LIN PERRELLA (State Bar No. 205019)  
mlinperrella@nrdc.org  
3 MORGAN WYENN (State Bar No. 270593)  
mwyenn@nrdc.org  
4 RAMYA SIVASUBRAMANIAN (State Bar No. 241334)  
rsivasubramanian@nrdc.org  
5 NATURAL RESOURCES DEFENSE COUNCIL  
1314 Second Street  
6 Santa Monica, CA 90401  
Telephone: (310) 434-2300  
7 Facsimile: (310) 434-2399

8 Attorneys for Petitioners/Plaintiffs  
East Yard Communities For Environmental  
9 Justice, Coalition For Clean Air, Century Villages  
at Cabrillo, Elena Rodriguez, Evelyn Deloris Knight,  
10 and Natural Resources Defense Council, Inc.

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **COUNTY OF CONTRA COSTA, MARTINEZ DISTRICT**

13 FAST LANE TRANSPORTATION, INC., a  
California corporation,

14 Petitioner,

15 v.

16 CITY OF LOS ANGELES, et al.,

17 Respondents.

19 BNSF RAILWAY COMPANY, a Delaware  
corporation,

20 Real Party In Interest.

23 AND CONSOLIDATED CASES

Case No.: CIVMSN14-300  
(Consolidated With:  
Case No. CIVMSN14-308;  
Case No. CIVMSN14-309;  
Case No. CIVMSN14-310;  
Case No. CIVMSN14-311;  
Case No. CIVMSN14-312;  
Case No. CIVMSN14-313)

**PLAINTIFFS' OPENING BRIEF  
(California Gov't Code Section 11135)**

Dept. 17  
Judge: Hon. Barry Goode

Action Filed: Jan. 24, 2014 (June 5, 2013 in  
LASC)

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1 INTRODUCTION

2 The Port of Los Angeles (the Port)<sup>1</sup> is the largest port in the United States by cargo  
3 volume. AR H.6:86469. For nearby communities, the Port's heavy reliance on diesel-powered  
4 trucks, locomotives, ships, and other cargo-moving equipment comes with a terrible price.  
5 Diesel particulate matter pollution is a human carcinogen. AR H.6:78966; 79651. Exposure to  
6 diesel emissions can increase adult and infant mortality as well as hospital admissions for  
7 pulmonary illnesses, including pneumonia and asthma. See AR H.6:58622–58623; D:15444.

8 In this case, Plaintiffs East Yard Communities for Environmental Justice, Century  
9 Villages at Cabrillo, the Natural Resources Defense Council, Coalition for Clean Air, and two  
10 community members, Evelyn Deloris Knight and Elena Rodriguez, (collectively, Plaintiffs)<sup>2</sup>  
11 challenge the Port's approval of a new 185-acre railyard adjacent to a low-income, community of  
12 color as a violation of California Government Code Section 11135(a) (hereafter, Section 11135).  
13 That section prohibits the Port from taking any action that discriminates on the basis of race,  
14 national origin, or ethnic group identification, as a condition of financial assistance from the  
15 State of California. Section 11135(a)'s prohibition is not limited to intentional discrimination.  
16 *Darensburg v. Metropolitan Transp. Com'n* (N.D. Cal. 2009) 611 F.Supp.2d 994, 1042 (hereafter  
17 *Darensburg I*) *aff'd*, (9th Cir. 2011) 636 F.3d 511. State funds may not be used even indirectly  
18 to support actions that have a disparate impact, regardless of intent. *Ibid*.

19 The proposed Southern California International Gateway project (SCIG or Project), will

20 <sup>1</sup> The Port of Los Angeles includes the Los Angeles Harbor Department and its governing board,  
the Los Angeles Board of Harbor Commissioners.

21 <sup>2</sup> East Yard Communities for Environmental Justice, Century Villages at Cabrillo, the Natural  
22 Resources Defense Council, and Coalition for Clean Air also challenge the Port's failure to  
23 comply with the California Environmental Quality Act (CEQA), Public Resources Code § 21000  
24 *et seq.* East Yard Communities for Environmental Justice, the Natural Resources Defense  
25 Council, and Coalition for Clean Air have an additional claim seeking a writ of mandate for a  
fair hearing. Those claims are briefed separately.

1 be located in a community of color that already suffers from high levels of air pollution. The  
2 Project would add over a million new truck trips and thousands of new train trips through this  
3 community every year. The proposed site is across the road—and in some cases less than 500  
4 feet—from residences, an elementary school, a junior high school, a high school, Plaintiff  
5 Century Villages at Cabrillo (the Villages), and a park.

6 The Port’s decisions<sup>3</sup> to certify the environmental impact report (EIR), approve the  
7 Project as currently designed and sited, approve the use of Port land for the Project, and approve  
8 the development permit violates Section 11135(a) and the civil rights of the community of color  
9 surrounding the Project. The Port’s EIR and its data show that the construction and operation of  
10 the SCIG will create significant air quality and health impacts that will disproportionately burden  
11 the surrounding community of color.<sup>4</sup> The Port has not demonstrated a substantial legitimate  
12 justification for the Project, and, even if it could, and a number of less discriminatory alternatives  
13 exist to achieve the Project’s stated goals.

14 Accordingly, Plaintiffs seek declaratory and injunctive relief, enjoining the Project as  
15 currently proposed.<sup>5</sup>

## 16 **STATEMENT OF FACTS**

### 17 **I. The Community of Color Surrounding the Project**

18 Comprised of portions of West Long Beach and Wilmington, the community within one  
19

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20 <sup>3</sup> See Petitioner’s Opening Brief (California Environmental Quality Act) (hereafter *Petr.* CEQA Brief) at pp. 11–12 for a summary of the approvals and decisions.

21 <sup>4</sup> The Port’s EIR uses the term “minority” to include “American Indian or Alaskan Native; Asian or Pacific Islander; Black (not of Hispanic origin; or Hispanic.” AR D:13146. Because the combined total of these groups does not represent a minority of the overall population, this brief (except when quoting other documents) prefers the term “communities of color” or “people of color” when referring to racial and ethnic groups other than non-Hispanic Whites.

23 <sup>5</sup> California Government Code § 11139 (section 11135(a) “may be enforced by a civil action for equitable relief; which shall be independent of any other rights and remedies”).  
24

1 mile of the Project is 93 percent people of color. AR D:13149; 13151. This community includes  
2 Plaintiffs the Villages, Evelyn Deloris Knight, and Elena Rodriguez. Decl. Brian D’Andrea;  
3 Decl. Evelyn Deloris Knight; Decl. Elena Rodriguez.

4 Elena Rodriguez is a Hispanic woman who lives less than half a mile east of the Project  
5 site. Ms. Rodriguez has been concerned about the area’s air pollution problems since her  
6 children were in elementary school and were forced to spend recess indoors because of poor air  
7 quality. She is very concerned about the Project’s negative health impacts on her and her  
8 community. Decl. Rodriguez.

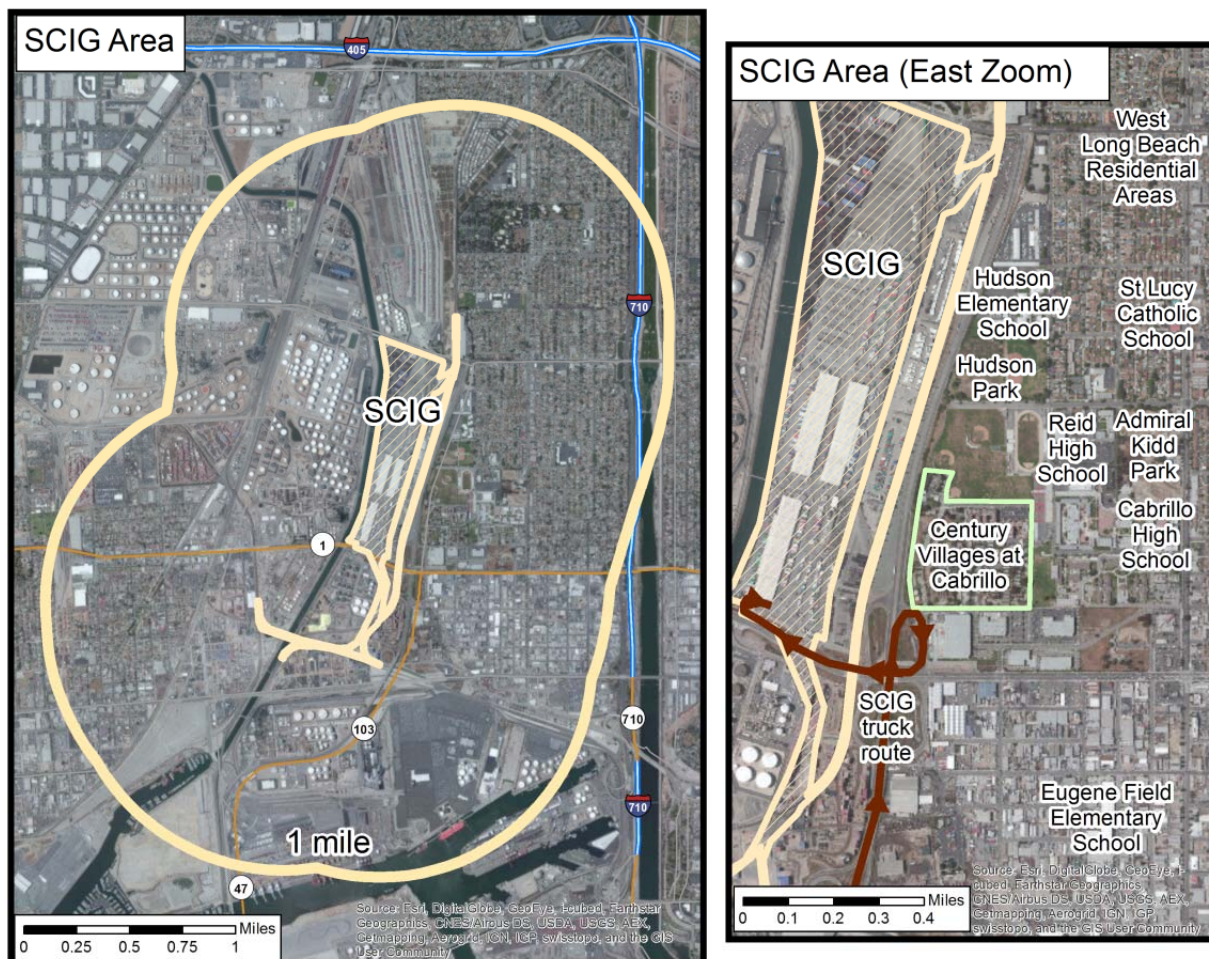
9 Evelyn Deloris Knight is an African-American woman who lives less than half a mile  
10 east of the Project site. Ms. Knight is also very concerned about the Project’s negative impacts  
11 on the air that she and her family breathe. Decl. Knight.

12 The Villages is a 27-acre nonprofit homeless services community, directly adjacent to the  
13 truck route to and from the Project site. The Villages provides housing to over 1,000 people  
14 each night, including veteran and non-veteran individuals, families, and children. Over half of  
15 the Villages’ residents on any given day are African-American or Latino. Decl. Brian D’Andrea.

16 The community of color surrounding the Project is also home to groups (children,  
17 elderly, and ill) who are the most sensitive to the harmful effects of diesel exhaust inhalation.  
18 AR D:12547; 12477. For example, the Cabrillo Child Development Center, the Bethune School,  
19 and the Elizabeth Hudson Elementary School<sup>6</sup> are 460, 425, and 630 feet, respectively, from the  
20 Project’s eastern boundary. Two convalescent homes are located within 1,500 feet of the Project  
21 boundaries. AR D:12477.

22 \_\_\_\_\_  
23 <sup>6</sup> California Air Resources Board guidance instructs against locating a school near a railyard,  
24 because of the negative health impacts. AR H.6:58068; 58072; 58073; 58075; 58107; 58109;  
25 58138; 58167.

The maps below depict the one-mile area surrounding the Project site, as well as the community landmarks closest to the site.



Decl. Rowangould, exhibit 1, fig. 1.

## II. The Port and BNSF Railway Company's Project<sup>7</sup>

The Port has approved a proposal by Burlington Northern Santa Fe Railway Company (BNSF) to build and operate a 185-acre railyard, with a maximum capacity of 2.8 million twenty-foot shipping container units, about 4 miles north of the Port and less than 500 feet from parts of the community. AR D:12318; 12323; 12367. The Port is the Project's lead agency for CEQA purposes. AR F:21129; G:21278. Furthermore, the Port has a substantial role,

<sup>7</sup> For a complete description of the Project, *see* the CEQA Brief at pp. 5–9.

1 investment, and financial stake in the Project. The Project will be primarily on Port-owned land.  
2 AR D:12208; 12318; H.8:220938. The Port is contributing \$29 million towards the Project.  
3 H.8:220933–220934. Based on its investment in this Project, “[t]he Port expects to receive a  
4 revenue rate of return for the 50-year lease term for the Permit . . . between \$755,430,634  
5 (9.8%) and \$792,376,429 (10.5%).” AR H.6:220934.

6 At full capacity, the Project would add over a million new truck trips and thousands of  
7 new train trips annually to the community of color surrounding the Project. AR D:12216; 12402.  
8 The projected truck traffic can conservatively be expected to generate 115 truck trips per hour, or  
9 1.9 trips per minute, feet from the only entrance to Plaintiff Century Villages at Cabrillo.<sup>8</sup> AR  
10 D:3939; 3917; 4455; 4583 (disputing accuracy of freeway ramp analysis); 12783–12784;  
11 H.7:172672 (map of SCIG site, truck routes, and the Villages).

12 The SCIG also expects eight inbound and eight outbound trains per day, each powered by  
13 three or four diesel-electric locomotives. AR D:12403. These trains will meet U.S.  
14 Environmental Protection Agency Tier 3 emissions standards, but not more the stringent Tier 4  
15 emission standards. AR D:12527. The Project will also include diesel-powered cargo handling  
16 equipment and service and maintenance equipment, all emitting diesel exhaust. AR D:12495.

### 17 **III. Health Impacts of Diesel Pollution**

18 The harmful effects of diesel exhaust from trucks, trains, and equipment on human health  
19 are well-documented and indisputable. *See, e.g.*, AR H.6:78547. As noted above, inhalation of  
20 diesel particulate emissions can cause serious and terminal health impacts, including increased  
21 adult mortality from lung cancer, cardiopulmonary and other causes; increased infant mortality;

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22 <sup>8</sup> This number is based on 5,542 truck trips equating to 2,711 one-way trips per day entering the  
23 SCIG, divided by 24 hours, assuming an even distribution of trips throughout the day. AR  
24 D:3939.

1 and increased hospitalization for pulmonary illnesses, chronic obstructive pulmonary disease,  
2 pneumonia, asthma, and cardiovascular illnesses. *See* AR H.6:58622–58623; D:15444. Diesel  
3 particulates account for an estimated 84 percent of cancer risk in the South Coast Air Basin,<sup>9</sup>  
4 with “the highest risks from air toxics surrounding the port areas.” AR H.6:90340.

5 The Port’s own EIR explains that particulate matter less than 10 micrometers in diameter  
6 (PM10) and less than 2.5 micrometers in diameter (PM2.5) are “respirable” and “can accumulate  
7 in the respiratory system or penetrate the vascular system, causing or aggravating diseases such  
8 as asthma, bronchitis, lung disease, and cardiovascular disease.” AR D:12547. “Numerous  
9 studies published over the past 15 years have established a strong correlation between the  
10 inhalation of ambient PM and an increased incidence of premature mortality from heart and/or  
11 lung diseases.” *Ibid.* “Children, the elderly, and the ill” are “sensitive receptors” that are  
12 particularly at risk. AR D:12547; 12477.

#### 13 **IV. The Port’s Analyses of the Project’s Impacts on the Surrounding Community of Color**

14 Pursuant to CEQA, the Port prepared an EIR for the Project, which purported to disclose  
15 the Project’s environmental impacts including those related to air quality, traffic, greenhouse  
16 gases, and health, as well as cumulative impacts. Based on these analyses, there is no dispute that  
17 the Project will have significant negative air quality, health risk, noise, land use, aesthetic, and  
18 cultural resource impacts that will “fall disproportionately on minority . . . populations” located  
19 near the SCIG site. AR D:13156–13159.

20 To conclude that the Project’s air quality and health impacts will be disproportionately

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21 <sup>9</sup> The South Coast Air Basin (SCAB), within which the Project is located, “consists of the non-  
22 desert portions of Los Angeles, Riverside, and San Bernardino Counties and all of Orange  
23 County. The SCAB covers an area of approximately 15,500 square kilometers (6,000 square  
24 miles) and is bounded on the west by the Pacific Ocean, on the north and east by the San Gabriel,  
25 San Bernardino, and San Jacinto Mountains, and on the south by the San Diego County line.”  
AR D:12463.

borne by people of color, the Port’s Recirculated Draft EIR (RDEIR) analyzes U.S. Census data on the demographics of the nearby affected populations. These data show that the Census block groups within one mile of the Project site are 93 percent people of color. AR D:13149; 13151. By way of comparison, Los Angeles County is 72.2 percent people of color, the South Coast Air Basin is 68 percent people of color, and the State of California is 59.9 percent people of color. AR D:13147; Decl. Rowangould, exhibit 1, tbl. 1. Nearby cities are also demographically distinguishable: the City of Los Angeles is 71.3 percent people of color, and the City of Long Beach is 70.6 percent people of color. *Ibid.*

The RDEIR concedes that the toxic air contaminants resulting from Project construction and operation will increase the surrounding community’s cancer risk “above the [SCAQMD] significance threshold.” AR D:13158 (AQ-7). Thus, the SCIG will “make a cumulatively considerable contribution to the significant health risk impact to the predominately minority . . . population in the Port region . . . [, and this impact] would constitute a disproportionately high and adverse effect on minority . . . populations.” AR D:13158.

Even after mitigation, Project construction will generate emissions and local, off-site pollution concentrations that are significant (i.e., that exceed the South Coast Air Quality Management District’s significance thresholds) for several harmful air pollutants, including PM10, PM2.5, NOx, and CO. AR D:13157–13158 (AQ-1 and AQ-2). These emissions and pollution concentrations “would constitute a disproportionately high and adverse effect[s] on minority . . . populations.” *Ibid.*

The RDEIR similarly concludes that, even after mitigation, Project *operation* will generate significant local, off-site ambient pollutant concentrations and “constitute a disproportionately high and adverse effect on minority . . . populations.” AR D:13157–13158

1 (AQ-4).

2 Based on this record, the Port certified the final environmental impact report (FEIR),  
3 approved the Project as currently designed and sited, approved the use of Port land for the  
4 Project, and approved the development permit and site preparation (collectively, the “Project  
5 Approvals”). AR A:1; B:4–24; B:25–114.56.

6 **V. State Financial Assistance to the Port**

7 The Port of Los Angeles receives substantial financial assistance from the State of  
8 California, totaling more than \$50 million. For example, State grants received by the Port  
9 include: a \$750,000 grant from the California Office of Homeland Security (131213 LAHD  
10 Responses to East Yard FRP No. 1, 2005 Security Grant:1–14); a \$10,066,000 Proposition 1B  
11 grant from the California Office of Homeland Security (RFP No. 1, FY07 Award Notification  
12 052008: 645); a \$9,925,927 Proposition 1B grant from the California Emergency Management  
13 Agency (RFP No. 1, FY08 Prop 1B Award Notification 041509: 654–664); \$20,000 in AB 118  
14 grant funding from the California Air Resources Board (CARB) (RFP No. 1, Agreement\_13-  
15 2920\_CA\_Air\_resources\_Board\_AQIP\_Amend\_C: 283–374); an additional \$1,000,000 in AB  
16 118 grant funds from CARB to promote the development of clean vehicles (RFP No. 1,  
17 Agreement\_13-3145\_AQIP\_CAARB\_Grant: 415–496); \$17 million in Proposition 1B grant  
18 funds for the South Wilmington Grade Separation project (RFP No. 1, Agr\_13-  
19 3105\_CA\_Prop\_1B\_Wilmington\_Grade\_Sep\_Proj: 399–413); and an additional \$12.705 million  
20 in Proposition 1B funds for the TraPac Terminal on-dock railyard (RFP No. 1, Agreement\_13-  
21 3079\_TracPac\_Terminal\_OnDock\_Railyard\_Amend\_A: 375–384). In addition, the State  
22 previously granted the Port the approximately 107 acres of land that the Port plans to lease for  
23 the Project. AR D:12208; 12318; H.7:116572–116575.

## STATUTORY FRAMEWORK AND STANDARD OF REVIEW

California Government Code § 11135(a) states, in relevant part:

“No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability . . . be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.”

Discriminatory intent is *not* required to sustain a Section 11135 claim; liability may be based on a project’s disparate impact on a protected class.<sup>10</sup> *Darensburg I*, *supra*, 611 F.Supp.2d at p. 1042 (citing *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 432 [91 S.Ct. 849, 854] and *Gamble v. City of Escondido* (9th Cir. 1997) 104 F.3d 300, 306).

Disparate impact cases under Section 11135 are analyzed under a three-step burden-shifting framework.<sup>11</sup> First, the plaintiff bears the burden of establishing that the defendant’s facially neutral practice causes a disproportionate adverse impact on a protected class. *Darensburg v. Metropolitan Transp. Com’n* (9th Cir. 2011) 636 F.3d 511, 519 (hereafter *Darensburg II*) (citing *City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal.App.3d 976, 984 [236 Cal.Rptr. 716, 721-722]) (hereafter *San Francisco*). This showing “involves a comparison between two groups — those affected and those unaffected by the facially neutral policy”, . . . “tak[ing] into account the correct population base and its racial makeup.” *Darensburg II*, 636 F.3d 5 at p. 520-521 (quoting *Tsombanidis v. West Haven Fire*

<sup>10</sup> Cal. Code Regs., tit. 22, § 98101(j) (prohibiting discrimination in licensing, site selection, or location of facilities); see *Comunidad En Accion v. Los Angeles City Council* (2013) 219 Cal.App.4th 1116, 1126 [162 Cal.Rptr.3d 423, 429], *review denied* (Dec. 18, 2013) (challenging disparate impact of the city’s approval of three solid waste facilities in a Latino community).

<sup>11</sup> Because the language of Section 11135 parallels Title VI of the Civil Rights Act, “federal law provides important guidance in analyzing state disparate impact claims.” *Darensburg II*, *supra*, 636 F.3d 5 at p. 519 (citing *San Francisco*, *supra*, 236 Cal. Rptr. at p. 721-22). Courts also “look to Title VII disparate impact analysis in analyzing Title VI claims.” *Darensburg II*, 636 F.3d 5 at p. 519 (citing *Larry P. By Lucille P. v. Riles* (9th Cir. 1984) 793 F.2d 969, 982 & n.9).

1 *Dept.* (2d Cir. 2003) 352 F.3d 565, 575 and citing *Robinson v. Adams* (9th Cir. 1987) 847 F.2d  
2 1315, 1318).

3 Second, if the plaintiff establishes a prima facie case of disparate impact, the burden  
4 shifts to the defendant to prove by a preponderance of competent evidence the existence of a  
5 substantial, legitimate, nondiscriminatory justification for its actions. *Darensburg I, supra*, 611  
6 F.Supp.2d at p. 1051-1052 (citing *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405 [95 S.Ct.  
7 2362] (hereafter *Albemarle*); *Watson v. Fort Worth Bank and Trust* (1988) 487 U.S. 977, 979  
8 [108 S.Ct. 2777, 2780, 101 L.Ed.2d 827] (hereafter *Watson*) (specifying the burden as one of  
9 proof, not production).

10 Third, if the defendant successfully rebuts the plaintiff's prima facie case with a  
11 substantial legitimate justification, the plaintiff may still prevail by offering "an equally effective  
12 alternate practice which results in less racial disproportionality," as shown by a preponderance of  
13 the evidence. *Darensburg I, supra*, 611 F.Supp.2d at pp. 1042, 1060 (citing *Georgia State*  
14 *Conference of Branches of NAACP v. State of Ga.* (11th Cir. 1985) 775 F.2d 1403, 1417); *see*  
15 *also Albermarle, supra*, 422 U.S. 405; *Blake v. City of Los Angeles* (9th Cir. 1979) 595 F.2d  
16 1367, 1383 (in the Title VII context). To escape liability, "there must be available no acceptable  
17 alternative policies or practices which would better accomplish the business purpose advanced,  
18 or accomplish it equally well with a lesser differential racial impact." *Officers for Justice v. Civil*  
19 *Service Com'n of City and County of San Francisco* (N.D. Cal. 1975) 395 F.Supp. 378, 383.  
20 Thus, plaintiffs prevail if they demonstrate by a preponderance of evidence that *any* less  
21 discriminatory alternative would equally effectively accomplish the business purpose proffered.

22 As with the related CEQA claims, the factual determinations underlying the Port's  
23 Project Approvals must be supported by substantial evidence. *See Turlock Irr. Dist. v. Zanker*  
24  
25

(2006) 140 Cal.App.4th 1047, 1054 [45 Cal.Rptr.3d 167, 172] (citing *Horsford v. Board Of Trustees Of California State University* (2005) 132 Cal.App.4th 359, 390 [33 Cal.Rptr.3d 644, 668]). The “substantial evidence” test applies to the Port’s EIR findings that various less discriminatory alternatives and mitigation measures are infeasible. Substantial evidence is “evidence of ponderable legal significance, reasonable in nature, credible, and of solid value.” *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1070 [52 Cal.Rptr.3d 312, 318].

## ARGUMENT

### **I. The Port is a Program that Receives Financial Assistance from the State**

Section 11135(a)’s prohibition against discrimination applies to “any program or activity that . . . receives any financial assistance from the state.” Gov. Code § 11135(a). The term “program or activity” includes “any project, action or procedure” by recipients of “State support,” whether undertaken directly or indirectly. Cal. Code Regs., tit. 22, § 98010 (emphasis added). A “recipient” includes any “public entity” employing “five or more” individuals and receiving more than \$10,000 per year in “State support.” *Ibid.* “State support” is defined broadly to include “any grant, entitlement, loan, cooperative agreement, contract or any other arrangement by which a State agency provides or otherwise makes available aid.” *Ibid.*

The state financial assistance need not be tied to the challenged project specifically; rather, if any part of the program or activity receives state funding, the whole program or activity is required to comply with Section 11135. Cal. Code Regs., tit. 22, § 98010 (State supported program defined as “any program or activity which receives State support, in whole *or in part*.” (emphasis added); see *Committee for Immigrant Rights of Sonoma County v. County of Sonoma* (N.D. Cal. 2009) 644 F.Supp.2d 1177, 1207 (a recipient of state support may not discriminate in

any of its activities) (citing *Darensburg v. Metropolitan Transp. Com'n* (N.D. Cal., Aug. 21, 2008, C-05-01597 EDL) 2008 WL 3915349, at \*14).

The Port is a recipient of State support for purposes of Section 11135. Cal.Code Regs., tit. 22, § 98010. The Port is a public entity with over five employees. *See, e.g.*, AR H.7:172787. The Port also receives numerous grants from the State of California, each well over the \$10,000 threshold. 131213 LAHD Responses to East Yard FRP No. 1,1–14; 654–664; 283–374; 415–496; 399–413; 375–384 (describing over \$50 million dollars in State grants to the Port). Moreover, State grants to the Port will directly fund the SCIG, including the 107-acre property that the Port received from the State and plans to lease to BNSF for the Project. AR D:12208, 12318; H.7:116572–116575; *see also* Cal.Code Regs., tit. 22, § 98010 (specifying that financial assistance can include “real property or any interest in or use of such property”). The site’s current *rental* value alone is over \$6 million annually. AR H.8:220933.

Because the Port receives substantial financial assistance from the State, all of its projects and actions—including the Project Approvals for the SCIG—are subject to the constraints of Section 11135.

## **II. The Port’s Project Approvals for the SCIG Impermissibly Discriminate on the Basis of Race**

The Port’s Project Approvals for the SCIG are a *prima facie* violation of Section 11135. The Port admits that the construction and operation of the Project will create significant air quality and health impacts that are adverse and that will disproportionately burden the surrounding community of color as compared to the general population. AR D:13156–131567.

### **A. The Port’s Project Approvals for the SCIG Create Significant Adverse Impacts**

The construction and operation of the Project, as the Port admits, will have significant

negative impacts on air quality and health.<sup>12</sup> AR D: 13156–13159 (AQ-1, AQ-2, AQ-4, and AQ-7). As described above, the Project’s construction will generate significant new emissions of air pollutants, and the Project’s operations will generate significant new concentrations of these air pollutants, such as PM10, PM2.5, NO<sub>2</sub>, and CO, even after the planned mitigation efforts. AR D:13157–13158. The Project will also contribute to an increased cancer risk and a “cumulatively considerable contribution to the significant health risk impact” for community members. AR D:13158. The Port concedes that the surrounding community is likely to suffer from these negative health impacts. *Ibid.*

**B. The Project’s Adverse Impacts Disproportionately Burden the Surrounding Community of Color within One Mile of the Project**

Based on the Port’s admissions and data, the Project’s adverse impacts will disproportionately burden people of color in the communities within one mile of the SCIG as compared to the general population of Los Angeles County, thus establishing a prima facie violation of Section 11135. *See* AR D:13157–13158 (AQ-1, -2, -4, and -7) (admitting that the Project’s adverse impacts “fall disproportionately on minority . . . populations” located near the SCIG site as compared to the general population.).

The areas affected by the Project are disproportionately comprised of people of color as compared to the general population unaffected by the Project. The Port specifies that the appropriate affected area is a one-mile radius around the SCIG site. AR D:13146; 13148 (describing Figures 6-1 and 6-2); 13149 (Figure 6-1). The Port also specifies that the appropriate

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<sup>12</sup> In addition, to the extent the Court finds the Port’s EIR impacts analysis deficient as alleged in Petrs. CEQA Brief, the Project could have additional significant and unavoidable adverse impacts disproportionately injuring minority populations not identified by the Port, but that would be identified with the proper EIR analysis. Such impacts also would be relevant for purposes of discrimination under Section 11135.

1 unaffected comparison population is Los Angeles County. AR D:13156 (“the impact area  
2 characteristics were compared to data for the general population (i.e., Los Angeles County”).  
3 The data indicate that the population within the one-mile radius of impact is 93 percent people of  
4 color. AR D:13149; 13151. In contrast, the unaffected population of Los Angeles County is  
5 72.2 percent people of color. AR D:13147. This is a more than 20 percentage point disparity  
6 between the affected and unaffected populations.

7 This difference is “sufficiently substantial” for liability under Section 11135(a). *Watson*,  
8 *supra*, 487 U.S. at p. 988 (statistical disparities “must be sufficiently substantial that they raise . .  
9 . an inference of causation” as determined on a case-by-case basis); *Darensburg II*, *supra*, 636  
10 F.3d at p. 519 (“The basis for a successful disparate impact claim involves a comparison between  
11 two groups — those affected and those unaffected by the facially neutral policy,” “tak[ing] into  
12 account the correct population base and its racial makeup.”) (citations omitted). The court in  
13 *Darensburg I* found that a 14.7 percentage point difference between the ridership of the bus  
14 system (66.3 percent people of color) versus the rail system (51.6 percent) was sufficiently  
15 substantial to establish a prima facie case. *Darensburg I*, *supra*, 611 F. Supp. 2d at p. 1042  
16 (finding no violation, however, because appropriate less discriminatory alternatives were not  
17 adequately articulated) *aff’d* *Darensburg II*, *supra*, 636 F.3d 511 (finding no violation because  
18 bus versus rail ridership was not correct comparison, so not addressing the sufficiently  
19 substantial issue). Similarly, the appellate court in *The Committee Concerning Community*  
20 *Improvement v. City of Modesto* found that a 24 percentage point difference between the  
21 percentage of Latinos in areas served versus those in unserved areas “presented evidence of  
22 discriminatory impact.” *Modesto*, (9th Cir. 2009) 583 F.3d 690 (9th Cir. 2009) (hereafter  
23 *Modesto*) (reversing district court on this point). Accordingly, the more than 20 percentage point  
24  
25

1 difference between the community affected by the Project and the unaffected population of Los  
2 Angeles County is sufficiently substantial to establish prima facie case of disparate impact.

3 Furthermore, in this case, the racial disparity between the affected community of color  
4 and unaffected populations is not limited to Los Angeles County. As the table below  
5 demonstrates, people of color will disproportionately bear the impacts associated with the  
6 Project, as compared to the cities of Long Beach (in which part of the affected community is  
7 located) and Los Angeles (in which part of the affected community is located and within which  
8 the Port is a public entity), as well as compared to the greater South Coast Air Basin (many of  
9 the adverse impacts at issue are air quality-related). This is true even if the relevant geographic  
10 boundary around the Project site is narrowed to a half-mile.

	People of color	Total Population
<b>Affected Areas</b>		
1 mile around SCIG <sup>13</sup>	93%	50,027
1/2 mile around SCIG <sup>14</sup>	94%	23,551
<b>Unaffected Populations</b>		
Los Angeles County <sup>15</sup>	72.2%	9,818,605
City of Los Angeles <sup>16</sup>	71.3%	3,792,621
City of Long Beach <sup>17</sup>	70.6%	462,257

<sup>13</sup> AR D:13151 (based on a summation of demographic data presented in Table 6-2).

<sup>14</sup> Decl. Rowangould, exhibit 1, tbl. 1.

<sup>15</sup> AR D:13147.

<sup>16</sup> AR D:13147.

<sup>17</sup> AR D:13147.

South Coast Air Basin<sup>18</sup>

68%

15,739,963

Decl. Rowangould, exhibit 1, tbl. 1.

Thus, the Port’s Project Approvals for the SCIG create disproportionate adverse impacts based on race, establishing a prima facie case under Section 11135.

### **III. The Port Has Not Offered a Substantial, Legitimate Nondiscriminatory Justification for its Project Approvals**

Given the Port’s prima facie violation of Section 11135, the burden shifts to the Port to prove by a preponderance of evidence a substantial, legitimate, nondiscriminatory justification for its actions. *Darensburg I, supra*, 611 F.Supp.2d at p. 1051-1052 (citing *Albemarle, supra*, 422 U.S. 405; *Watson, supra*, 487 U.S. at p. 979 (specifying the burden as one of proof, not production)). Here, the Port has not justified the need for the Project.

Senior Port staff state that, “The people in Long Beach need to be told why they have to take a hit on localized impacts.” AR H.7:104117–104118. Yet the only justification offered by the Port is that the Project is necessary to ensure that Port facilities have the rail capacity to accommodate anticipated growth in cargo throughout the region. *See* Petrs. CEQA Brief at pp. 21–26. In a number of other portions of the record, however, the Port concludes that existing facilities can accommodate *all* anticipated cargo growth for twenty more years. AR D:12338 (“the 2009 forecast predicts that 2035 is the last year in which the Ports will accommodate the actual demand”); 12337–12339 (showing rail capacity will not be exceeded until just before 2035, based on the 2009 cargo forecasts performed after the recession and actual cargo throughput in 2010 and 2011 exceeding that forecast); 15518 (2035 “No Project” scenario showing “Additional BNSF Yard Capacity Needed” as zero); H.6:78363–78364 (BNSF

<sup>18</sup> Decl. Rowangould, exhibit 1, tbl. 1.

1 memorandum noting the existing Hobart railyard can accommodate the cargo that would be  
2 handled by the SCIG for the life of the Project, and further facility developments will allow the  
3 Hobart facility to “exceed[] the capacity the Port has determined will be necessary” under the No  
4 Project Alternative); C:3850 (“Physical modification and operational changes would be  
5 undertaken at Hobart Yard in order to accommodate the increased cargo.”). The Port cannot  
6 have it both ways.

7 If the Project is built, the surrounding community of color will breathe dirty, polluted air  
8 for no legitimate reason. Because the Port has not satisfied its burden of demonstrating a  
9 substantial legitimate justification for approving the Project, its Project Approvals violate the  
10 civil rights of the community of color within one mile of the SCIG.

#### 11 **IV. Less Discriminatory Alternatives to the Project Exist that Equally Effectively Meet the 12 Project’s Goals**

13 Assuming *arguendo* that the Port can demonstrate a substantial legitimate justification for  
14 the Project, the Port’s Project Approvals nevertheless violate Section 11135 because a number of  
15 less discriminatory alternatives exist that would equally effectively accomplish the Project’s  
16 stated goals. Where a less discriminatory alternative exists, Section 11135 prohibits the Port  
17 from proceeding with the more discriminatory Project.

18 The Port identified several objectives for the Project:

- 19 1. Provide an additional near-dock intermodal rail facility that would:
  - 20 a) Help meet the demands of current and anticipated containerized cargo  
21 from the various San Pedro Bay port marine terminals, and
  - 22 b) Combine common destination cargo “blocks” and/or unit trains  
23 collected from different San Pedro Bay Port marine terminals to build  
24 trains for specific destinations throughout the country.
- 25 2. Reduce truck miles traveled associated with moving containerized cargo by  
providing a near-dock intermodal facility that would:
  - 26 a) Increase use of the Alameda Corridor for the efficient and  
27 environmentally sound transportation of cargo between the San Pedro  
28 Bay Ports and destinations both inland and out of the region; and
  - 29 b) Maximize the direct transfer of cargo from port to rail with minimal

- 1 surface transportation, congestion and delay.
- 2 3. Provide shippers carriers, and terminal operators with comparable options for
- 3 Class I<sup>19</sup> railroad near-dock intermodal rail facilities.
- 4 4. Construct a near-dock intermodal rail facility that is sized and configured to
- 5 provide maximum intermodal capacity for the transfer of marine containers
- 6 between truck and rail in the most efficient manner.
- 7 5. Provide infrastructure improvements consistent with the California Goods
- 8 Movement Action Plan.

9 AR C:3920; 3849–3850.

10 The Port has also identified as objectives the incorporation of advanced environmental

11 controls and helping to convert existing and future truck transport into rail transport, thereby

12 providing air quality and transportation benefits. AR D:5892.

13 There are at least four less discriminatory alternatives that meet the Port’s objectives

14 without rendering the surrounding community an environmental sacrifice zone. These include

15 (a) a more fully mitigated project; (b) the Reduced Project Alternative identified in the EIR; (c) a

16 delayed project; and (d) building the railyard on-dock rather than near-dock. Furthermore, a

17 subset or combination of these alternatives, such as a more fully mitigated project adopted later

18 in time (i.e., a delayed project), would also be less discriminatory. The Port considered aspects

19 or the entirety of these alternatives during the CEQA process. All of them would accomplish the

20 Port’s goals as well as the SCIG but with less disparate racial impacts.

21 **A. A More Fully Mitigated Project is a Less Discriminatory Alternative Achieves the**

22 **Project’s Goals**

23 Several reasonable mitigation measures would significantly reduce the Project’s adverse

24 air pollution impacts on the surrounding community of color, while effectively achieving the

25 Project’s objectives. This mitigated project alternative would require: 100 percent of the trucks

accessing the SCIG facility to use zero-emission technology by 2020; 95 percent of the trains

<sup>19</sup> There are two “Class I” railroads that operate at the Port: BNSF and Union Pacific. AR D:12371.

1 accessing the SCIG facility to use Tier 4 low-emission technology by 2020; reconfiguring part of  
2 the designated truck route to the SCIG; and retrofitting nearby schools, residences, and other  
3 facilities with air filters and other air pollution control strategies. These measures would  
4 minimize the amount of air pollution generated by SCIG operations as well as reduce the  
5 community's exposure to Project emissions. Furthermore, a more fully mitigated project would  
6 not interfere with the SCIG's ability to meet the Port's goals. In fact, these measures would do  
7 *more* to meet the Port's goal of "incorporation of advanced environmental controls" than the  
8 proposed Project would. This alternative and its elements are not "speculative," but rather  
9 feasible and well-documented in the record. *Cf. Coalition of Concerned Citizens Against I-670*  
10 *v. Damian* (S.D. Ohio 1984) 608 F.Supp. 110, 127-28.

11 **1. Requiring 100% Zero Emission Trucks by 2020 is an Effective, Less**  
12 **Discriminatory Option**

13 Trucks travelling to and from the SCIG will contribute a large portion of the overall  
14 Project's air pollution and resultant health impacts. AR D:7089. According to the Port's Health  
15 Risk Assessment, 8.7 percent of the residential cancer risk and 61.7 percent of the non-cancer  
16 health risks from the SCIG will be caused by truck emissions. AR D:7089. Using 100 percent  
17 zero-emissions trucks is a less discriminatory alternative that would equally effectively achieve  
18 the Port's objectives with fewer negative impacts on the surrounding community.

19 Zero-emissions truck technology is viable and effective. The Port, recognizing that,  
20 committed in its 2012 Five-Year Strategic Plan to achieve "100% of the truck moves to proposed  
21 and existing near-dock railyards by zero-emission trucks by 2020." AR D: 3977; H.6:86476;  
22 H.7:163598. Now, the Port rejects requiring 100% zero-emission trucks, arguing that the  
23 technology is not proven for use today. AR D:3974. This position, however, is contradicted by  
24 the record. The Port's EIR quotes a CALSTART report stating that "technology is *not*

1 considered a barrier to a zero-emission freight truck.” AR F:21132 (emphasis added);  
2 H.6:78480; 78456 (noting CALSTART’s broad knowledge of technologies and the industry). In  
3 fact, as of 2013 when the Project was approved, zero-emission trucks for port service were built  
4 and being demonstrated. AR H.2:23557–23558 (SCAQMD comment letter). Furthermore, even  
5 if the record did not support the use of 100% zero emissions trucks by 2020, requiring use of  
6 such trucks even after 2020 but still relatively early in the life of the 50-year Project would  
7 provide an effective alternative that would reduce disparate impacts on the surrounding  
8 community of color. AR D:3913 (Project entails granting a 50-year lease to BNSF).

9 **2. Requiring 95% Tier 4 Line-Haul Locomotives by 2020 is an Effective, Less**  
10 **Discriminatory Option**

11 Emissions from locomotives are a major source of the SCIG’s pollution and health  
12 impacts: 79 percent of the Project’s expected residential cancer risk comes from the locomotives  
13 going to and from the SCIG site. AR D:7089. The Port could require that 95 percent of  
14 locomotives accessing the SCIG comply with the Tier 4 emissions standard (or an equivalent) by  
15 2020 as part of a less discriminatory alternative that would achieve the Port’s objectives with  
16 fewer negative impacts on the surrounding community. Emissions from Tier 4 line-haul  
17 locomotives are over 70 percent lower than the Tier 3 line-haul locomotives BNSF plans to use.  
18 AR H.6:81121; D:12527 (tbl. 3.2-27).

19 The Port’s own Clean Air Action Plan identified requiring 95 percent Tier 4 locomotives  
20 as a measure to be imposed on new and redeveloped near-dock railyards, including the SCIG.  
21 AR H.6:81124–81127. Yet, while the EIR references this measure in Project Condition AQ-12,  
22 the Port declined to impose any actual requirements on the SCIG. AR C:3804–3805.

23 EPA regulations require that all locomotives available for sale after January 1, 2015  
24 comply with a Tier 4 emissions standard. 40 C.F.R. § 1033.101(a). By 2020, Tier 4 locomotives  
25

will have been the only ones available for purchase by BNSF for five years. Under BNSF's existing plans, it will have enough Tier 4 locomotives in its national fleet by 2020 to use only Tier 4 locomotives in the South Coast Air Basin. AR H.2:23557. The South Coast Air Quality Management District explains that the number of locomotives needed for the SCIG is relatively small: 12 locomotives in 2020. This represents less than one percent of the 1,380 Tier 4 locomotives that BNSF will have in its national fleet by 2020. *Ibid.*<sup>20</sup> Furthermore, BNSF has previously entered into agreements to focus a certain percentage of cleaner locomotives in the South Coast Air Basin. AR D:12361; 12483; AR H.6:78844; 83562; 83684. A commitment to using 95 percent Tier 4 locomotives by 2020 could reasonably be part of a mitigated, less discriminatory alternative for the SCIG that equally effectively achieves the Project's objectives.

### **3. Reconfiguring the Truck Route is an Effective, Less Discriminatory Option**

The Project's disparate impacts would be further mitigated by reconfiguring a short section of the designated truck route to the SCIG to avoid San Gabriel Avenue, the sole point of ingress and egress for the Century Villages at Cabrillo, while still equally effectively achieving the Port's objectives. *See* AR D:12783–12784. Several engineering designs could accomplish this reconfiguration, such as constructing a flyover or underpass where the northbound Terminal Island Freeway transitions to Pacific Coast Highway, so that the trucks accessing SCIG would not go on to San Gabriel Ave. This would distance the Project's expected thousands of trucks per day away from the Villages' entrance.<sup>21</sup> These measures would not limit the Port's ability to meet the Project's objectives, and thus constitute an effective, less discriminatory alternative to the SCIG.

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<sup>20</sup> According to the Port, BNSF's national fleet will have about 26.5 percent Tier 4 locomotives by 2020, equaling around 1,380 locomotives. H.2:23557.

<sup>21</sup> For a thorough discussion on the impacts of the SCIG truck traffic on the Villages, *see* Petrs. CEQA Brief at pp. 52–54 and AG CEQA Brief at pp. 32–34.

1           **4. Retrofitting Schools, Homes, and Other Facilities in the Community is an**  
2           **Effective, Less Discriminatory Option**

3           Measures could also be undertaken to reduce the affected community's exposure to diesel  
4           emissions. Specifically, the schools, residences, the Villages, and other facilities serving  
5           sensitive receptors within one mile of the SCIG site could be retrofitted with air filtration  
6           technology to purify the outdoor air that enters buildings, and air conditioning systems so that  
7           windows and doors closed can be kept shut in the hot Southern California heat. *See, e.g.*, AR  
8           H.2:23546; 22680; *see* AR D:12645 (tbl. 3.8-1); 12477-12480; 3912; H.2:23778 (listing  
9           sensitive populations near the Project). Windows and doors could also be weather-proofed to  
10          increase the efficiency of the air filters. *See, e.g.*, AR H.2:22680. Additionally, the construction  
11          of an indoor recreation facility outfitted with air filters would provide a safe place for exercise in  
12          clean air for community members, students, and residents at the Villages. These measures would  
13          reduce health risks for community members and protect sensitive populations near the Project.  
14          Furthermore, these measures would not impact the operations of the SCIG railyard or undermine  
15          the Project's objectives.

16           **B. The EIR's Reduced Project Alternative to the Project is a Less Discriminatory**  
17           **Alternative that Achieves the Project's Goals**

18          The Reduced Project Alternative described in the EIR is another less discriminatory  
19          alternative that would achieve the Port's objectives with fewer negative impacts on the  
20          surrounding community. As part of this alternative, a railyard would be built at the same site to  
21          handle approximately 1.85 million twenty-foot shipping container units per year (instead of the  
22          2.8 million units associated with the proposed SCIG Project). AR D:12992–12993.

23          The Port's EIR identified the Reduced Project Alternative as the Environmentally  
24          Superior Alternative. AR D:6567. The Port admits that the magnitude of significant, adverse  
25          impacts from the Reduced Project Alternative would be less severe than those from the selected

Project. AR D:13056; 6567; 13161. Furthermore, the Reduced Project Alternative would meet all of the Port's Project objectives. See AR D:3919–3920; C:3849–3850. The Port's stated goals include adding near-dock capacity to address projected demands, but do not specify a minimum level of capacity. Furthermore, as discussed above, the Port concludes that no capacity is needed for decades; thus, a reduced capacity would not be a limiting factor in achieving the Project's stated goal of addressing projected cargo demands nor its other goals.<sup>22</sup>

**C. A Delayed Project is a Less Discriminatory Alternative that Achieves the Project's Goals**

The Port could also lessen the disparate impacts of the Project by delaying its construction, while still achieving the Project's objectives. As noted above, the Port's future throughput is not likely to exceed capacity until shortly before 2035. AR D:12337–12339. Acting conservatively, the Port could delay construction of the SCIG until shortly before the railyard is actually needed. AR D:12394 (construction would take 3 years). This would avoid creating about almost two decades' worth of air pollution and associated health risks. Moreover, cleaner technologies such as the Tier 4 locomotive and zero-emission trucks described above will be even more fully integrated into the Port's and BNSF's operations by 2035, meaning that once operational, the Project would have fewer adverse impacts. In addition, since this alternative would simply delay the Project, it would be equally effective in increasing Port capacity and achieving the other Project objectives.<sup>23</sup>

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<sup>22</sup> The Port, however, disregarded this option and justified its decision by claiming that BNSF would not invest in the Reduced Project Alternative because it provides less return on BNSF's investment. AR C:3852. The relevant inquiry, however, is whether a less discriminatory alternative exists that would equally effectively achieve the Project's goals. If such a less discriminatory alternative exists, then the Port cannot move forward with the SCIG Project as currently designed.

<sup>23</sup> The Port claims that one of its objectives is to realize the efficiency benefits and claimed environmental benefits of a near-dock railyard, not just when the Port needs the additional

(footnote continued on next page)

1       **D. Building a Railyard On-Dock is a Less Discriminatory Alternative that Achieves the**  
2       **Project’s Goals**

3       Building a railyard on-dock at the ports—instead of at the SCIG site—is another viable,  
4       less discriminatory alternative. Instead of trucks transporting cargo from port terminals to a  
5       railyard at the SCIG site and near the community, trucks would transport cargo within the port  
6       complex to an on-dock railyard. As noted above, 8.7% of the residential cancer risk and 61.7%  
7       of the increased chronic health index from the SCIG will be caused by emissions from Project-  
8       related truck traffic. AR D:7089. With an on-dock rail alternative, the impacts of this traffic and  
9       all the other air emissions from the Project would be farther from the community of color  
10       surrounding the Project.

11       On-dock rail would also meet the Project’s objectives. It would “meet the demands of  
12       current and anticipated containerized cargo” and “provide maximum intermodal capacity,” *and*  
13       result in significantly less air pollution and other harmful impacts. While narrowly viewed, the  
14       on-dock alternative would not meet the objective of “construct[ing] a near-dock intermodal rail  
15       facility” because it would be on-dock instead of near-dock, it *would* meet the underlying  
16       rationale for that stated objective, as well as *all* the other objectives. Thus, it should nonetheless  
17       be considered an effective less discriminatory alternative.

18       The record shows that the Port initially considered an on-dock railyard as an alternative

19       \_\_\_\_\_  
(footnote continued from previous page)  
20       capacity in the future, but to also realize those benefits sooner, with existing cargo levels. AR  
21       C:3920; 3849–3850. It is clear, however, that the Project will not in fact result in the  
22       environmental benefits that the Port claims. *See* discussion above of disproportionate significant  
23       impacts on the local community; Petrs. CEQA Brief at pp. 31–35, 38–43. If there is a less  
24       discriminatory way to achieve the efficiency benefits, the Port is prohibited from moving  
25       forward with the Project. There are other approaches the Port can take to achieve these  
efficiencies in the near-term, such as increasing on-dock rail, including building an on-dock rail  
yard. *See* discussion below. Thus, a delayed project, on its own or in conjunction with the  
alternative of increased on-dock rail, is an effective, less discriminatory alternative to the Project.

1 to the SCIG. The Port’s consultant conducted an initial analysis, comparing the on-dock  
2 railyard<sup>24</sup> with the SCIG. H.7:106115–106122; *see also* H.7 106606; 106592–106621 (Port  
3 study stating that the “TIJIT project appears to have merit in that it provides much needed  
4 intermodal terminal capacity in a location that potentially minimizes adverse environmental  
5 impacts.”). The on-dock railyard would have a similar acreage and activity level as the proposed  
6 SCIG site, cost about \$180 million more than the SCIG (which costs \$500 million), and require a  
7 few additional years to comply with the applicable environmental laws (since federal  
8 environmental laws would apply) and construct. AR H.7:106116–106117; *see also* AR  
9 D:15371–15372 (TIJIG “would resemble the proposed Project in size and capacity  
10 (approximately 1.5 million containers per year)” and “operate in a manner similar to the  
11 proposed Project”). The TIIG analysis noted that the on-dock alternative, unlike the SCIG,  
12 “[w]on’t have a West Long Beach community and several hot spots within 500 feet.” AR  
13 H.7:106117.

14 Despite this promising analysis, the Port failed to move forward with a full evaluation of  
15 on-dock rail, apparently for political reasons. A letter from Port Commissioner Freeman asked  
16 the Mayor of Los Angeles for his help in convincing BNSF that the TIIG analysis was not an  
17 attempt to kill BNSF’s SCIG project. This correspondence suggests that the Port had a political  
18 desire to accommodate BNSF’s preference to move forward quickly with the SCIG, regardless of  
19 comparable project alternatives. H.7:110065–110066; 105392 (Port consultant noting “how  
20 stressful this was from both scheduling and from discomfort with the fear of having to support  
21 such an important decision on a less than ideal evaluation”). The Port’s EIR, finalized years

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22 <sup>24</sup> The on-dock railyard is often referred to as the Terminal Island Intermodal Gateway (TIIG),  
23 Terminal Island Joint Intermodal Gateway (TIJIG), or Terminal Island Joint Intermodal Terminal  
24 (TIJIT). AR H.7:106197–99.

1 later, dismisses the TIIG and fails to fully analyze it as an alternative. AR D:3969.<sup>25</sup>

2 The four less discriminatory alternatives discussed above meet the Port's objectives  
3 without rendering the surrounding community an environmental sacrifice zone. In addition,  
4 combinations or subsets of these alternatives would be less discriminatory. All would  
5 accomplish the Port's goals as well as the SCIG but with less adverse disparate impacts.  
6 Because at least one equally effective, less discriminatory alternative exists, moving forward  
7 with the Project as proposed violates Section 11135.

## 8 **V. Plaintiffs Have Standing**

9 In the attached declarations, Plaintiffs establish they have standing under Section 11135.  
10 Plaintiffs and their members within one mile of the Project will be injured by the Port's approval  
11 of the Project's construction and operation, and the relief sought will redress this harm. *See*  
12 *Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 997 [24  
13 Cal.Rptr.3d 474, 477] (discussing standing in the context of section 11135).

## 14 **CONCLUSION**

15 The Port's Project Approvals for the SCIG violate the civil rights of the community of  
16 color within one mile of the Project. The Port concedes that construction and operation of the

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17 <sup>25</sup> The Port asserts several unavailing arguments in claiming that an on-dock railyard is not  
18 feasible. First, the Port suggests that the on-dock railyard is not feasible because it would need  
19 to be built on a landfill. AR D:3969. The Port, however, has built new terminals and other  
20 operations on landfill many times by obtaining landfill credits, which can be readily purchased,  
21 and, regardless, the record indicates the Port either already had or could obtain the needed credits  
22 through either purchase or from coordinating with the Port of Long Beach. AR H.7:105382;  
23 105386; 106116; 106119–21; 106601;106603. Second, the Port argues that an on-dock railyard  
24 would clog the Port's rail infrastructure. AR D:3971–3972. A closer look at the studies relied on  
25 by the Port, however, reveals that they are based on outdated and overestimated cargo forecasts.  
These studies also assume certain port development projects that would have increased rail cargo  
volumes, which did not in reality get implemented. AR D:12337. Furthermore, the Port failed to  
explore any infrastructure improvements that could alleviate any congestion problems caused by  
an on-dock railyard.

1 SCIG will significantly degrade air quality, resulting in increased health risks—including cancer  
2 risks—for the nearby community. These impacts will disproportionately burden the people of  
3 color who live within one mile of the Project site as compared to the general population, in  
4 violation of Section 11135's prohibitions. The Port has not demonstrated a substantial legitimate  
5 need for the Project, and, even if it could, that need could be met by less discriminatory  
6 alternatives. As a beneficiary of State funds, the Port must comply with Section 11135. Because  
7 its Project Approvals do not, Plaintiffs seek declaratory and injunctive relief, enjoining the  
8 Project as currently proposed.

9 DATED: February 27, 2015

NATURAL RESOURCES DEFENSE COUNCIL

10  
11 By:

12   
MORGAN WYENN

13 Attorney for East Yard Communities For  
14 Environmental Justice; Coalition For Clean Air;  
15 and Natural Resources Defense Council, Inc.  
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