CALIFORNIA
AIR RESOURCES BOARD

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Re: World Logistics Center Revised Final Environmental Impact Report (SCH # 2012021045)

Dear Mr. Armijo:

The California Air Resources Board (CARB) has reviewed the World Logistics Center (WLC or project) Revised Final Environmental Impact Report (RFEIR). CARB appreciates the opportunity to comment on the RFEIR. Unfortunately, despite revisions, the RFEIR mischaracterizes (1) the scope of the Cap-and-Trade Program administered by CARB as they relate to the state's overall greenhouse gas reduction mandates, and (2) how that program may be relevant to a CEQA analysis. Because the RFEIR's GHG analysis relies almost entirely on those mischaracterizations for its GHG analysis and significance determination, it does not meet California Environmental Quality Act (CEQA) requirements.

The RFEIR's core flaw with regard to greenhouse gases (GHGs) is that it declines fully to analyze or mitigate emissions from fuel and electricity demand that the project will cause - the vast majority of the project's emissions - on the ground that CARB's Cap-and-Trade Program purportedly "covers" the project's emissions for this purpose. In fact, the Program does not, and was never designed to, adequately address emissions from local projects and CEQA does not support a novel exemption for such emissions on this ground. The RFEIR's approach obscures the project's significant potential contribution to greenhouse gas emissions, and does not properly account for the combination of federal, state, and local approaches to address climate change that the crisis demands and the law requires.

We also note that the project still has not been modified to address serious health concerns from criteria and toxic air pollutants that CARB discussed in prior letters. Although this letter focuses on GHGs, we continue to be very concerned that local communities may face undue pollution from this project, if completed, as a result of inadequate mitigation.

We urge the City of Moreno Valley (City) to address the criteria and toxics issues we previously raised, and to revise its GHG analysis to accurately account for all GHG emissions that would result from the project, apply those emissions against the applicable significance threshold identified in the RFEIR, adopt feasible mitigation to

ensure those emissions would not cause significant impacts, and recirculate the RFEIR, all as required by CEQA.

I. CARB's Participation in This Project's Review Process

CEQA requires analysis of a project's GHG emissions. Like all CEQA analyses, these disclosures must inform the public and provide appropriate information on mitigation. Planning for greenhouse gas reductions is critical at the project level, as CARB and other state agencies have repeatedly determined. Although various statewide programs address the climate change crisis as well, the CEQA guidelines, and state guidance documents, are clear that achieving the necessary reductions requires project-level focus.

The WLC project proponents have taken a different view in prior versions of the RFEIR and in related litigation, *Paulek v. City of Moreno Valley* (Riverside County Superior Court Case No. RIC 1510967) (*"Paulek"*). That case addresses, among other topics, the initial GHG analysis conducted for the WLC, and in the RFEIR. There, WLC advocates contended that, because some of the suppliers of the fuels and electricity consumed by the project are in the Cap-and-Trade Program CARB administers, the project was not required to analyze or mitigate the significant emissions impacts it would cause. Attorneys for the WLC also argued that because CARB did not specifically object to the project's GHG significance methodology, CARB "apparently had no problem with the EIRs not counting capped emissions against the [WLC] in order to determine the significance of greenhouse gas emissions."[1]

CARB had, in fact, recommended an array of project-based emissions reductions strategies contrary to these claims. CARB takes this opportunity to reiterate those recommendations (prior letters are attached) and to explain why the Cap-and-Trade Program's operations do not allow a departure from CEQA's general rule that project-level impacts be properly addressed.[2]

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[1] Transcript of January 22, 2018 hearing in *Paulek* case, before Hon. Sharon J. Waters, page 18, Lines 3-7.

[2] In both of CARB's comment letters, which we again incorporate by reference, CARB indicated that its recommendations were for the purpose of reducing not only criteria and toxics pollutants, but also for GHG emissions. CARB reviewed the Draft Environmental Impact Report (DEIR) and provided comments to the City of Moreno Valley in a letter dated April 16, 2013. CARB's comment letter expressed concern over the increase in health risk in the immediate area and the significant and unavoidable air quality and greenhouse gas (GHG) related impacts caused by the proposed WLC. To address those concerns, CARB recommended actions to support the development, demonstration, and deployment of zero and near-zero emission technology at the WLC. On June 8, 2015, CARB again provided comments on the Final Environmental Impact Report (FEIR), making similar recommendations. In those comments, CARB noted that the FEIR was unresponsive to the comments CARB provided in its April 16, 2013 letter regarding the DEIR. (See CARB April 16, 2013 letter at 2; CARB June 8, 2015 letter at 1, 3, and 8.)

II. The RFEIR's Claims About CARB's Cap-and-Trade Regulation Are Incorrect

CEQA translates between high-level policy goals, and individual project choices to better inform the public and support decision-making. The GHG section of the RFEIR takes a novel, and factually unsupported, departure from ordinary CEQA practice by essentially excusing analysis and potential mitigation of GHG emissions when they are indirectly "covered" by a state program. Yet, state programs regularly address at least some aspect of essentially all CEQA impact areas – from state water pollution standards to habitat conservation laws to building codes to endangered species mandates, projects are always considered against a backdrop of state rules. In the ordinary course, the presence of state programs is not taken simply to "cover" the relevant project level impact. On the contrary, CEQA requires project proponents to inquire as to how the project affects environmental resources of statewide concern and to focus on project-level analysis and mitigation. The same rule applies with regard to greenhouse gases. As the California Supreme Court has held, "[l]ocal governments thus bear the primary burden of evaluating a land use project's impacts on greenhouse gas emissions."[3]

Project proponents may refer to statewide analyses and programs, but, as the Court held, ultimately must provide "substantial evidentiary support" explaining how project-level decisions relate to state-level programs to justify findings of significance based on those programs.[4] This is particularly important for new projects, as, per the Court, "a greater degree of reduction may be needed from new projects than from the economy as a whole."[5] And these projects may not simply point to *any* statewide regulations; on the contrary, "[a] significance analysis based on compliance with such statewide regulations ... only goes to impacts within the area governed by the regulations."[6]

In this instance, the Cap-and-Trade Program simply does not cover the project, or require it do anything to mitigate its emissions. As the Court explained, CARB has not "propose[d] statewide regulations of land use planning, but relies instead on local governments." (*Id.* at 230).

CARB has expressed its non-binding views on these matters via the Scoping Plans it is required to prepare under AB 32. The California Supreme Court has recognized the

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CARB was not silent. Moreover, an inference from silence would be improper, in any event. CARB sometimes does not comment on individual projects' GHG or other analyses due to resource constraints and other considerations. Nothing should be inferred from silence on a particular matter.

[3] *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 230).

[4] *Id.* at 226-230.

[5] *Id.* at 225.

[6] *Id.* at 229.

Scoping Plan as a valuable source of data for local governments.[7] As each version of CARB's Scoping Plan, including the recent 2017 Scoping Plan Update, explains, on the basis of extensive modeling and analysis, the Cap-and-Trade Program is not intended to address project-level impacts and does not do so. Rather, complementary measures, including land-use planning and project-level analyses, are vital adjuncts to the Cap-and-Trade Program, serve additional purposes to address climate change, and, if neglected, put undue and unanticipated pressure on the Program. The RFEIR's analysis would thus make the problem it purports to analyze even worse; if followed generally, it would result in development patterns and mitigation choices that would lessen the state's ability to address climate change, and would contribute to cumulatively considerable impacts.

Rather than address project-level emissions, the Cap-and-Trade Program covers activities related to electricity generation, natural gas supply, oil and gas extraction, refining, and transportation fuel supply and combustion. The points of regulation are the operators of electricity generating plants, natural gas fuel suppliers, operators of oil and gas extraction facilities, refinery operators, and transportation fuel suppliers at the rack. *See* Tit. 17, Cal. Code Regs., § 95811. The Program also addresses GHG emissions in aggregate at the state level and is not intended nor designed to mitigate greenhouse gas from, or otherwise inform, local land use decisions. Without adequate analysis and mitigation, local jurisdictions may not appropriately consider the greenhouse gas implications of their decisions, conflicting with a core CEQA principle of promoting informed decisionmaking. Rather, demand for fuels and electricity created by poorly-planned local projects creates unnecessary demand on the Cap-and-Trade system, potentially raising prices in the system and making statewide compliance more difficult.

These impacts could be substantial because the transportation sector is the state's largest source of GHG emissions (as well as criteria and toxic pollutant emissions, as we have previously addressed with regard to this project). The recently released California Greenhouse Gas Emission Inventory – 2018 Edition shows that while the state's overall GHG emissions declined from 2015 to 2016, the emissions in the transportation sector increased 2 percent over that same time period.[8] This increase was driven by increases in fuel purchases and use. To effectively achieve the State's GHG target, both production and demand for energy and fuels must be addressed. The

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[7] As the California Supreme Court has held "CEQA requires public agencies...to ensure that such analysis stay in step with evolving scientific knowledge and state regulatory schemes." The Court viewed the Scoping Plan as a particularly useful source of information, given the extensive study and public participation involved in its preparation. (*Cleveland National Forest Foundation v. San Diego Ass'n of Governments* (2017) 3 Cal. 5th 497, 504.) A recent article provides a useful primer on this body of law. (*See* Janill Richards, *The SANDAG Decision: How Lead Agencies Can "Stay in Step" with Law and Science in Addressing the Climate Impacts of Large-Scale Planning and Infrastructure Projects* (2017) 26:2 Environmental Law News 17))

[8] See https://www.arb.ca.gov/cc/inventory/pubs/reports/2000_2016/ghg_inventory_trends_00-16.pdf.

Legislature recognized this need with regard to electricity when passing SB 350 (Stats. 2015 Ch. 547, De León) to increase the Renewable Portfolio Standard and double energy savings. A similar approach is needed for transportation sector emissions. State-level production side policies such as the Renewable Portfolio Standard, Low Carbon Fuel Standard, and Cap-and-Trade Program cannot alone achieve the State's GHG reduction targets.

In this instance, the RFEIR not only improperly relies on the Cap-and-Trade Regulation; it also fails fully to address consistency with the local measures that *do* more clearly apply. There are a suite of potential emissions reduction strategies identified in the 2017 Scoping Plan aimed at reducing GHG emissions from on-road vehicle travel (e.g., fuel economy standards, technology advancements, SB 375[9]), and the majority of such emissions are not covered in any way by the Cap-and-Trade program.

The City chose not to analyze the project's consistency with the applicable Regional Transportation Plan (RTP), for example, which is subject to GHG emissions reduction targets set by CARB pursuant to SB 375. The City asserted that the RTP does not apply to this project (Table 4.7-11, page 4.7-41 of the RDEIR). We disagree, and suggest that a more appropriate analysis would be whether the project's GHG emissions from on-road transportation would be consistent with, or conflict with, assumptions in the applicable RTP found to comply with SB 375. The city might also refer to the additional nonbinding recommendations offered in CARB's Scoping Plan, though the application of these recommendations, if used, depend on the circumstances of a particular project.

We discuss these points in more detail below.

A. The Cap-and-Trade Regulation Was Never Designed to Achieve All Necessary GHG Reductions From Land Use and Logistics Planning.

The Cap-and-Trade Program was designed from the start as one of a diverse suite of measures, some statewide and some local, to move California toward achieving its GHG targets. To understand the Cap-and-Trade Program's purposes and limitations, the Scoping Plan provides helpful context. The Cap-and-Trade Program covers about 80 percent of all GHG emissions in California.[10] Crucially, just because emissions are "covered" by Cap-and-Trade does not mean all of those emissions from any particular covered entity are mitigated or reduced. It simply means they are included in the cap.

[9] SB 375 (Steinberg, Statutes of 2008).
[10] Scoping Plan at ES16.

Thirty-nine percent of California's GHG emissions come from the transportation sector, including logistics-related transportation (like the WLC would involve).[11] Another 19 percent of the state's GHG emissions comes from electricity generation.[12] In addition to Cap-and-Trade, the Scoping Plan includes various other CARB measures, some of which also address transportation and electricity sector emissions, including SB 350, the Low Carbon Fuel Standard, the Mobile Source Strategy, and the Sustainable Freight Action Plan. In addition to the other complementary Scoping Plan measures, the Scoping Plan also clearly states that "[l]ocal government efforts to reduce emissions within their jurisdiction are critical to achieving the State's long-term GHG goals."[13]

The RFEIR's GHG methodology departs from this science, and has enormous implications for other projects across the state: it would amount to a determination that massive logistics centers, sprawling far-flung residential developments, and other types of remote greenfield development need not do anything to address and mitigate their GHG emissions because those emissions are already "taken care of" by the Cap-and-Trade Program. This is simply not true.

B. The Cap-and-Trade Regulation Is Not Intended to Bear the Burden of Achieving the State's Transportation and Energy Sector GHG Goals Alone.

Cap-and-Trade is not intended to achieve California's climate goals on its own. Rather, Cap-and-Trade is designed to motivate behavior by capping and pricing carbon at the regulated entity level – that is, at the industrial facility and fuel/energy supplier level. It does not send a direct price signal to developers of land use or logistics projects. This means, if CEQA and other "checks" on unsustainable development are weakened as the WLC analysis proposes, such development would simply continue without direct cost to the developers, while adding market demand without mitigating the WLC's emissions.

Moreover, if land use development does not account for GHG emissions, more and more of our state's carbon "cap" would be taken up by increasing transportation emissions. Developers do not receive a price signal from Cap-and-Trade, meaning that there will be no clear incentive to alter this pattern, even as it impacts the Cap-and-Trade system. Thus, the prices of compliance instruments under the Cap-and-Trade Program would increase at a higher rate than was contemplated when CARB developed the Cap-and-Trade Program. This would eventually cause a greater cost burden than

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[11] As noted above, transportation-related GHG emissions have increased, from 37% in 2015, to 39% in 2016. See CARB, *California Greenhouse Gas Emissions for 2000 to 2016, Trends of Emissions and Other Indicators* (July 2018) at 1 (available at https://www.arb.ca.gov/cc/inventory/pubs/reports/2000_2016/ghg_inventory_trends_00-16.pdf); see also Scoping Plan at ES1.
[12] Scoping Plan at ES1.
[13] Scoping Plan at 99.; see also page 101.

anticipated, and it would be borne by all Californians rather than dealt with during the project design phase. Properly-designed local policies, by contrast, may account for GHG emissions of development in a direct way—which furthers the equity objectives of AB 32, complements Cap-and-Trade, and better achieves California's climate goals.

C. There Is No Substantial Evidence Showing that the Project's Transportation and Electricity Related Emissions Would Actually Be Mitigated.

In the face of these substantial difficulties, the RFEIR does not articulate substantial evidence demonstrating a rational connection to the Cap-and-Trade Program – and that connection is badly attenuated, as we have explained. The project developer in this instance is claiming it may do nothing with regard to fuels and electricity, and will rely on reductions other entities may achieve. This is not the tight evidentiary connection required by the Supreme Court and by CEQA, and it is not consistent with the State's GHG reduction programs.

The Final Statement of Reasons (FSOR) prepared when section 15064.4 of the CEQA guidelines, concerning GHGs, was promulgated demonstrates that to properly rely on subsection (b)(3), concerning compliance with statewide programs, a project must demonstrate *with evidence in the record* how the regulations of GHG emissions would actually address the emissions that result from the project. That document states:

> Reading section 15064.4 together with 15064(h)(3), however, to demonstrate consistency with an existing GHG reduction plan, a lead agency would have to show that the plan actually addresses the emissions that would result from the project. *Thus, for example, a subdivision project could not demonstrate consistency with the ARB's Early Action Measures because those measures do not address emissions resulting from a typical housing subdivision.* (ARB, Expanded List of Early Action Measures to Reduce Greenhouse Gas Emissions in California Recommended for Board Consideration, October 2007; see also State CEQA Guidelines, §§ 15063(d)(3) (initial study must be supported with information to support conclusions), 15128 (determination in an EIR that an impact is less than significant must be briefly explained).)[14]

Here, there is no evidence in the RFEIR regarding who is responsible for complying with Cap-and-Trade for all the GHG emissions at issue in this case – and it certainly is not the project itself. The project is a logistics facility, with trucks involved in interstate commerce, and it is not covered by that Program. Indeed, there is no basis for the

[14] See Natural Resources Agency, Final Statement of Reasons for Amendments to the State CEQA Guidelines
Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB97 (December 2009) at 27 (emphasis added).

RFEIR's conclusion that the fuel for all of the vehicles serving the project would be covered under the Cap-and-Trade regulation, since it is not clear that all of these vehicles would even purchase their fuel in California.

D. The Project Fails to Account for the Duration of the Project Compared to the Duration of the Cap-and-Trade Program.

The RFEIR states the project's buildout year is 2035,[15] yet the GHG analysis seems to stop after 2035. This raises multiple problems for the RFEIR analysis.

First, it is unclear why the analysis stops at buildout, when GHG emissions (and other environmental impacts) would continue into the indefinite future – at their highest levels – once full operations begin. Without further analysis throughout the project's anticipated life (which does not appear to be stated in the RFEIR but, presumably, would be at least 30 years after buildout), the analysis is incomplete and dramatically understates the project's GHG emissions. This also means the project would likely place a much higher burden on the Cap-and-Trade program than disclosed in the RFEIR – a burden that, as described above, is pushed onto all Californians instead of the project developer as a result of the project's failure to mitigate the vast majority of its GHG emissions.

Second, the RFEIR fails to account for, or even consider, the fact that the current Cap-and-Trade regulation extends only to 2030 – which is five years *before* the project's full buildout is achieved. This means that the RFEIR has no plan whatsoever to account for its GHG emissions once the project is fully built out. The RFEIR also does not address the inconsistency between the project's GHG emissions and Executive Order S-03-05, which, among other things, establishes a state GHG reduction target to reduce GHG emissions to 80 percent below 1990 levels by 2050.[16] The California Supreme Court has emphasized the importance of California's GHG targets in selecting appropriate CEQA thresholds.[17] Despite these considerations, there is no substantial evidence in the record to ensure that *any* of the project's post-buildout operational emissions are mitigated by the Cap-and-Trade program.

E. The Project Fails to Include a Backstop In Case Cap-and-Trade is Altered.

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[15] Revised FEIR at 3-1.

[16] See Governor's Executive Order No. S-03-05 (June 1, 2005) (available at http://static1.squarespace.com/static/549885d4e4b0ba0bff5dc695/t/54d7f1e0e4b0f0798cee3010/1423438304744/California+Executive+Order+S-3-05+(June+2005).pdf); see also Governor's Executive Order No. B-30-15 (April 29, 2015) (available at https://www.gov.ca.gov/2015/04/29/news18938/).

[17] See *Cleveland Nat'l Forest Found. v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497 at 516-519.

In addition to its other evidentiary flaws, the RFEIR does not analyze how the analysis would change, and how the project's significant GHG impacts would be mitigated, if Cap-and-Trade were revised in a way that affects the state's GHG levels. In other words, the RFEIR's approach puts an almost complete reliance on the Cap-and-Trade Program in ways that, if adopted generally, would considerably affect the Program, and then fails to consider the possibility that the Program might change even as the Project continues to exist. This could include, for example, a scenario in which:

- The Cap-and-Trade program ceased to exist, or
- If the scope of the program were limited to exclude fuels and electricity, or
- If the Legislature or other factors required the program to be amended in a way that allows a higher cap.

Rather than anticipating any of these or other potential contingencies and building in an appropriate backstop to ensure the project's GHG emissions are mitigated below significance, the RFEIR instead blindly relies on the current Cap-and-Trade Program, with no further commitments or requirements. As a result, the RFEIR fails to provide substantial evidence supporting its conclusion that the project will result in less than significant GHG emissions, while forwarding an analysis that, if accepted, would make the state significantly less able to address climate change impacts resulting from its built infrastructure.

III. The RFEIR is Inconsistent with CEQA Requirements.

The RFEIR's multiple errors with regard to the Cap-and-Trade Program render it contrary with CEQA law. The RFEIR misapplies the key CEQA Guideline, section 15064.4(b), which provides in pertinent part:[18]

(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

[18] CEQA Guidelines § 15064.4(b) (emphasis added).

> 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.*

Thus, the CEQA Guidelines focus on project-level compliance and project-level impacts. State programs are available for consideration, but they are not held out as a panacea, for GHGs any more than for any other resource area.

Yet, the RFEIR relies upon subsection (b)(3) of this provision to claim that emissions which are indirectly included under the "cap" created by the Cap-and-Trade Program (referred to in the RFEIR as "capped emissions") need not be analyzed and mitigated under CEQA. This approach would excuse all of the WLC's transportation and electricity related emissions, leaving the project only "on the hook" for analyzing and mitigating a tiny fraction of its emissions. The following sections explain why this approach is legally and factually flawed.

A. Subsection (b)(3) Itself Does Not Allow The Approach Used in the Revised Final EIR.

As noted above, subsection (b)(3) of CEQA Guidelines section 15064.4 can be used as a factor to assess GHG significance when "*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...." Here, the RFEIR concedes that the project is not subject to the Cap-and-Trade Regulation.[19] This in itself should be sufficient to demonstrate that subsection (b)(3) is inapplicable to the project, as "the project" does not "comply" with Cap-and-Trade at all.

B. The RFEIR's Hybrid Approach Used To Determine Significance Is Not Allowed.

In addition to improperly relying on subsection (b)(3), as described above, the RFEIR improperly attempts to create a "hybrid" significance scheme based on selectively combining subsection (b)(3) with the South Coast Air Quality Management District's (SCAQMD) bright-line threshold. As explained in the RFEIR, a potentially appropriate significance threshold in this case is the SCAQMD's 10,000 metric ton threshold.[20] The problem here is that the RFEIR does not compare the project's GHG emissions against this 10,000 metric ton threshold, and then mitigate those emissions to below that threshold to the extent feasible. Rather, the RFEIR simply subtracts from its emissions quantifications any GHG emissions that it deems to be "capped," and compares only the net "non-capped" emissions against the bright-line threshold.

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[19] See page 4.7-4.
[20] RFEIR at 4.7-21.

This approach is unsupported in law. Regardless of which threshold applies, CEQA requires lead agencies to "make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project."[21] CEQA then provides that the lead agency must consider "whether *the project emissions* exceed a threshold of significance the lead agency determines applies to the project."[22] Thus, even if subsection (b)(3) properly applied here (which it does not, as explained above), nothing in the CEQA Guidelines allows this hybrid approach of cherry-picking what emissions are applied to an otherwise-applicable bright-line threshold. The City has not even attempted to satisfy its burden of providing such substantial evidence. As noted elsewhere in this letter, Cap-and-Trade does not result in ton-for-ton mitigation of each metric ton covered by the program. Rather, it is a declining market-wide cap designed to achieve certain statewide goals – which, as explained elsewhere in this document, is not designed to mitigate all GHG emissions from land use and logistics facilities.

Because the REFIR fails to properly apply the vast majority of the project's GHG emissions to the applicable bright-line significance threshold, it also fails to mitigate those emissions, as it simply dismisses them as "less than significant". If the full scope of the GHG emissions attributable to the project were compared to the applicable bright-line threshold, the mitigated emissions would still be substantially over the threshold. CEQA requires that the project's significant GHG emissions must be mitigated to the extent feasible. Additional mitigation measures are available to further reduce the project's GHG emissions that were not considered due to the inappropriate exclusion of the majority of project-generated emissions from the analysis.

C. Reliance Upon *AIR v. Kern County* Is Improper.

While the RFEIR provides little support for the GHG significance approach it takes, the briefing for *Paulek* further explains the reasoning behind the project's GHG analysis. In those briefs, attorneys for the developer claim that an unrelated appellate ruling, the *AIR v. Kern County* decision[23] is relevant. That decision concerned CEQA analyses for sources actually covered by the Cap-and-Trade Regulation, but the claim is that it somehow applies not only to GHGs from projects that are directly subject to the Cap-and-Trade Regulation, but also to all transportation and electricity related GHG

[21] CEQA Guidelines § 15064.4(a).
[22] CEQA Guidelines § 15064.4(b)(2).
[23] *Association of Irritated Residents v. Kern County Board of Supervisors* (2017) 17 Cal. App. 5th 708. In CARB's view this case was wrongly decided as to the Cap-and-Trade issue, and it is certainly not apposite in this very different context.

emissions, the logic being that those emissions are technically included in the statewide "cap" on emissions. This is incorrect factually, for all the reasons discussed above.

It is also not a controlling case legally. The holding in *AIR v. Kern County* addressed whether it "is appropriate for a lead agency to conclude *a project compliance* [sic] *with the cap-and-trade program* provides a sufficient basis for determining the impact of the project's greenhouse gas emissions will be less than significant."[24] The project at issue in that case was a refinery that was directly subject to the Cap-and-Trade Regulation. The court did not address the broader question of whether *all* GHG emissions from resources that are indirectly covered by Cap-and-Trade, at some undefined upstream point, may be cast aside as less than significant. Here, as noted above, the WLC is *not* subject to the Cap-and-Trade regulation. It therefore does not "comply" with the Cap-and-Trade program, and is distinguishable from the project at issue in *AIR v. Kern County*.

C. Reliance Upon Obscure 2013 Negative Declarations and a Policy Document from Another District Is Similarly Uncompelling.

The RFEIR itself also attempts to justify excluding "capped emissions" from its significance analysis by referencing two seemingly cherry-picked 2013 mitigated negative declarations,[25] and one 2014 guidance document from the San Joaquin Valley Air Pollution Control District (SJVAPCD) titled Policy APR-2025. The RFEIR does not explain why it chose to follow the methodology allegedly used in two obscure mitigated negative declarations and in a 2014 policy document from an air district in a different air basin, rather than following traditional CEQA GHG analysis and mitigation principles. Furthermore, the primary SJVAPCD guidance documents regarding analyzing and mitigating GHG emissions under CEQA make no mention of Policy APR-2025, including the guidance documents relied upon in the *AIR v. Kern County* decision.[26]

To the extent the RFEIR is considering what other air districts have done, it is worth noting that the California Air Pollution Control Officers' Association (CAPCOA) has considered a range of potential CEQA significance thresholds, none of which summarily

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[24] *AIR v. Kern County* at 743 (emphasis added).

[25] The Revised FEIR only cryptically references these MNDs, without citations or links to the documents, and without any other information explaining the basis for their CEQA significance approach. The RFEIR's failure to include or adequately reference these mitigated negative declarations hampers the public's ability to review and comment on the RFEIR.

[26] See, e.g., *AIR v. Kern County* at 743-744; see also http://www.valleyair.org/transportation/GAMAQI_3-19-15.pdf; http://www.valleyair.org/transportation/GAMAQI_3-19-15.pdf; and http://www.valleyair.org/Programs/CCAP/12-17-09/3%20CCAP%20-%20FINAL%20LU%20Guidance%20-%20Dec%2017%202009.pdf.

exclude emissions that are indirectly included within the Cap-and-Trade program.[27] While that document was generated in 2008, it makes multiple references to the Cap-and-Trade program, and does not endorse simply subtracting all so-called "capped emissions" from GHG analyses.

D. Even If CEQA Guideline 15064.4(b)(3) Applied Here, The RFEIR Ignores Other Requirements in the CEQA Guidelines.

The sections above provide in-depth analysis regarding why subsection (b)(3) of CEQA Guideline 15064.4 does not allow this project to simply disregard the vast majority of its GHG emissions. Even if that subsection did apply, there are other deficiencies in the RFEIR's GHG analysis that must be addressed.

First, the CEQA Guidelines make clear that an agency cannot focus solely on a single significance consideration while ignoring other evidence or indicators showing potentially significant impacts. For example:

- Section 15064.4(b) states that "[a] lead agency should consider the following factors, *among others*, when assessing the significance of impacts from greenhouse gas emissions on the environment."
- Section 15064.4(b)(3) provides in pertinent part: "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."
- Section 15064(h)(3) provides: "If there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding that the project complies with the specified plan or mitigation program addressing the cumulative problem, an EIR must be prepared for the project."'

As discussed in depth above, there is evidence in this record showing significant GHG impacts that were not analyzed or mitigated in the RFEIR. CEQA does not allow these impacts to be overlooked, even if the lead agency believes the project's GHG emissions would be less than significant under one particular (and here, improper) significance metric.

IV. Criteria Pollutants and Toxic Emissions Must Still Be Considered

In its 2013 and 2015 comment letters, CARB noted its substantial concerns regarding the project's air pollutant and toxics emissions, and suggested several feasible means of reducing the significant impacts from those emissions. These emissions raise

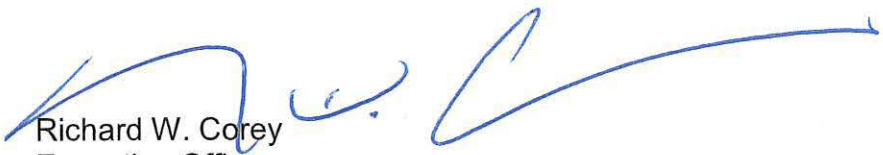
[27] See CAPCOA, CEQA & Climate Change (January 2008). Available at http://www.capcoa.org/wp-content/uploads/downloads/2010/05/CAPCOA-White-Paper.pdf.

substantial local exposure and environmental justice concerns, as Moreno Valley already suffers from very substantial air pollution exposures. These exposures would likely be worsened without appropriate mitigation measures.[28] CARB incorporates the comments from those letters into this letter by reference, and strongly recommends that the RFEIR be revised to incorporate all mitigation recommended in its 2013 and 2015 comment letters.

V. Conclusion

While the WLC has enormous GHG implications in itself, the attention this project has received, and the recent legal developments in the emerging *AIR v. Kern County* and *Paulek* line of cases, demonstrate that the City's decisions in the RFEIR have implications beyond the WLC project as well. The City should revise its GHG analysis to accurately account for all GHG emissions that would result from the project, apply those emissions against the applicable significance threshold identified in the RFEIR, and adopt feasible mitigation to ensure those emissions would not cause significant impacts, as required by CEQA.

Sincerely,



Richard W. Corey
Executive Officer

[28] On these issues of acute local exposure, especially to roadway emissions, and the importance of fully addressing these sources of risk, see Ann Carlson, *The Clean Air Act's Blind Spot: Microclimates and Hotspot Pollution* (2018) 65 UCLA L. Rev. 1036.