

Law Offices of
Stuart M. Flashman
5626 Ocean View Drive
Oakland, CA 94618-1533
(510) 652-5373 (voice & FAX)
e-mail: stu@stufash.com

September 28, 2014

Hon. Tani Gorre Cantil-Sakauye,
Chief Justice
California Supreme Court
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102-4797

RE: Opposition to Request for Depublication of *Town of Atherton et al. v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314 – Rule of Court 8.1125(b).

To the Chief Justice and Associate Justices of the California Supreme Court:

I am writing on behalf of my clients, the Town of Atherton, the Cities of Menlo Park and Palo Alto, California Rail Foundation, Planning and Conservation League, Community Coalition on High-Speed Rail, Transportation Solutions Defense and Education Fund, Mid-Peninsula Residents for Civic Sanity, and Patricia Hogan-Giorni to oppose the requests for depublication of the above-referenced decision by the California Attorney General, the California Department of Transportation, and the North County Transit District.

My clients were the appellants in the above-referenced case, and I represented them both in the trial court and on appeal. While my clients are obviously not pleased that the Court of Appeal's upheld the trial court on the specific issues they had appealed under the California Environmental Quality Act ("CEQA"), they, and I, nevertheless believe that the case deserves to remain published for its discussion of whether the Interstate Commerce Commission Termination Act ("ICCTA") preempts application of CEQA to the California high-speed rail project.

The Court of Appeal's decision is the first published California appellate decision to address preemption under the ICCTA. For that reason alone, it deserves to be published. Further, it is the first published case *in any jurisdiction* to address the application of the market participant exception under the ICCTA. This gives the decision even greater importance.

This was not a decision that the court issued lightly. While the issue was not addressed in the trial court and was first raised in the Court of Appeal by the Attorney General herself¹, it received extensive briefing not only by the parties themselves but also by numerous amici curiae. Thus the Court of Appeal received the benefit of many hours of thought and effort to guide it in

¹ Perhaps ironically, earlier this year the Attorney General intervened, pursuant to Government Code §12606, in *Fast Lane Transportation, Inc. v City of Los Angeles et al.* (Contra Costa County Superior Court Case No. CIV NSN14-0300) to support enforcement of CEQA in a case where CEQA might similarly be argued to be preempted by the ICCTA. A copy of that motion is attached hereto as Exhibit A. Apparently, the Attorney General is not bothered by this inconsistency.

its deliberations. Further, the decision itself contains extensive discussion and explanation, making it of exceptional value in providing guidance for future decisions.

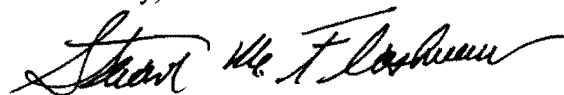
All of the letters requesting depublication argue that the decision was wrongly decided. They argue that the Court of Appeal erred in construing the legislature's and the voters' intent in creating and funding the High-Speed Rail Authority. If the Attorney General wished to press these points, her proper recourse was to petition for review, and the other agencies could have supported review. However, depublication is not intended to express the Court's opinion on the correctness of a decision. (Rule of Court 8.1125 subd. (d).)

The requests for depublication also assert that the Legislature did not intend that important state transportation projects be delayed by CEQA review or that CEQA plaintiffs be allowed to use the market participant exception to avoid preemption of their claims. These arguments involve balancing the environmental benefits of requiring CEQA review for major state transportation projects against the problems CEQA review might create for such projects. Such balancing of policy priorities, however, is appropriately left to the Legislature, not the courts. (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 122.) If the parties seeking depublication feel that major state transportation projects should not be subject to CEQA review, that argument should be addressed to the Legislature, which clearly knows how to exempt classes of projects from CEQA review when it feels such exemption is warranted. (See, e.g., Public Resources Code §21080.13 [exemption from CEQA of projects eliminating a railroad grade crossing], §21080.07 [exemption from CEQA of certain prison construction projects].)

The Court of Appeal's decision here satisfies multiple criteria for publication under Rule of Court 8.1105 subd. (c). Not only does it apply the market participant exception doctrine to an important category of cases under the ICCTA, but it also addresses the application of the doctrine to cases where the public interest would be served by allowing application of the market participant exception. (*Town of Atherton et al. v. California High Speed Rail Authority* (2014) 228 Cal.App.4th 314, 340, 341.) Depublication of the decision would deprive the legal community of an important decision that makes a significant contribution to the development of the law, not to mention one involving one of the largest public works projects in California's history. Further, this case will find application in many other public transportation projects in California, especially with the enactment of SB 375, with its emphasis on promoting public transit as an alternative to the private automobile.²

In conclusion, publication of the Court of Appeal's well-reasoned decision on the application of the market participant exception doctrine to preemption of the ICCTA is fully justified under the criteria set forth in Rule of Court 8.1105 subd. (c). The requests for depublication should therefore be denied.

Sincerely,

A handwritten signature in black ink, appearing to read "Stuart M. Flashman".

Stuart M. Flashman
Attorney for Appellants Town of Atherton et al.

² For example, *Friends of the Eel River et al. v. North Coast Rail Authority et al.*, consolidated cases A139222, A139235 (First District) [CEQA challenge to proposed rail project] where supplemental briefing was ordered specifically to address the *Town of Atherton* decision.

1 KAMALA D. HARRIS
Attorney General of California
2 SALLY MAGNANI
Senior Assistant Attorney General
3 SARAH E. MORRISON
Supervising Deputy Attorney General
State Bar No. 143459
4 300 South Spring Street, Suite 1702
Los Angeles, CA 90013
5 Telephone: (213) 897-2640
Fax: (213) 897-2802
6 E-mail: Sarah.Morrison@doj.ca.gov

7 *Attorneys for People of the State of California*
8 *ex rel. Kamala D. Harris, Attorney General*

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF CONTRA COSTA

11
12
13 **FAST LANE TRANSPORTATION, INC., a**
California corporation,

14 **Petitioner,**

15 **v.**

16 **CITY OF LOS ANGELES; CITY**
17 **COUNCIL OF THE CITY OF LOS**
18 **ANGELES; PORT OF LOS ANGELES;**
19 **LOS ANGELES BOARD OF HARBOR**
COMMISSIONERS; and DOES 1 through
20 **50, inclusive,**

21 **Respondents.**

22
23 **BNSF RAILWAY COMPANY, a Delaware**
corporation,

24 **Real Party in Interest.**

25 **AND RELATED CONSOLIDATED**
26 **CASES.**

Case No. CIV MSN14-0300 (Consolidated
with Case Nos. CIV MSN14-0308, MSN14-
0309, MSN14-0310, MSN14-0311, MSN14-
0312, MSN14-0313)

**PEOPLE'S NOTICE OF MOTION AND
MOTION FOR LEAVE TO INTERVENE;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF
SARAH E. MORRISON IN SUPPORT
THEREOF**

[CEQA CLAIM]

**[Code Civ. Proc., §§ 387 and 1094.5; Gov.
Code, § 12606; Pub. Resources Code, §
21167]**

Hearing Date:

Time:

Judge: Honorable Steve K. Austin

Dept.: 33

Actions Filed: June 5 and 7, 2013

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on _____, 2014, at _____,

3 in Department 33 of the Contra Costa County Superior Court, located at 725 Court Street,
4 Martinez CA 94553, the People of the State of California *ex rel.* Kamala D. Harris, Attorney
5 General (“People”), will move, and hereby do move the Court for leave to intervene in one of the
6 above-captioned consolidated actions pursuant to Code of Civil Procedure section 387,
7 subdivision (b). The People’s proposed Petition for Writ of Mandate in Intervention (“People’s
8 Petition”) is attached to this motion as Exhibit 1. The People’s Petition challenges a proposed
9 railyard project, known as the Southern California International Gateway Project, approved by
10 Respondents the City of Los Angeles, the Los Angeles City Council, the Los Angeles Harbor
11 Department, and the Los Angeles Board of Harbor Commissioners (collectively, “Respondents”)
12 under the California Environmental Quality Act (Pub. Resources Code, §§ 21000 *et seq.*)

13 This motion is based on the following grounds:

14 1. Pursuant to Government Code section 12606, the People, as represented by the
15 Attorney General, have an unconditional right to intervene in any judicial or administrative
16 proceeding in which facts are alleged concerning pollution or adverse environmental effects that
17 could affect the public in general. Such facts are alleged in the consolidated actions, including in
18 Case Number MSN14-0312.

19 2. The People have an unconditional right to intervene and must be permitted to
20 intervene as a matter of right pursuant to Code of Civil Procedure section 387, subdivision (b).

21 3. The People’s motion to intervene is timely and will not impair or impede the prompt
22 resolution of the issues presented in this action.

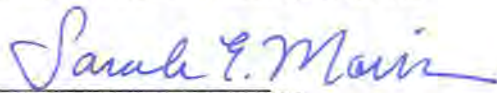
23 4. Based on the unconditional right of the People to intervene pursuant to Government
24 Code section 12606 and in accordance with Code of Civil Procedure sections 387, subdivision
25 (b), and 388, this Court should grant the People leave to intervene in one of the consolidated
26 actions, Case Number MSN14-0312.

1 This motion is based upon this notice, the People's Petition, the accompanying
2 Memorandum of Points and Authorities and the Declaration of Sarah Morrison in support of
3 motion, any matters of which the Court may take judicial notice, the pleadings on file with the
4 Court in this action, and such other matters which may be brought to the attention of this Court
5 before or during the hearing of this motion.

6
7 Dated: May 15, 2014

Respectfully submitted,

8 KAMALA D. HARRIS
9 Attorney General of the State of California
10 SALLY MAGNANI
11 Senior Assistant Attorney General

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13 SARAH E. MORRISON
14 Supervising Deputy Attorney General
15 Attorneys for the People
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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
2 **MOTION FOR INTERVENTION**

3 **INTRODUCTION**

4 Pursuant to Code of Civil Procedure section 387, subdivision (b), the People of the State
5 of California *ex rel.* Kamala D. Harris, Attorney General (“People”) seek to intervene in one of
6 the above-captioned consolidated actions, Case Number MSN14-0312, filed under the California
7 Environmental Quality Act (“CEQA”), Public Resources Code section 21000, *et seq.* and other
8 state laws. The People’s proposed Petition for Writ of Mandate in Intervention (“People’s
9 Petition”) is attached hereto as Exhibit 1. The People have an unconditional right to intervene in
10 actions in which facts are alleged concerning pollution and adverse environmental effects that
11 could affect the public in general. (Gov. Code, § 12606.) The petitioners¹ in the consolidated
12 proceedings allege that a new large railyard approved by Respondents the City of Los Angeles,
13 the City Council of the City of Los Angeles, the Los Angeles Harbor Department, and the Los
14 Angeles Board of Harbor Commissioners (collectively, “Respondents”) will result in air pollution
15 and other adverse environmental effects to the nearby communities. Therefore, the People should
16 be granted leave to file the People’s Petition.

17 **STATEMENT OF ALLEGED FACTS**

18 On or about June 5 and 7, 2013, Petitioners filed seven petitions for writs of mandate,
19 including the Petition for Writ of Mandate and Complaint for Injunctive Relief in Case Number
20 MSN14-0312 (“Initial Petition”), against Respondents in Los Angeles County Superior Court.
21 The petitions were consolidated for limited purposes, and the consolidated cases were transferred
22 to this Court in January 2014. The Initial Petition alleges that Respondents violated CEQA by
23 approving a new railyard, known as the Southern California International Gateway project

24 _____
25 ¹ The petitioners in these consolidated actions include the South Coast Air Quality
26 Management District; the City of Long Beach; the Long Beach Unified School District; Natural
27 Resources Defense Council; East Yard Communities for Environmental Justice; Coalition for
28 Clean Air; Century Villages at Cabrillo; Elena Rodriguez; Evelyn Deloris Knight; [other
environmental petitioners]; Fast Lane Transportation, Inc.; California Cartage Company, Inc.;
Three Rivers Trucking Inc.; Los Angeles Harbor Grain Terminal; and San Pedro Forklift, Inc.
(collectively, “Petitioners”).

1 (“SCIG railyard” or “Project”). The SCIG railyard will be an “inter-modal” facility at which
2 cargo containers are transferred from trucks to trains. The Project Site is located approximately
3 four miles from the Port of Los Angeles and Port of Long Beach (“Ports”), and is less than 1,000
4 feet from the West Long Beach residential community in the adjacent City of Long Beach,
5 including schools, a park, a day care center, residences, and the Villages of Cabrillo, a housing
6 community for veterans and homeless individuals and families. The residential community of
7 West Long Beach is already overburdened with air pollution, traffic and noise from trucks, trains,
8 and ships accessing the Ports. According to the California Air Resources Board (“ARB”), the
9 people living in communities near the Ports are at increased risk of health effects, including
10 cancer, asthma attacks, pulmonary disease, cardiovascular disease, and other health effects from
11 air pollution related to the Ports.²

12 The SCIG railyard, as proposed, will significantly increase the levels of air pollutant
13 emissions, such as particulate matter and nitrogen dioxide, impacting the overburdened
14 communities near the Ports, including the West Long Beach community. The air pollution from
15 the SCIG railyard combined with the other port-related emissions poses a serious increased risk
16 of cancer, respiratory illnesses, and other adverse health effects to the people who reside, work
17 and attend school in the West Long Beach community. The Initial Petition alleges that the
18 environmental impact report for the Project failed to adequately analyze the Project’s individual
19 and cumulative impacts, including impacts on air quality, transportation and traffic, noise, climate
20 change, inducement of growth, and aesthetics. (Initial Petition, ¶¶ 9 and 54.) The Initial Petition
21 also alleges that Respondents failed to adequately analyze feasible mitigation measures and
22 alternatives to mitigate the Project’s significant environmental impacts, including air quality,
23 climate change, and health impacts. (Initial Petition, ¶¶ 9 and 54.)

24 The People move to intervene to ensure that Respondents disclose and mitigate the
25 impacts of the SCIG Project in a manner that fully complies with CEQA.

26
27 ² State of California Air Resources Board, Diesel Particulate Matter Exposure Assessment
28 Study for the Ports of Los Angeles and Long Beach. (2006), pp. 2-4, available at
<http://www.arb.ca.gov/ports/marinevevss/documents/portstudy0406.pdf>

1 **THE PEOPLE SHOULD BE PERMITTED TO INTERVENE**
2 **AS A MATTER OF RIGHT**

3 The standard for intervention as a matter of right is contained in Code of Civil Procedure
4 section 387, subdivision (b): “If any provision of law confers an unconditional right to intervene .
5 . . . , the court shall, upon timely application, permit that person to intervene.”

6 The People, through the Attorney General, have an unconditional right to intervene in the
7 consolidated actions pursuant to Government Code section 12606, which provides that: “The
8 Attorney General *shall* be permitted to intervene in any judicial or administrative proceeding in
9 which facts are alleged concerning pollution or adverse environmental effects which could affect
10 the public generally.” (Emphasis added.) Government Code section 12606 is to be read in
11 conjunction with Public Resources Code section 21167.7, which requires service of all CEQA
12 pleadings on the Attorney General. CEQA’s service requirement “has the effect of informing that
13 office of the action and permits the Attorney General to lend its power, prestige and resources to
14 secure compliance with CEQA and other environmental laws” (*Schwartz v. City of*
15 *Rosemead* (1984) 155 Cal.App.3d 547, 561.) It is well established that “the Attorney General can
16 intervene in an action to enforce compliance with CEQA.” (*Id.* at p. 556, fn.7.)

17 As noted above, the Initial Petition alleges that Respondents violated CEQA, and that the
18 Project will result in air pollution and other adverse environmental impacts. This action clearly
19 constitutes a “judicial . . . proceeding in which facts are alleged concerning pollution or adverse
20 environment effects which could affect the public generally.” (See Gov. Code, § 12606.) The
21 Attorney General, on behalf of the People, therefore has an unconditional right to intervene.

22 **THE MOTION TO INTERVENE IS TIMELY**

23 The People filed a timely motion for leave to intervene under Code of Civil Procedure
24 section 387, subdivision (b). The People have met the standard of timeliness given that the
25 consolidated proceedings are in an early phase and the parties will not be prejudiced by the
26 People’s intervention at this stage in the proceedings.

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1 **A. Standard for Timeliness.**

2 Code of Civil Procedure section 387, subdivision (b) provides, in relevant part: “If any
3 provision of law confers an unconditional right to intervene . . . the court shall, upon timely
4 application, permit that person to intervene.” In determining whether the standards for
5 intervention have been met, courts have held that California Code of Civil Procedure section 387
6 “should be liberally construed in favor of intervention.” (*Lindelli v. Town of San Anselmo* (2006)
7 139 Cal.App.4th 1499, 1505; *Lincoln National Life Ins. Co. v. State Bd. of Equalization* (1994) 30
8 Cal.App.4th 1411, 1423.)

9 Section 387 does not place a statutory time limit on motions to intervene. (*Noya v. A.W.*
10 *Coulter Trucking* (2006) 143 Cal.App.4th 838, 842.) However, “it is the general rule that a right
11 to intervene should be asserted within a reasonable time and that the intervener must not be guilty
12 of an unreasonable delay after knowledge of the suit.” (*Allen v. California Water & Tel. Co.*
13 (1947) 31 Cal.2d 104, 108 [complaint in intervention untimely where filed 11 years after the
14 commencement of the action, and several years after the trial.]) Depending on the circumstances
15 of the case, leave to intervene may even be granted after judgment has been rendered. (*Mallick v.*
16 *Superior Court* (1979) 89 Cal.App.3d 434, 437 [“intervention is possible, if otherwise
17 appropriate, at any time, even after judgment.”].) Intervention is timely even when the statute of
18 limitations has run on the claims alleged in the complaint in intervention. (*Mar v. Sakti Internat.*
19 *Corp.* (1992) 9 Cal.App.4th 1780, 1785 [the running of the statute of limitations “was to be
20 calculated not from the filing of the complaint in intervention, but from the date the underlying
21 complaint was filed.”].)

22 **B. The People’s Intervention Will Not Prejudice the Parties.**

23 Intervention is not untimely unless any party opposing intervention can show any prejudice
24 from any delay attributable to filing of a motion to intervene. (*Truck Ins. Exchange v. Superior*
25 *Court* (“*Truck Ins. Exchange*”) (1997) 60 Cal.App.4th 342, 351.) In *Truck Ins. Exchange*, the
26 court held that a motion to intervene in a lawsuit, which had been pending for four years, was
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1 timely when real parties in interest had not shown any prejudice “other than being required to
2 prove their case.” (*Ibid.*)

3 Here, the consolidated actions are still in an early phase. Respondents have not filed
4 answers, motions, or other pleadings in response to the petitions. The parties stipulated that
5 responsive pleadings to the petition are due within 30 days after the preparation of the
6 administrative record. (Declaration of Sarah Morrison in Support of People’s Motion for Leave
7 to Intervene (“Morrison Decl.”), ¶ 6.) The administrative record has not yet been certified.
8 (Morrison Decl.”), ¶ 7.) Neither a briefing schedule nor the date for a hearing on the petitions has
9 been set in this matter. (Morrison Decl., ¶ 8.)

10 The People’s intervention in this action will not prejudice the parties. As in the *Truck Ins.*
11 *Exchange* case, here Respondents and Real Parties in Interest cannot show any prejudice from the
12 timing of the People’s motion to intervene.

13 **C. The People Are Seeking to Intervene Within a Reasonable Time.**

14 In June 2013, Petitioners notified the California Attorney General’s Office of their petitions
15 in compliance with Public Resources Code section 21167.7. (Morrison Decl., ¶ 4.) Since
16 receiving notice of the petitions, the People have spent considerable time and effort reviewing the
17 seven petitions and the environmental impact report for the Project; evaluating and verifying the
18 factual and legal allegations in the petitions, communicating and meeting with the parties to fully
19 understand the arguments on both sides, and preparing pleadings seeking to intervene in the
20 action. (Morrison Decl., ¶ 10.) Given that the documents relevant to this case are voluminous
21 and the factual and legal issues involved in this matter are complicated, the People did not
22 unreasonably delay filing the motion for leave to intervene. The Attorney General now seeks to
23 exercise her unconditional right to intervene at the early stages of this case as the State’s chief law
24 officer and on behalf of the People of California in order to enforce CEQA and protect the public
25 interest. There has been no unreasonable delay in the filing of the People’s Motion for
26 Intervention.

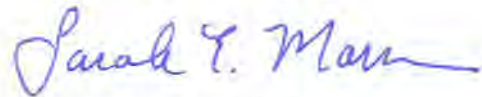
1 **CONCLUSION**

2 The People have an unconditional right to intervene in the consolidated actions, including
3 Case Number MSN14-0312, and, therefore, the Court should grant the People leave to file the
4 People's Petition.

5
6 Dated: May 15, 2014

Respectfully Submitted,

7 KAMALA D. HARRIS
8 Attorney General of California
9 SALLY MAGNANI
10 Senior Assistant Attorney General



11 SARAH E. MORRISON
12 Supervising Deputy Attorney General
13 *Attorneys for People*
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DECLARATION OF SARAH MORRISON

I, Sarah Morrison, declare as follows:

1. I am a Supervising Deputy Attorney General with the California Attorney General's Office in Los Angeles. I have been assigned to represent the People of the State of California, *ex rel.* Kamala D. Harris, Attorney General ("People") in the above-entitled consolidated actions.

2. I make the following statements based upon personal knowledge of the facts and, if called as a witness, I could competently testify to these statements.

3. The petitioners in these consolidated actions include the South Coast Air Quality Management District; the City of Long Beach; the Long Beach Unified School District; Natural Resources Defense Council; East Yard Communities for Environmental Justice; Coalition for Clean Air; Century Villages at Cabrillo; Elena Rodriguez; Evelyn Deloris Knight; [other environmental petitioners]; Fast Lane Transportation, Inc.; California Cartage Company, Inc.; Three Rivers Trucking Inc.; Los Angeles Harbor Grain Terminal; and San Pedro Forklift, Inc. (collectively, "Petitioners".) Petitioners filed seven petitions for writ of mandate and complaints for declaratory relief against Respondents the City of Los Angeles, the City Council of the City of Los Angeles, the Los Angeles Harbor Department, and the Los Angeles Board of Harbor Commissioners (collectively, "Respondents") in Los Angeles County Superior Court. The petitions alleged violations of the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 *et seq.*

4. In June 2013, Petitioners notified the California Attorney General's Office of their petitions in compliance with Public Resources Code section 21167.7.

5. The parties stipulated to limited consolidation of the petitions, and the court entered an order approving limited consolidation of the cases. In January 2014, the consolidated cases were transferred to this Court.

6. The consolidated actions are still in an early phase. Respondents have not filed answers, motions, or other pleadings in response to the petitions. I have been informed by

1 Petitioners' counsel the parties stipulated that responsive pleadings to the petition are due within
2 30 days after the preparation of the administrative record.

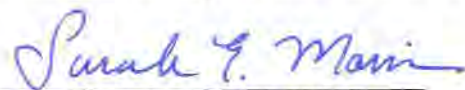
3 7. The deadline for certification of the administrative record is currently May 17, 2014.
4 I have been informed by Petitioners' counsel that the administrative record is not certified, and
5 the parties are circulating a stipulation for a 60 day extension of the certification deadline.

6 8. A case management conference in the consolidated actions is scheduled for June 12,
7 2014. I have been informed by Petitioners' counsel that neither a briefing schedule nor the date
8 for a hearing on the petitions has been set in this matter.

9 9. Given the early stage of the proceedings, the People's intervention in this action will
10 not prejudice the parties.

11 10. Since receiving notice of the petitions, the Attorney General's Office has spent
12 considerable time and effort reviewing the seven petitions, evaluating and verifying the factual
13 and legal allegations in the petitions, communicating and meeting with the parties to fully
14 understand the arguments on both sides, and preparing pleadings seeking to intervene in the
15 action. The documents relevant to this case are voluminous and the factual and legal issues
16 involved in this matter are complicated. As a result, the People did not unreasonably delay filing
17 their motion for leave to intervene.

18 I, Sarah Morrison, declare under penalty of perjury under the laws of the State of
19 California that the above is true and correct. Executed on May 15, 2014 at Los Angeles,
20 California.



21 SARAH E. MORRISON
22 Supervising Deputy Attorney General
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EXHIBIT 1

1 KAMALA D. HARRIS
Attorney General of California
2 SALLY MAGNANI
Senior Assistant Attorney General
3 SARAH E. MORRISON
Supervising Deputy Attorney General
State Bar No. 143459
4 300 South Spring Street, Suite 1702
Los Angeles, CA 90013
5 Telephone: (213) 897-2640
Fax: (213) 897-2802
6 E-mail: Sarah.Morrison@doj.ca.gov

**Exempt from Filing Fees pursuant to
Government Code section 6103**

7 *Attorneys for Intervenor People of the State of*
8 *California*

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF CONTRA COSTA
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12
13 **FAST LANE TRANSPORTATION, INC., a**
14 **California corporation,**

15 **Petitioner,**

16 **v.**

17 **CITY OF LOS ANGELES; CITY**
18 **COUNCIL OF THE CITY OF LOS**
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22 **50, inclusive,**

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24 **BNSF RAILWAY COMPANY, a Delaware**
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27 **AND RELATED CONSOLIDATED**
28 **CASES.**

Case No. CIV MSN14-0300 (Consolidated
with Case Nos. CIV MSN14-0308, MSN14-
0309, MSN14-0310, MSN14-0311, MSN14-
0312, MSN14-0313)

**PEOPLE'S PETITION FOR WRIT OF
MANDATE IN INTERVENTION**

[CEQA CLAIM]

**[Code Civ. Proc., §§ 387 and 1094.5; Gov.
Code, § 12606; Pub. Resources Code, §
21167]**

Dept: 33
Judge: Honorable Steve K. Austin
Assigned for All Purposes

Action Filed: June 5 and 7, 2013

INTRODUCTION

1. The People of the State of California, acting by and through Attorney General Kamala D. Harris (“the People”), intervene as of right in the above-captioned consolidated actions¹, Case Number MSN14-0312, pursuant to Government Code section 12606. The People challenge the adequacy of the approvals by Respondents the City of Los Angeles, the City Council of the City of Los Angeles, the City of Los Angeles Harbor Department, and the Los Angeles Board of Harbor Commissioners (collectively, “Respondents”) of a new large railyard that will be operated for 50 years by Real Parties in Interest BNSF Railway Company and Burlington Northern Santa Fe Railway Company (collectively, “BNSF”), under the California Environmental Quality Act (“CEQA”), Public Resources Code section 21000 *et seq.*

2. The new railyard, called the Southern California International Gateway Project (“SCIG railyard” or “Project”), will be an “inter-modal” facility at which cargo containers are transferred from trucks to trains. The Project Site is located approximately four miles from the Port of Los Angeles and Port of Long Beach (“Ports”), and is located less than 1,000 feet from sensitive land uses in the West Long Beach community in the adjacent City of Long Beach, including schools, a park, a day care center, residences, and the Villages of Cabrillo, a housing community for veterans and homeless individuals and families. The residential community of West Long Beach is already overburdened with air pollution, traffic and noise from trucks, trains, and ships accessing the Ports.

3. The Ports currently handle over 30% of all containerized trade in the United States. The combined emissions from trucks, locomotives, ships, and other cargo-moving equipment already operating at the Ports result in high levels of air pollutants, including diesel particulate matter and nitrogen dioxide (“NO₂”). As a result of these emissions, the Ports are one

¹ The petitioners in these consolidated actions include the South Coast Air Quality Management District; the City of Long Beach; the Long Beach Unified School District; Natural Resources Defense Council; East Yard Communities for Environmental Justice; Coalition for Clean Air; Century Villages at Cabrillo; Elena Rodriguez; Evelyn Deloris Knight; [other environmental petitioners]; Fast Lane Transportation, Inc.; California Cartage Company, Inc.; Three Rivers Trucking Inc.; Los Angeles Harbor Grain Terminal; and San Pedro Forklift, Inc. (collectively, “Petitioners”).

1 of the biggest sources of diesel particulate material in California. According to the California Air
2 Resources Board (“ARB”), the people living in communities near the Ports are at increased risk
3 of health effects, including cancer, asthma attacks, pulmonary disease, cardiovascular disease,
4 and other health effects from air pollution related to the Ports.²

5 4. Railyards are also a major source of air pollutants, including diesel particulate
6 matter and NO₂. In particular, “inter-modal” (truck to train) railyards, like the SCIG railyard,
7 cause heavy truck traffic with associated air pollutant emissions. ARB recommends that a
8 railyard not be located within 1,000 feet of sensitive land uses, such as schools, parks, day care
9 centers, and residences.

10 5. The SCIG railyard will exacerbate the air quality problems for the overburdened
11 West Long Beach community. At full capacity, the Project will daily result in thousands of
12 trucks coming from the Ports delivering containerized cargo to the SCIG railyard where the
13 containers will be transferred onto trains with multiple locomotives. The trains will move and
14 idle on tracks located close to (in some places less than 200 feet) residences and schools in West
15 Long Beach. All trucks accessing the SCIG railyard must travel on a ramp within a few hundred
16 feet of the entrance to the Villages of Cabrillo.

17 6. The existing operations on the Project Site, which will be displaced by the SCIG
18 railyard, include port-related transportation services that generate truck trips. However, at full
19 capacity in 2023, the SCIG railyard will result in more than one million new one-way truck trips
20 and approximately 2,500 new round-trip train trips each year in comparison to existing
21 operations.

22 7. As a result, the SCIG railyard, as proposed, will significantly increase the levels of
23 air pollutant emissions, such as particulate matter and NO₂, impacting the overburdened
24 communities near the Ports, including the West Long Beach community. The air pollution from
25 the SCIG railyard combined with the other port-related emissions poses a serious increased risk

26
27 ² State of California Air Resources Board, Diesel Particulate Matter Exposure
28 Assessment Study for the Ports of Los Angeles and Long Beach. (2006), pp. 2-4, available at
<http://www.arb.ca.gov/ports/marine vess/documents/portstudy0406.pdf>

1 of cancer, respiratory illnesses, and other adverse health effects to the people who reside, work
2 and attend school in the West Long Beach community.

3 8. Under CEQA, a public agency must fully analyze and disclose all significant
4 effects on the environment that may occur if the project is approved, and also analyze and adopt
5 all feasible mitigation measures and/or alternatives that could minimize the project's significant
6 impacts on the environment. (Pub. Resources Code, §§ 21102, 21061, 21081, 21100, 21151.)

7 9. Respondents' approval of the SCIG railyard violated CEQA by failing to
8 adequately and fully analyze the direct, indirect, and cumulative impacts of the Project. For
9 example, the EIR's air quality analysis overestimates the existing baseline of air pollutant
10 emissions and underestimates the air pollutant emissions from the SCIG railyard. As a result, the
11 EIR fails to adequately disclose the full extent of the Project's impacts and the health risks to the
12 already overburdened West Long Beach community. Respondents also failed to adopt all feasible
13 mitigation measures that could lessen the pollution burden on the residents of West Long Beach.
14 In particular, Respondents did not adopt feasible and enforceable measures to reduce air quality
15 impacts, including allowing only zero-emission trucks to access the SCIG railyard, and requiring
16 locomotives accessing the SCIG railyard to meet EPA's Tier 4 low-emission engine standards.

17 10. Under CEQA, a public agency may not approve a project that may result in
18 significant effects on the environment, unless the agency finds that there are no additional feasible
19 mitigation measures or alternatives that could lessen or avoid the project's impacts and the
20 agency makes findings, supported by substantial evidence, that specific overriding considerations
21 outweigh the project's significant effects. (Pub. Resources Code, §§ 21081, 21081.5.)

22 11. The statement of overriding considerations adopted by Respondents to approve
23 the SCIG Project violated the public information and informed decision making purposes of CEQA
24 by not clearly disclosing that the negative health and quality of life impacts of the Project will be
25 borne by the students and residents in the adjacent City of Long Beach, while the expected
26 benefits of jobs and tax revenues from the Project will accrue to the region as a whole. In
27 addition, as discussed above, Respondents underestimated the Project's impacts, and thus failed to
28

1 fully disclose the Project's adverse impacts; as a result, Respondents' findings of overriding
2 considerations are not supported by substantial evidence. Respondents also failed to adopt all feasible
3 mitigation to reduce or avoid the Project's adverse impacts, and therefore the statement of overriding
4 considerations that all feasible mitigation was adopted is not supported by substantial evidence.

5 12. Therefore, the People intervene in support of Petitioners in one of the above-
6 captioned consolidated cases, Case Number MSN14-0312, alleging that Respondents' approval of
7 the SCIG railyard violates CEQA. The People request that the Court set aside Respondents'
8 approvals relating to the SCIG railyard, and require Respondents to prepare an environmental
9 impact report that adequately analyzes the adverse environmental impacts of the Project, and
10 adopts all feasible mitigation measures and/or alternatives to avoid or reduce those impacts.

11 13. The People recognize the importance of the Ports to the economy and the need to
12 develop infrastructure to support increased port-related goods movement. The Ports are a huge
13 regional and national economic engine, and the demand for containerized cargo moving through
14 the Ports is estimated to double by 2025. As the Ports have themselves acknowledged, the Ports'
15 ability to accommodate the projected growth in trade will depend upon their ability to address
16 adverse environmental impacts that result from such trade. The Ports have expressed their intent
17 to accelerate efforts to reduce air emissions and health risks to the neighboring communities
18 while allowing the Ports' development to continue.³ The People intervene to ensure that
19 Respondents' mitigation with respect to the Project is implemented in a manner that fully
20 complies with CEQA.

21 **ALLEGATIONS SUPPORTING INTERVENTION**

22 14. Pursuant to Government Code section 12606, the People, acting through the
23 Attorney General, intervene in Case Number MSN14-0312, which alleges facts concerning
24 pollution and adverse environmental effects. The Attorney General has an unconditional right
25 pursuant to Government Code section 12606 to "intervene in any judicial or administrative
26 proceeding in which facts are alleged concerning pollution or adverse environmental effects

27 ³ San Pedro Bay Ports Clean Air Action Plan 2010 Update, p. 19, available at
28 <http://www.cleanairactionplan.org/>

1 which could affect the public generally.” Intervention is timely in that the administrative record
2 has not yet been certified. Neither a briefing schedule nor a hearing date has yet been set. No
3 prejudice will occur to the existing parties from this intervention.

4 PARTIES

5 15. The Attorney General, as the chief law officer of the State of California, has broad
6 independent powers under the California Constitution and the California Government Code to
7 participate in all legal matters in which the State is interested, and she has special and explicit
8 statutory authority to participate in cases involving the protection of California’s environment.
9 (Cal. Const., art. V, § 13; Gov. Code, §§ 12511, 12600-12612.) The Attorney General also has a
10 unique and important role in the enforcement of CEQA, as recognized by statute. (Pub.
11 Resources Code, §§ 21167.7, 21177, subd. (d).)

12 16. Respondent City of Los Angeles (“City”) is and was, at all relevant times, a
13 charter city and a political subdivision of the State of California organized and existing under
14 Government Code sections 34000 *et seq.* The City is a local governmental agency charged with
15 regulating and controlling local land use and development within its territory in compliance with
16 provisions of state law, including CEQA. The City is the lead agency for the Project under Public
17 Resources Code section 21067.

18 17. The City Council of the City of Los Angeles (“City Council”) is the legislative
19 body of the City of Los Angeles. The City Council is responsible for hearing administrative
20 appeals for decisions made by individual city departments, making certain land use decisions, and
21 ensuring its decisions are made in compliance with applicable laws.

22 18. Respondent Los Angeles Harbor Department (“LAHD”) is and was, at all relevant
23 times, an independent department of the government of the City of Los Angeles. LAHD is
24 responsible for operating the lands in the Harbor District, and for ensuring that land use decisions
25 are made in compliance with applicable laws.

26 19. Respondent Los Angeles Board of Harbor Commissioners (“BOHC”) is, and was,
27 at all relevant times, a local governmental body created by the City of Los Angeles Charter, with
28

1 possession, management and control of all navigable waters, and all tidelands and submerged
2 lands comprising the Port of Los Angeles. It is charged with the duty of ensuring compliance
3 with applicable laws.

4 20. The People are informed and believe and therefore allege that Real Party in
5 Interest BNSF Railway Company is a corporation organized and existing under the laws of the
6 State of Delaware, and doing business in the State of California. BNSF Railway Company is a
7 project applicant and proposed lessee of the SCIG Project.

8 21. Real Party in Interest Burlington Northern Santa Fe Railway is also identified as a
9 project applicant and therefore named as a real party in interest.

10 22. DOES 1 through 10, inclusive, are persons whose names and identities are
11 unknown to the People at this time, and the People therefore sue them under these fictitious
12 names. The People will amend this petition to allege the true names and capacities of DOES 1
13 through 10 as soon as they are discovered.

14 **JURISDICTION AND VENUE**

15 23. Pursuant to Public Resources Code sections 21168 and 21168.5 and California
16 Code of Civil Procedure section 1085 and 1094.5, this Court has jurisdiction over this matter.

17 24. Venue is appropriate in this judicial district pursuant to the stipulation of the
18 parties and the order of the Court. (Code of Civ. Proc., §§ 392, 394.)

19 25. The People have satisfied all statutory prerequisites to filing this action.

20 **STATUTORY BACKGROUND**

21 26. Under CEQA, where a proposed project may have a significant adverse effect on
22 the environment, the lead agency must prepare, circulate, and certify an environmental impact
23 report. (Pub. Resources Code, §§ 21080, subd. (d), 21082.2, subd. (d).) The environmental
24 impact report must fully analyze and disclose the significant effects on the environment that
25 would occur if the project is approved, and also propose all feasible measures that mitigate or
26 avoid the project's significant impacts on the environment. (Pub. Resources Code, §§ 21002,
27 21081.) If the agency finds that no further feasible mitigation or alternatives could lessen or
28

1 avoid the project's impacts, and the agency proposes to approve the project, then the agency must
2 issue a statement of overriding considerations supported by substantial evidence in the record
3 stating the specific reasons that economic, legal, social, technological, or other benefits that
4 outweigh the project's environmental impacts. (Pub. Resources Code, §§21081, 21081.5.)

5 27. Code of Civil Procedure section 1094.5, subdivision(b) provides that a reviewing
6 court's scope of inquiry into the validity of any final administrative order or decision made as a
7 result of a proceeding in which by law a hearing is required to be given shall extend to: whether
8 the agency proceeded without or in excess of its jurisdiction; or whether there was any prejudicial
9 abuse of discretion. Abuse of discretion is established if Respondents have not proceeded in the
10 manner required by law, the order or decision is not supported by the findings, or the findings are
11 not supported by the evidence. (Code Civ. Proc., § 1094.5, subd. (b).)

12 28. In proceedings brought under Code of Civil Procedure section 1094.5, the court
13 may stay the operation of the administrative order or decision pending the judgment. (Code Civ.
14 Proc. § 1094.5, subd. (g).)

15 29. Under CEQA, actions to void a determination, finding or decision of a public
16 agency, made as a result of a proceeding in which by law a hearing is required to be given, based
17 on CEQA violations, shall be in accordance with Code of Civil Procedure section 1094.5, and the
18 court shall determine whether the act or decision is supported by substantial evidence in light of
19 the whole record. (Pub. Resources Code, § 21168.)

20 30. Public Resources Code section 21168.9, subdivision (a), states that if a court finds
21 that any determination, finding, or decision of a public agency has been made without compliance
22 with CEQA, the court shall enter an order that includes one or more of the following:

23 (1) A mandate that the determination, finding, or decision be voided by the public
24 agency, in whole or in part.

25 (2) If the court finds that a specific project activity or activities will prejudice the
26 consideration or implementation of particular mitigation measures or alternatives
27 to the project, a mandate that the public agency and any real parties in interest
28 suspend any or all specific project activity or activities, pursuant to the
determination, finding, or decision, that could result in an adverse change or
alteration to the physical environment, until the public agency has taken any

actions that may be necessary to bring the determination, finding, or decision into compliance with [CEQA].

(3) A mandate that the public agency take specific action as may be necessary to bring the determination, finding or decision into compliance with [CEQA].

FACTUAL BACKGROUND

31. **Proposed Project.** The Project involves the construction and operation of a new railyard by BNSF that would handle containerized international goods transported by trucks from the Ports. At the SCIG railyard, containers of imported goods will be stored onsite or transferred from trucks onto trains going to destinations throughout the nation. At full capacity in 2023, the SCIG Project will result in approximately 5,500 one-way truck trips to and from the SCIG railyard each day and 2 million one-way truck trips transporting 1.5 million forty-foot containers annually. The Project will also result in 8 round-trip train trips each day and 2,880 round-trip train trips accessing the SCIG railyard annually. The SCIG railyard will operate 24 hours a day, seven days a week, 360 days a year.

32. **Existing Conditions.** The Project Site consists of 185 acres of land located approximately four miles north of the Ports. The Project Site includes approximately 103 acres of land in the City of Los Angeles owned by Respondents, which will be leased to BNSF for 50 years. The other portions of the Project Site will be located on land that BNSF plans to purchase or lease in the adjacent cities of Carson and Long Beach. The Project Site is bounded generally by Sepulveda Boulevard to the north, the Pacific Coast Highway to the south, the Dominguez Channel to the west, and the Terminal Island Freeway to the east. The City of Long Beach is located to the east of the SCIG Project Site, the Wilmington community is located to the west of the Project, and the City of Carson is located to the west and north of the Project Site.

33. The West Long Beach residential community is located less than 1,000 feet to the east of the Project Site, and includes single family residences, Hudson K-8 School, Hudson Park, Bethune School, Cabrillo High School, the Cabrillo Child Development Center (daycare center), and the Villages of Cabrillo, a 24 acre campus operated by a non-profit to provide

1 housing, medical, education, childcare, and other services to veterans and homeless individuals
2 and families.

3 34. The existing businesses on the Project Site, which will be displaced by the SCIG
4 railyard, include operations engaged in warehousing and goods transportation, container and
5 truck maintenance, servicing, and storage, rail services, and industrial uses.

6 35. The communities near the Ports are already exposed to high levels of harmful air
7 pollutant emissions, including diesel particulate matter and NO₂, from current operations at the
8 Ports, including trucks, trains, and ships accessing the Ports, as well as from freeways and port-
9 related industries in the area. The South Coast Air Basin ("Basin"), which encompasses the
10 Ports, has some of the worst air quality in the nation. The Basin is currently designated by the
11 United States Environmental Protection Agency ("EPA") as being in nonattainment of the
12 federal Clean Air Act's national ambient air quality standards for ozone and particulate matter.
13 According to ARB, diesel particulate matter emissions from the Ports are a major contributor to
14 diesel particulate matter in the Basin. Diesel particulate matter is a carcinogen identified by
15 ARB as a toxic air contaminant. NO₂ reacts in the presence of sunlight to form ozone. These
16 pollutants also cause asthma and severe respiratory effects.

17 36. In order to address the Ports' air quality problems, the Ports, EPA, ARB, and
18 Petitioner South Coast Air Quality Management District collectively adopted the San Pedro
19 Bay Ports Clean Air Action Plan ("CAAP") in 2006. The CAAP was updated in 2010 ("CAAP
20 Update.")⁴ The CAAP Update states that "[t]he economic benefits of the ports are felt
21 throughout the nation; however, the environmental impacts of trade are more locally
22 concentrated." (CAAP Update, p. 2.) The CAAP is designed "to develop and implement
23 strategies and programs necessary to reduce air emissions and health risks while allowing port
24 development to continue." (CAAP Update, p. 2.) The CAAP includes measures to reduce port-
25 related emissions and health risks "in highly-impacted communities located proximate to port
26 sources and throughout the residential areas in the port region." (CAAP Update, p. ES-3.)

27 ⁴ San Pedro Bay Ports Clean Air Action Plan 2010 Update, available at
28 <http://www.cleanairactionplan.org/>

1 Such measures include strategies for zero-emission trucks to transport cargo to and from the
2 Ports, low emission locomotives meeting EPA's Tier 4 engine emission standards, and
3 maximization of new railyards located at the Ports ("on-dock rail").

4 37. **SCIG EIR.** On September 23, 2011, Respondents issued a draft EIR for the
5 SCIG Project. Petitioners and others submitted comments identifying numerous deficiencies in
6 the draft EIR. On September 27, 2012, Respondents issued a recirculated draft EIR for the
7 SCIG Project. Petitioners and others again submitted comments identifying numerous
8 deficiencies in the recirculated draft EIR.

9 38. Petitioners and others commented that approval of the SCIG Project would result
10 in significant health risks from air pollutants and other environmental impacts to the
11 communities near the SCIG Project, including the West Long Beach community, already
12 exposed to excessive levels of air pollutants and associated health risks from port-related
13 emissions.

14 39. Petitioners and others commented that Respondents violated CEQA by failing to
15 (a) conduct an adequate analysis of the environmental and public health impacts of the SCIG
16 project; (b) adopt effective, enforceable mitigation measures to reduce the environmental
17 impacts on the already overburdened communities near the SCIG Project; and (c) consider a
18 full range of alternatives that would create reduced environmental impacts compared to the
19 SCIG Project.

20 40. Nevertheless, Respondents approved the SCIG Project without complying with
21 CEQA's requirements to adequately analyze the Project's direct, indirect, and cumulative
22 impacts; to adequately analyze and adopt all feasible mitigation measures; or to consider a
23 reasonable range of alternatives.

24 41. For example, the EIR fails to fully analyze the significant impacts of the Project,
25 because the EIR underestimates the Project's significant impacts. The EIR improperly
26 assumes, in the air quality analysis, that the Project will result in a reduction in emissions
27 because trucks will be diverted from the existing BNSF Hobart railyard in Commerce to the
28

1 SCIG railyard. The EIR includes in the analysis of existing conditions and the no project
2 alternative the emissions from the trucks going from the Ports to the Hobart railyard, even
3 though the trucks are not related to current operations at the Project Site. The EIR completely
4 omits these same trucks when calculating the emissions from the Project, based on the
5 assumption that 100% of the trucks now going to Hobart railyard will be diverted to the SCIG
6 railyard. Yet the Project description does not limit or prohibit future truck traffic to the Hobart
7 railyard after the SCIG Project is operating. In fact, evidence in the record indicates that the
8 volume at the Hobart railyard will increase dramatically by 2023, even with the operation of
9 SCIG. By not comprehensively evaluating truck trips going to and from the Hobart railyard,
10 and by only including the Hobart railyard trucks in the existing conditions and no project
11 alternative, the EIR underestimates the Project's impacts. As a result, the EIR does not
12 adequately analyze the exposure to air pollutants (including diesel particulate matter, NO₂, and
13 greenhouse gases) and the health risks affecting the people in the already overburdened
14 communities in the vicinity of the SCIG Project.

15 42. The EIR also fails to fully analyze the cumulative impacts by not evaluating the
16 Project in light of the expected increase in air pollutant emissions associated with the proposed
17 expansion of the Union Pacific Railroad's railyard (known as the "Intermodal Container
18 Transfer Facility" or "ICTF") adjacent to the SCIG Project Site. Under CEQA, Respondents
19 are required to evaluate whether the Project's impacts are cumulatively considerable when
20 viewed together with the environmental impacts from past, present, and probable future
21 projects. (Cal. Code Regs., tit. 14, § 15130, subd. (a).) Although the EIR includes a list of
22 projects in the Project vicinity, the EIR fails to provide a detailed analysis of the combined
23 impacts of the SCIG railyard together with the other projects.

24 43. The EIR also fails to adequately disclose and analyze the greenhouse gas
25 emission ("GHG") impacts of the Project. In order to stabilize our existing climate, we must
26 substantially and continuously reduce total GHG emissions in the coming decades. Consistent
27 with the science, state law and policy, the California Global Warming Solutions Act of 2006,
28

1 known as AB 32, and the Governor's Executive Orders S-03-05 and B-16-2012, call for steep
2 reductions in GHG emissions through 2050. It is therefore important for an EIR to accurately
3 account for projected GHG emissions. The EIR admits that at full operation in 2023, the
4 Project's GHG emissions will exceed the GHG emissions from existing conditions at the Project
5 Site, but the EIR underestimates Project GHG emissions by failing to include GHG emissions
6 from the continued operation of the Hobart railyard.

7 44. In addition, the EIR is misleading in its statements about consistency with state,
8 regional or local plans for the reduction or mitigation of GHG emissions. The EIR concludes
9 that the Project is consistent with ARB's AB 32 Scoping Plan, because the Project will increase
10 fuel efficiency and decrease GHG emissions by shifting truck trips from the Hobart railyard to
11 the SCIG railyard. However, the EIR ignores the GHG emissions from the continued operation
12 of the Hobart railyard. Therefore, the EIR fails as an informational document, and the EIR's
13 conclusion regarding the Project's consistency with plans and policies to reduce GHG
14 emissions is not supported by substantial evidence in the record.

15 45. The EIR also violates CEQA by improperly rejecting feasible and enforceable
16 mitigation measures to reduce or avoid the significant impacts of the SCIG railyard, including
17 impacts on air quality and GHG emissions. Such feasible mitigation measures include
18 requirements for zero-emission trucks, low-emission locomotives meeting EPA's Tier 4 engine
19 emission standards, and reconfiguration of the access ramp to the SCIG railyard away from the
20 Villages of Cabrillo.

21 46. The EIR also violates CEQA by proposing mitigation measures that are not
22 enforceable or that improperly defer mitigation, including Mitigation Measure AQ-9 and
23 Mitigation Measure AQ-10.

24 47. The EIR also fails to consider, or improperly rejects, feasible alternatives to the
25 Project. The EIR analyzes only two alternatives, a reduced volume alternative and a no-project
26 alternative. Other feasible alternatives, for example, a zero-emission container movement
27 alternative, are rejected without substantial evidence of infeasibility.
28

1 48. **Approval and Appeal of the SCIG Project.** Respondents issued a final EIR in
2 February 2013. On or about March 7, 2013, BOHC certified the EIR for the SCIG Project
3 (Resolution No. 13-7451.) On or about March 21, 2013, BOHC approved a Site Preparation
4 Access Agreement (“Site Agreement”) that authorizes BNSF to use and occupy Respondents’
5 property to develop, prepare, coordinate and construct a railyard intermodal container transfer
6 facility. BOHC also approved and a lease for the SCIG Project (Permit No. 901”) that
7 authorizes BNSF to operate and maintain the new railyard on Respondents’ land for 50 years.

8 49. Respondents issued a statement of overriding considerations to approve the SCIG
9 Project despite its significant impacts. In adopting this statement, Respondents failed to comply
10 with CEQA’s public information and informed decision making purposes because they did not
11 clearly disclose that the negative health and quality of life impacts of the Project will be borne by
12 the adjacent communities in City of Long Beach, while the expected benefits from the Project
13 will accrue to the region as a whole. In addition, as discussed above, Respondents underestimated
14 the Project’s impacts, and thus failed to fully disclose the Project’s adverse impacts; as a result,
15 Respondents’ findings of overriding considerations are not supported by substantial evidence.
16 Because Respondents also failed to adopt all feasible mitigation to reduce or avoid the Project’s
17 adverse impacts, Respondents’ statement of overriding considerations is not supported by substantial
18 evidence.

19 50. Petitioners timely appealed BOHC’s approvals for the SCIG Project to the City
20 Council.

21 51. On or about May 8, 2013, the City Council heard Petitioners’ appeals and
22 affirmed BOHC’s decisions approving the SCIG Project, including the Site Agreement, the
23 certification of the EIR for the Project, and Permit No. 901.

24 52. On or about May 9, 2013, Respondents filed a Notice of Determination for
25 approval of the SCIG Project.

26 53. On or about June 5 and 7, 2013, Petitioners timely filed petitions for writ of
27 mandate and complaints for declaratory relief against Respondents in Los Angeles County
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1 Superior Court, alleging, among other things, that Respondents violated CEQA by failing to
2 evaluate the potential environmental impacts of the Project before approving the Project. The
3 parties stipulated to limited consolidation of the petitions.

4 54. In January 2014, the consolidated cases challenging the SCIG Project were
5 transferred to this Court.

6 **FIRST CAUSE OF ACTION**
7 **(Violation of CEQA – Failure to Adequately Analyze Impacts**
8 **(Pub. Resources Code, § 21000 et seq.; Code Civ. Proc., § 1094.5)**

9 55. The allegations in paragraphs 1 through 54 are realleged and incorporated by
10 reference herein as though set forth in full.

11 56. CEQA mandates that a public agency proposing to approve a project that may
12 have a significant effect on the environment must prepare an environmental impact report that
13 identifies and analyzes all potentially significant adverse effects of a project, including
14 reasonably foreseeable direct, indirect, and cumulative impacts from all phases of the project,
(Pub. Resources Code, § 21100; Cal. Code Regs., tit. 14, §§ 15126, 15126.2.)

15 57. An environmental impact report must evaluate local as well as regional impacts.
16 (Cal. Code Regs., tit. 14, §§ 15125, 15126.2.)

17 58. Respondents' EIR violates CEQA by failing to adequately analyze the direct,
18 indirect, and cumulative impacts of the SCIG Project on the local community, including
19 impacts to air quality, GHG emissions, health, traffic, and noise.

20 59. Respondents' actions in failing to adequately evaluate Project's environmental
21 impacts are arbitrary and capricious, a prejudicial abuse of discretion, and/or not in accordance
22 with law. Accordingly, Respondents' approvals of the Project must be set aside under Code of
23 Civil Procedure section 1094.5.

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SECOND CAUSE OF ACTION

(Violation of CEQA – Failure to Adopt all Feasible Mitigation Measures and Improper Adoption of Unenforceable or Deferred Mitigation Measures) (Pub. Resources Code, § 21000 et seq.; Code Civ. Proc., § 1094.5)

60. The allegations in paragraphs 1 through 59 are realleged and incorporated by reference herein as though set forth in full.

61. CEQA requires a public agency to “mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.” (Pub. Resources Code, § 21002.1, subd. (b); Cal. Code Regs., tit. 14, §§ 15021, subd. (a), 15126.4, subd. (a)(2).)

62. A lead agency may not approve a project for which there are significant environmental impacts unless the agency finds that: (a) mitigation measures have been required of the project which avoid or substantially lessen the significant environmental effects, or (b) mitigation measures are found to be infeasible based on substantial evidence. (Cal. Code Regs., tit. 14, § 15091.)

63. CEQA requires that adopted mitigation measures be fully enforceable. (Pub. Resources Code § 21081.6, subd.(b); Cal. Code Regs., tit. 14, § 15126.4, subd. (a)(2).)

64. Although formulation of mitigation measures should not be deferred until some future time, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way. (Cal. Code Regs., tit. 14, § 15126.4, subd. (a)(1)(B).)

65. Petitioners and other commenters proposed additional feasible mitigation measures to lessen the Project’s environmental impacts, including, but not limited to, mitigation measures relative to air quality, GHG emissions, health, noise, and traffic impacts.

66. Respondents violated CEQA by failing to adopt all feasible mitigation measures to mitigate or avoid the potential significant impacts of the SCIG Project, and failed to make findings, supported by substantial evidence, that identified mitigation measures were infeasible.

67. Respondents also violated CEQA by adopting mitigation measures that are not enforceable or that improperly defer mitigation.

1 68. Respondents' actions in failing to adopt all feasible mitigation measures are
2 arbitrary and capricious, a prejudicial abuse of discretion, and/or not in accordance with law.
3 Accordingly, Respondents' approvals of the Project must be set aside under Code of Civil
4 Procedure section 1094.5.

5 **THIRD CAUSE OF ACTION**

6 **(Violation of CEQA – Failure to Consider a Reasonable Range of Alternatives and**
7 **Improper Rejection of Feasible Alternatives)**
8 **(Pub. Resources Code, § 21000 et seq.; Code Civ. Proc., § 1094.5)**

9 69. The allegations in paragraphs 1 through 68 are realleged and incorporated by
10 reference herein as though set forth in full.

11 70. An adequate EIR must consider a reasonable range of alternatives to the
12 proposed project. The alternatives must be designed to meet basic project objectives and lessen
13 or avoid significant environmental impacts. (Cal. Code Regs., tit. 14, § 15126.6(a).)

14 71. A lead agency may not approve a project for which there are significant
15 environmental effects unless it makes findings supported by substantial evidence that
16 alternatives are infeasible. (Cal. Code Regs., tit. 14, § 15091, subd. (a)(3).)

17 72. Respondents failed to evaluate a reasonable range of project alternatives that
18 were designed to meet basic project objectives and lessen the significant impacts of the Project.

19 73. Respondents failed to make findings supported by substantial evidence that
20 Project alternatives were infeasible within the meaning of Cal. Code Regs., tit. 14, § 15091,
21 subd. (a)(3).

22 74. Respondents' actions in failing to consider a reasonable range of alternatives,
23 improperly rejecting feasible alternatives, and failing to approve the environmentally superior
24 alternative, are arbitrary and capricious, a prejudicial abuse of discretion, and/or not in
25 accordance with law. Accordingly, Respondents' approvals of the Project must be set aside
26 under Code of Civil Procedure section 1094.5 and Public Resources Code section 21168.9.

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FOURTH CAUSE OF ACTION
(Violation of CEQA – Failure to Support Overriding Considerations
With Substantial Evidence
(Pub. Resources Code, § 21000 et seq.; Code Civ. Proc., § 1094.5)

75. The allegations in paragraphs 1 through 74 are realleged and incorporated by reference herein as though set forth in full.

76. Under CEQA, a public agency may not approve a project with significant effects on the environment, unless the agency makes findings that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment. (Pub. Resources Code, § 21081, subd.(b).)

77. A statement of overriding considerations must be supported by substantial evidence in the record. (Cal. Code Regs., tit. 14 § 15093.)

78. Additionally, a lead agency may not adopt a statement of overriding considerations for significant project impacts unless all feasible mitigation has been required of the project, or the agency makes findings, supported by substantial evidence, of the infeasibility of the mitigation measures. (Cal. Code Regs., tit. 14, § 15091.)

79. Respondents adopted a statement of overriding considerations at the time of Project approval.

80. Respondents failed to fully disclose the Project's adverse impacts on the environment and therefore, Respondents' findings of overriding considerations lack transparency and are not supported by substantial evidence.

81. The statement of overriding considerations does not explain, on the basis of substantial evidence, why the specific significant effects of the Project are outweighed by the purported policy benefits of the Project. In addition, Respondents' failure to clearly disclose that the impacts of the Project will be imposed on the local community while the benefits of the Project will accrue to the region at large fails to satisfy the public information and informed decision making requirements of CEQA.

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1 82. Respondents improperly adopted a statement of overriding considerations when
2 feasible mitigation and alternatives existed to lessen Project impacts. (Cal. Code Regs., tit. 14, §
3 15092.)

4 83. By approving the Project when the statement of overriding considerations was
5 not sufficiently transparent, and not supported by substantial evidence in the record,
6 Respondents committed a prejudicial abuse of discretion for which the Project approvals must
7 be set aside. (Pub. Resources Code, § 21168.5.)

8 84. Respondents' actions in approving a statement of overriding considerations are
9 arbitrary and capricious, a prejudicial abuse of discretion, and/or not in accordance with law.
10 Accordingly, Respondents' approvals of the Project must be set aside under Code of Civil
11 Procedure section 1094.5 and Public Resources Code section 21168.9.

12 **PRAYER FOR RELIEF**

13 The People pray for judgment as follows:

14 1. For peremptory or alternative writs of mandate under Code of Civil Procedure
15 section 1094.5 and Public Resources Code section 21168.9:

16 a. Directing Respondents to void every determination, finding and/or
17 decision approving the SCIG Project, including, but not limited to, the City
18 Council's certification of the EIR for the Project and adoption of Findings of Fact,
19 Statement of Overriding Considerations, and the Mitigation Monitoring and
20 Reporting Program for the Project; approval of the Site Preparation and Access
21 Agreement; approval of Permit No. 901 (the 50 year lease of Respondents' real
22 property); and issuance of the Notice of Determination for the Project;

23 b. Directing Respondents, and BNSF to suspend any and all activities
24 pursuant to, or in furtherance of, Respondents' determination, finding and/or
25 decision related to the Project approval, until Respondents have taken all actions
26 necessary to bring the determination, finding and/or decision into compliance with
27 CEQA; and
28

1 c. Directing Respondents to fully comply with the requirements of
2 CEQA with respect to the Project, and take any other specific action that may be
3 necessary to bring Respondents' determination, finding and/or decision into
4 compliance with CEQA.

5 2. For costs of this suit;

6 3. For attorney's fees as authorized in Code of Civil Procedure section 1021.8 and
7 other provisions of law; and

8 4. For such other relief as the Court deems just and proper.

9
10 Dated: May 15, 2014

Respectfully Submitted,

11 KAMALA D. HARRIS
12 Attorney General of California
13 SALLY MAGNANI
14 Senior Assistant Attorney General

15 

16 SARAH E. MORRISON
17 Supervising Deputy Attorney General

18 *Attorneys for Intervenor People of the State*
19 *of California*

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28

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **FAST LANE TRANSPORTATION, INC., a California corporation v. CITY OF LOS ANGELES; CITY COUNCIL OF THE CITY OF LOS ANGELES; PORT OF LOS ANGELES; LOS ANGELES BOARD OF HARBOR COMMISSIONERS, et al.**

No.: **CIV MSN14-0300 (Consolidated with Case Nos. CIV MSN14-0308, MSN14-0309, MSN14-0310, MSN14-0311, MSN14-0312, MSN14-0313)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On May 15, 2014, I served the attached:

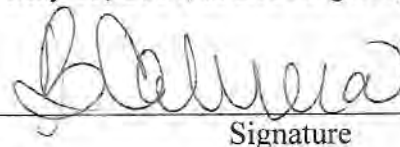
**PEOPLE'S NOTICE OF MOTION AND MOTION FOR LEAVE TO INTERVENE;
MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF SARAH E.
MORRISON IN SUPPORT THEREOF**

by placing a true copy thereof enclosed in a sealed envelope with the **[FED EX Overnight service]**, addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 15, 2014, at Los Angeles, California.

B. Cabrera
Declarant


Signature

SERVICE LIST

John S. Peterson
Peterson Law Group
19800 MacArthur Blvd., Suite 290
Irvine, CA 92612
(213) 236-9720

Janna B. Sidley, General Counsel
Joy M. Crose, Assistant General Counsel
Minah Park, Deputy City Attorney
Office of the City Attorney of Los Angeles
425 South Palos Verdes Street
San Pedro, CA 90731
(310) 732-3750

Margaret M. Sohagi
Philip A. Seymour
The Sohagi Law Group, PLC
11999 San Vicente Boulevard, Suite 150
Los Angeles, CA 90049-5136
(310) 475-5700

David R. Pettit Esq.
Melissa Lin Perella
Morgan Wyenn•
Natural Resources Defense Council
1314 Second Street
Santa Monica, CA 90401
(310) 434-2300

Robert E. Shannon, City Attorney
Michael J. Mais, Assistant City Attorney
City of Long Beach
333 West Ocean Boulevard, 11th Floor
Long Beach, CA 90802
(562) 570-2200

Amrit S. Kulkarni
Julia L. Bond
Meyers, Nave, Riback, Silver & Wilson
555 12th Street, Suite 1500
Oakland, CA 94607
(510) 808-2000

Attorneys for Petitioners
Fast Lane Transportation, Inc., California
Cartage Company Inc., Los Angeles Harbor
Grain Terminal, American Hay, LLC, Harbor
Transload. LLC. and San Pedro Forklift. Inc.

Attorneys for Respondents/Defendants
City of Los Angeles; Los Angeles City
Council; City of Los Angeles Harbor
Department; Los Angeles Board of Harbor
Commissioners

Attorneys for Respondents/Defendants
City of Los Angeles; Los Angeles City
Council; City of Los Angeles Harbor
Department; Los Angeles Board of Harbor
Commissioners

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

Attorneys for Petitioner
City of Long Beach

Attorneys for Real Party in Interest
BNSF Railway Company

Rachel B. Hooper
Winter King
Erin B. Chalmers
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102
(415) 552-7272

Attorneys for Petitioner
City of Long Beach

Daniel P. Selmi
919 S. Albany Street
Los Angeles, CA 90015
(213) 736-1098

Attorneys for Petitioner
City of Long Beach

Michael H. Zischke
James Purvis
Cox Castle & Nicholson LLP
555 California Street, 10th Floor
San Francisco, CA 94104-1513
(415) 262-5100

Attorneys for Petitioner
Long Beach Unified School District

Kurt R. Wiese
Barbara Baird
Veera Tyagi
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, CA 91765
(909) 396-2000

Attorneys for Petitioner
South Coast Air Quality Management District

Raymond W. Johnson
Abigail A. Broedling
Kimberly Foy
Aminta Raffalovich
Johnson & Sedlack
26785 Camino Seco
Temecula, CA 92590
(951) 506-9925

Attorneys for Petitioners
Coalition for a Safe Environment, Apostolic
Faith Center, Community Dreams and
California Kids IAQ

William W. Wynder
Sunny K. Soltani
Adriana P. Mendoza
Aleshire & Wynder, LLP
18881 Von Karman Avenue, Suite 1700
Irvine, CA 92612
(949) 223-1170

Attorneys for Applicant for Intervention
City of Carson

PROOF OF SERVICE BY MAIL AND ELECTRONIC MAIL

I am a citizen of the United States and a resident of Alameda County. I am an attorney licensed to practice in the State of California and am not a party to the within above titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On September 29, 2014, I served the within LETTER OF APPELLANTS TOWN OF ATHERTON ET AL. OPPOSING REQUESTS FOR DEPUBLICATION on the parties listed on the attached service list by placing true copies thereof enclosed in sealed envelopes with first class postage thereon fully prepaid, in a United States Postal Service mailbox at Oakland, California, addressed as shown on the attached service list.:

I, Stuart M. Flashman, hereby certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on September 29, 2014.


Stuart M. Flashman

Danae Aitchison, Deputy Attorney General
Jessica Tucker-Mohl, Deputy Attorney General
Office of the Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

Pillsbury Winthrop Shaw Pittman LLP
Michael R. Barr
Kevin M. Fong
Blaine I. Green
Four Embarcadero Ctr., 22nd Floor
P.O. Box 2824
San Francisco, CA 94126-2824

Wanger Jones Helsley PC
Oliver W. Wanger
John P. Kinsey
Daren A. Stemwedel
265 E. River Park Cir., Ste. 310
Fresno, CA 93720

Griswold, LaSalle, Cobb, Dowd & Gin LLP
Raymond L. Carlson
Laura A. Wolfe
111 E. Seventh St.
Hanford, CA 93230

Chatten-Brown & Carstens
Jan Chatten-Brown
Douglas P. Carstens
Josh Chatten-Brown
2200 Pacific Coast Highway, Ste 318
Hermosa Beach, CA 90254

Hon. Michael Kenny, Dept. 31
c/o Clerk of Court, Sacramento County Superior Court
Gordon D. Schaber Courthouse
720 9th Street
Sacramento, CA 95814-1398

Virginia Gennaro, City Attorney
Andrew Heglund, Deputy City Attorney
Office of the City Attorney
City of Bakersfield
1600 Truxtun Ave., 4th Fl.
Bakersfield, CA 93301

Office of the County Counsel
County of Kings
Colleen Carlson, County Counsel
Erik Kaedling, Deputy County Counsel
1400 West Lacy Blvd., Bldg #4
Hanford, CA 93230

Court of Appeal, Third Appellate District
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

Lori A. Winfree, General Counsel
North County Transit District
810 Mission Ave.
Oceanside, CA 92054

David Gossage, Deputy Chief Counsel
Calif. Dept. of Transportation
Legal Division – MS 57
1120 N. Street
P.O. Box 1438
Sacramento, CA 95812-1438