Case No. D080902

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

Natural Resources Defense Council, Inc. et al.,
Petitioners and Appellants,

v.

City of Los Angeles et al.,
Respondents;
China Shipping (North America) Holding Co., LTD. et al.,
Real Parties in Interest and Respondents.

On Appeal from the San Diego County Superior Court,
Case No. 37-2021-00023385-CU-TT-CTL
The Honorable Timothy Taylor

COMMUNITY PETITIONERS' OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES

In accordance with California Rules of Court, rule 8.208, the undersigned certifies that there are no interested entities with either (1) an ownership interest of 10 percent or more in San Pedro and Peninsula Homeowners Coalition, San Pedro Peninsula Homeowners United, East Yard Communities for Environmental Justice, Coalition for Clean Air, or Natural Resources Defense Council, or (2) a financial or other interest in the outcome of this proceeding that the justices should consider in determining whether to disqualify themselves.

Date: December 6, 2022

Respectfully submitted,
/s/ Jaclyn H. Prange
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INTRODUCTION

The area surrounding the Port of Los Angeles has been dubbed a "diesel death zone." The ships, trucks, trains, and equipment that transport the Port's cargo emit toxic air pollution that harms the people who live, work, and go to school nearby. The Port is well aware of this pollution and its effects. Yet for more than a decade, it has allowed one of its biggest tenants—China Shipping—to operate without pollution-cutting measures required by law. These actions have long harmed, and continue to harm, Community Petitioners' members and other people living near the Port.[1]

Community Petitioners have spent more than 20 years working to bring the Port's approvals for the China Shipping terminal into compliance with the California Environmental Quality Act (CEQA). In 2001, the Port approved construction of the terminal without first preparing a project-specific Environmental Impact Report (EIR), as required by CEQA. After the Court of Appeal found that the Port's actions were illegal, the Port finally issued an EIR for the terminal in 2008. In that EIR, the Port purported to adopt measures to mitigate the significant pollution created by the terminal. But despite its promises to make those measures enforceable by incorporating them into the permit for the project, the Port never did so. Instead, over the

[1] Community Petitioners (Appellants) are San Pedro and Peninsula Homeowners Coalition, San Pedro Peninsula Homeowners United, East Yard Communities for Environmental Justice, Coalition for Clean Air, and Natural Resources Defense Council.

next few years, the Port ignored many of the mitigation measures in the 2008 EIR and affirmatively granted China Shipping secret backdoor waivers from even the minimal measures that were already incorporated into the permit.

After the Port's years of noncompliance were exposed in 2015, the Port promised to right its wrongs by preparing a supplemental EIR (SEIR) for the terminal. But when that SEIR process finally concluded four years later, the Port instead made matters worse by reneging on many of its earlier commitments and scaling back the 2008 mitigation measures. It also doubled down on its failure to make mitigation measures enforceable by *again* refusing to incorporate them into the permit for the project, meaning that even the newly weakened SEIR mitigation measures were not enforceable.

CEQA is clear that feasible mitigation measures must be "fully enforceable through permit conditions, agreements, or other legally-binding instruments." (Cal. Code Regs., tit. 14, § 15126.4, subd. (a)(2); see also Pub. Resources Code, § 21081.6, subd. (b).) Therefore, after Community Petitioners sued the Port again,[2] the trial court held that the Port violated CEQA by failing to make the mitigation measures enforceable. The trial court found that this violation was "profound" and faulted the "Port's

[2] The petition named Respondents City of Los Angeles, Port of Los Angeles, and Board of Harbor Commissioners (collectively, the Port), as well as Real Parties in Interest China Shipping (North America) Holding Co. Ltd., China COSCO Shipping Corporation Limited, COSCO Shipping (North America), Inc., and West Basin Container Terminal LLC.

repeated failures over many years" to place "compliance with California environmental law and the health of harbor workers and residents ahead of (or at least on equal footing with) its desire to appease its largest tenant." (AA457; AA451.)[3]

Yet despite its forceful reproach of the Port's behavior, the trial court's remedy ruling was woefully inadequate: The trial court found it could only set aside the SEIR and require a proposed schedule for a revised SEIR—remedies that are insufficient to rectify the violations in this case. In effect, the trial court's writ allows the Port to continue its illegal operation of the terminal with neither enforceable mitigation measures nor a deadline to adopt them.

After a court determines that an agency has violated CEQA, it must issue a peremptory writ that compels compliance with the law; the statute accordingly gives courts broad authority to craft a writ that does so. (Pub. Resources Code, § 21168.9.) Accordingly, the trial court's cramped interpretation of its powers was legally flawed and should be overturned. Further, as explained in more detail below, this Court should order specific relief to ensure that the Port *finally* makes the mitigation measures enforceable, as soon as possible.

In addition to the enforceability problem, the trial court found multiple flaws in the SEIR that are not at issue in this appeal. Per the trial court's ruling, the Port must return to the drawing board on those issues in a revised SEIR. However, the

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[3] "AA" refers to Appellant's Appendix. "AR" refers to the administrative record in this case.

trial court nonetheless erred in finding that the SEIR's analysis of certain other issues passes muster under CEQA, and its findings on those issues should be reversed as well.

First, the Port's rejection of a zero-emission demonstration project for certain types of heavily polluting cargo handling equipment is not supported with any—let alone substantial—evidence. Second, the Port improperly rejected further mitigation for the terminal's climate impacts, claiming that its paltry greenhouse gas "lease measure" need not meet CEQA's standards for mitigation measures. Third, the Port failed to respond adequately to Community Petitioners' many requests to appoint an independent third-party monitor to ensure compliance with mitigation measures in light of the Port's repeated failures to implement mitigation in the past. Additionally, for the reasons stated in sections II.A. and III of the opening brief filed by Appellant South Coast Air Quality Management District (Air District), the Port also improperly rejected zero-emission truck measures and ship speed limit measures that would substantially reduce pollution at the terminal. Besides violating CEQA, the Port's failure to implement these measures makes a mockery of its own "Clean Air Action Plan" pledge that all cargo handling equipment and trucks at the Port will be zero emission by 2030 and 2035, respectively.

The Port's years of flouting its CEQA obligations have already seriously harmed nearby residents—especially children and the elderly—who are forced to breathe the terminal's toxic air pollution every day. This Court should reverse the trial court's

erroneous remedy and SEIR rulings, and order the Port to comply with CEQA immediately.

STATEMENT OF THE CASE

I. Legal Background

CEQA and its implementing regulations "embody California's strong public policy of protecting the environment." (*Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 285.) The statute's core goals are to inform the government and public about a proposed activity's potential significant environmental effects and to require feasible alternatives or mitigation measures to reduce or avoid those effects. (*Id*. at pp. 285–286.) "The foremost principle under CEQA is that the Legislature intended the act 'to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 390, quoting *Friends of Mammoth v. Bd. of Supervisors* (1972) 8 Cal.3d 247, 259.)

Before an agency makes a discretionary decision, it must first prepare an EIR "if the project *may* have a significant effect on the environment." (*American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1071, citing Pub. Resources Code, § 21151, subd. (a).) The EIR is the "heart of CEQA." (*Laurel Heights*, *supra*, 47 Cal.3d at p. 392, citations omitted.) It protects both the environment and informed self-government, and it is intended to demonstrate "that the agency has, in fact, analyzed and

considered the ecological implications of its action." (*Ibid.*, quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86.)

"The core of an EIR is the mitigation and alternative sections." (*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564.) When an EIR shows that a proposed project would have significant effects on the environment, an agency must adopt mitigation to avoid or reduce those effects if it is feasible to do so. (Pub. Resource Code, § 21002.1, subd. (b); Cal. Code Regs., tit. 14, § 15021, subd. (a) [hereinafter Guidelines].) Mitigation measures must be "fully enforceable through permit conditions, agreements, or other legally-binding instruments." (Guidelines, § 15126.4, subd. (a)(2); see also Pub. Resources Code, § 21081.6, subd. (b).) And the agency must adopt a monitoring and reporting program to ensure that the mitigation measures are implemented. (Pub. Resources Code, § 21081.6, subd. (a)(1).) "The purpose of these requirements is to ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded." (*Federation of Hillside and Canyon Assns. v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261, italics omitted.)

Once a mitigation measure is adopted, it "cannot be deleted 'without a showing that it is infeasible.'" (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1509, quoting *Napa Citizens for Honest Gov. v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 359.) The agency must prepare a supplemental EIR and support its reason for deleting

or changing the earlier-adopted mitigation with "substantial evidence." (*Id.* at pp. 1509–1510.) Again, the requirement that an agency prepare a supplemental EIR before deleting or modifying any previously adopted mitigation measures is meant to ensure that mitigation measures will not be neglected or disregarded. (*Id.* at p. 1508.)

Section 21168.9 of the Public Resources Code[4] governs remedies for violations of CEQA. (*POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 756, as mod. on den. of rehg. (Aug. 8, 2013).) Under that section, after finding a CEQA violation, courts must issue a peremptory writ of mandate that compels compliance with the law. (Pub. Resources Code, § 21168.9, subd. (b); *San Bernardino Valley Audubon Society v. Metropolitan Water Dist. of So. Cal.* (2001) 89 Cal.App.4th 1097, 1107.) Subdivision (a) of section 21168.9 gives the courts a variety of tools to accomplish that requirement, including the ability to suspend project activities. (Pub. Resources Code, § 21168.9, subd. (a).) Courts also retain their traditional equitable powers to remedy violations of the law. (*Id.*, § 21168.9, subd. (c).) While the court "cannot direct the agency to exercise its discretion in a particular way," it must nonetheless "specify what action by the agency is necessary to comply" with CEQA and retain jurisdiction until that action is taken. (*San Bernardino Valley Audubon Society*, *supra*, 89 Cal.App.4th at pp. 1103, 1105, 1107.)

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[4] All subsequent references to statutes are to the Public Resources Code unless specifically noted otherwise.

II. Factual Background

A. The Port's air pollution harms nearby residents and the environment

The San Pedro Bay ports, which include the Port of Los Angeles and the adjoining Port of Long Beach, are the largest source of air pollution in the smoggiest air basin in the country. (See AR56207.) The Port of Los Angeles is managed by the Los Angeles Harbor Department, an agency chartered by the City of Los Angeles. (AR7740.) It is next to the San Pedro and Wilmington communities of Los Angeles, about 20 miles south of downtown. (AR7746.) There are many homes, schools, hospitals, daycare centers, and parks in the surrounding areas. (AR7832–AR7833.) Most neighborhoods around the Port are low-income communities of color and "are classified as 'disadvantaged' communities" by state law under the California Communities Environmental Health Screening Tool (CalEnviroScreen). (AR41266; see also AR89525; AR89559.)

The Port acts as a landlord. It leases its property to shipping and other companies, which are responsible for handling the cargo that moves through the Port. (See AR7745.) With 23 cargo terminals across 43 miles of waterfront, the Port is the largest in North America. (AR91750; AR91875; AR7745.) In fiscal year 2019, the Port's operating revenue was $506.4 million. (AR91760.) That same year, the Port's net position—its assets minus liabilities—was $3.5 billion, which included $483 million in "unrestricted" funds that the Port could use to meet its ongoing obligations. (AR91762.)

The ships, trucks, trains, and equipment that transport the Port's cargo release toxic emissions that pollute the environment and harm people who live next to the Port and in the broader region. A ship that runs its engine while docked at the Port spews more smog-forming pollution in a single visit than 40,000 cars produce in an entire day. (AR60881.) These pollutants include nitrogen oxides (NO_x) and volatile organic compounds (VOCs), which combine in the atmosphere to form ground-level ozone, which in turn can cause respiratory, cardiovascular, reproductive, and central nervous system effects—and even premature death. (AR7828–AR7829; AR10055–AR10056.) Ships' diesel-fueled engines also produce particulate matter (PM) (AR7859), tiny particles that can penetrate deep into the lungs. PM can also cause premature death, as well as a host of health issues, such as cancer, congestive heart failure, respiratory illness such as asthma and bronchitis, and reproductive and developmental effects. (AR10064; AR38166.) PM and ozone are especially dangerous to children, the elderly, and people with preexisting medical conditions. (AR10055–AR10056; AR10064; AR38166.)

Ships are also a major source of greenhouse gases, which cause climate change. (AR7917; AR7905–06.)[5] Climate change is expected to cause hotter temperatures and more fires throughout California, and less rain in the southern part of the state.

[5] Greenhouse gases include carbon dioxide (CO_2), methane (CH_4), and nitrous oxide (N_2O). (AR7905.) Greenhouse gas emissions are typically reported in terms of metric tons of carbon dioxide equivalents (CO_2e). (AR7906.)

(AR7907.) It is also expected to cause more extreme heat waves, which can be life threatening, especially for the elderly, children, people with chronic conditions, and other at-risk groups. (AR7907.)

The equipment that moves cargo around the Port is also a significant source of air pollution. Cargo handling equipment includes yard tractors, which move cargo containers around the terminal; top handlers (also called top picks) and rubber-tired gantry cranes, which stack cargo containers and move them on and off yard tractors and rail cars; and forklifts, which move and lift containers. (AR52696–AR52699.) Cargo handling equipment produces greenhouse gas emissions, as well as emissions of PM, NO_x, VOCs, and other pollutants such as carbon monoxide (CO). (AR7917; AR10043–AR10045.)

The people who live, work, and go to school next to the Port bear the brunt of the Port's pollution. According to the state's CalEnviroScreen tool, communities closest to the Port suffer more pollution burdens than 83 to 98 percent of the state. (AR56319.) Due to these high levels of pollution, people living close to the Port face more than *double* the risk of cancer than people living farther away. (AR60882; see AR41266–AR41267; AR89556 [showing cancer risks in communities around the Port are much higher than in rest of region].) People in these communities also suffer from higher rates of asthma and cardiovascular disease, and are more likely to have babies born at a low weight. (AR89558.)

The Port has acknowledged that it has a "responsibility to minimize [its] environmental and public health impacts." (AR41268.) In 2017, the mayors of Los Angeles and Long Beach announced a "joint declaration for creating a zero-emissions goods movement future – with ultimate goals of zero emissions for cargo handling equipment by 2030, and zero emissions for on-road drayage trucks serving the ports by 2035."[6] (AR41250–AR41251; AR97773–AR97774.) The Ports of Los Angeles and Long Beach thereafter approved the 2017 Clean Air Action Plan, which serves as a roadmap to achieve those targets. (AR41250.) However, as discussed below, the Port's approvals for this project allow the China Shipping terminal to continue using diesel cargo handling equipment and trucks far beyond those dates, and thus fail to realize the Clean Air Action Plan's goals.

B. The Port approves the China Shipping terminal project in violation of CEQA

In 2001, the Port issued a permit to construct a container terminal at Berths 97-109 at the Port and entered into a long-term lease, also known as "Permit No. 999," with China Shipping to occupy the terminal. (AR7747.)[7] The Port committed to build the China Shipping terminal in three phases. And, as part of the

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[6] "Drayage" refers to the transport of containers to and from the terminal. (See AR7753.)

[7] In 2016, China Shipping merged with China Ocean Shipping Group Company to create the Cosco Shipping Line. (AR7750.) For simplicity, this brief refers to both as "China Shipping."

lease, a subsidiary of China Shipping, West Basin Container Terminal (WBCT), would operate the terminal. (AR7747.)

Shortly after China Shipping and the Port executed their lease agreement, Community Petitioners sued the Port and China Shipping for attempting to build and operate the terminal without preparing a project-specific EIR, as required by CEQA. (*NRDC v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 270.)[8] Community Petitioners won that lawsuit on appeal. The Court of Appeal directed the trial court to order the Port to complete an EIR for the project and to stay operations in the meantime. (*Id.* at pp. 280–281, 285–286.) The court allowed the Port to complete the first phase of construction, which had already begun, but prohibited the Port from starting the second and third phases of construction. (*Ibid.*) The first phase of construction was completed in 2003. (AR7748.)

In 2004, Community Petitioners and the Port entered into a court-approved settlement that allowed the Port to finish construction of the terminal and to begin the first phase of operations while completing the EIR ordered by the Court of Appeal, as long as the Port agreed to a suite of mitigation measures. (AR2670–AR2728.) Several mitigation measures concerned the use of shoreside electric power, known as alternative maritime power or "AMP." AMP allows ships to turn off their engines while docking and can reduce ship emissions by up to 93 percent. (AR738.) Specifically, the settlement required

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[8] East Yard Communities for Environmental Justice, a petitioner in this case, was not a party in the earlier lawsuit.

the Port to pay up to $5 million to retrofit China Shipping's ships to make them AMP-capable and to ensure that, by July 2005, 70 percent of China Shipping's ships would use AMP while docked at the terminal. (AR2689–AR2691.) Other required mitigation measures included transitioning to cleaner yard tractors and top handlers, and establishing a $50 million fund to address the environmental and other effects of Port operations. (AR2687–AR2688; AR2693–AR2700.) The settlement also required the Port to amend its lease with China Shipping, so that China Shipping—which was not a party to the settlement—would be bound by the AMP and cargo handling equipment mitigation measures. (AR2693.)

In 2005, the Port and China Shipping amended their lease to incorporate the mitigation measures required by the settlement. (AR44362–AR44379.) In the lease amendment, the Port agreed to reimburse China Shipping for all costs associated with the settlement's AMP requirements, as well as the costs of purchasing cleaner cargo handling equipment. (AR44362–AR44363.) The Port paid China Shipping $17.7 million to implement the required mitigation. (AR45012.)

C. The Port prepares the 2008 EIR for the China Shipping terminal project

As required by the earlier Court of Appeal decision and settlement, in 2008, the Board of Harbor Commissioners certified an EIR for the China Shipping terminal project (the 2008 EIR). (AR7787.) The 2008 EIR analyzed all three phases of construction, as well as operation of the terminal under a 40-year lease, until 2045. (AR7788.) In that document, the Port concluded

that the terminal's operations would have significant effects on air quality, with disproportionately high effects on low-income communities and communities of color. (AR2430.) To help reduce these effects, the Port committed to implement a number of mitigation measures that it deemed feasible. Those measures included requirements aimed at ships (e.g., requiring an increasing number of ships to use AMP while docking at the terminal and a ship speed limit program); cargo handling equipment (e.g., requiring transitions to cleaner as well as zero-emission equipment); and drayage trucks (e.g., requiring an increasing percentage of trucks entering the terminal to be fueled by liquified natural gas). (AR6561; AR6564–AR6566.)

The 2008 EIR stated that the Port would implement the required mitigation by incorporating the measures into China Shipping's lease. (AR6561–AR6571.) Specifically, China Shipping's "existing lease" would supposedly "be modified upon certification" of the EIR "to require compliance with all laws and regulations," including the EIR's mitigation measures. (AR6534.) Community Petitioners supported the 2008 EIR based on these commitments.

D. The Port fails to implement the 2008 EIR mitigation measures

Despite the commitments made in the EIR, the Port never amended its lease with China Shipping to incorporate the required mitigation measures. (See AR9887.) After the Port issued the 2008 EIR, China Shipping apparently took the position in its negotiations with the Port that it was not required to amend its lease to comply with the EIR's requirements.

(AR7750; AR51179.) Ostensibly consenting to these demands, in 2009, the Port secretly, without notice to the public or elected officials, began allowing China Shipping to violate the requirement that ships plug into AMP while docking at the terminal. (AR60865–AR60869.) At the time, the 2008 EIR, as well as the 2004 settlement agreement between the Port and Community Petitioners, required 70 percent of China Shipping ships to use AMP. (AR6561.) However, the Port's Executive Director assured China Shipping that the Port would "not hold China Shipping responsible" if it violated this requirement during the recession. (AR45097 [letter from Port].)

The Port continued to privately waive China Shipping's compliance with the AMP requirement for the next few years. (AR46524–AR46525; AR47321–AR47322; AR48334.) As a result of these waivers, the number of ships plugging into AMP at the terminal fell far below the settlement agreement's 70 percent requirement, as well as the 2008 EIR's increasingly stringent requirements. The EIR required 90 percent of China Shipping ships to use AMP in 2010, but only 72 percent of ships plugged in that year. (AR7789.) Starting in 2011, the 2008 EIR required 100 percent compliance with AMP, but actual compliance rates in 2011, 2012, and 2013 were only 66 percent, 12 percent, and 30 percent, respectively. (AR7789.)

The Port similarly failed to require China Shipping's compliance with other important mitigation measures evaluated in the 2008 EIR. For example, the EIR required 100 percent of ships calling into the terminal to comply with a speed limit

within 40 nautical miles of the Port because at lower speeds, ships use less fuel and produce fewer emissions. (AR7790; AR41305.) However, between 2009 and 2012, most ships calling at the terminal did not comply with that requirement. (AR7790 [showing 20 percent, 42 percent, 41 percent, and 47 percent compliance in 2009, 2010, 2011, and 2012, respectively].) Likewise, the Port and China Shipping failed to phase in most of the cleaner cargo handling equipment and drayage trucks required by the 2008 EIR. (AR7790–AR7791.)

During this time, the Port never alerted the public about its failure to implement the required mitigation. In August 2015, the Port received a Public Records Act request from *Random Lengths News*, a local newspaper, requesting information about the status of mitigation at the terminal. (AR107548.) A month later, the Port publicly announced that many mitigation measures had not been fully implemented and provided notice that it was preparing a supplemental EIR to address the issue. (AR6600; AR6602–AR6603; AR6609–AR6610.)

The Port's failure to implement these mitigation measures harmed neighboring communities by exposing the people who live there to more toxic pollution. For example, in 2018, the terminal's NO_x emissions were almost 50 percent higher than what they would have been if the Port had implemented the required mitigation. (See AR10046.) The excess NO_x emissions created by the Port's noncompliance from 2009 to 2018 were equivalent to the NO_x emissions that 59,000 trucks would produce if they were traveling continuously during that entire period. (AR88449.)

E. The Port certifies the 2019 SEIR for the China Shipping terminal project

For the next four years, the Port engaged in a painstakingly slow supplemental EIR process while continuing to profit from terminal operations. The Port issued a draft supplemental EIR in 2017 and a recirculated draft supplemental EIR in 2018. (AR14.) Finally, in September 2019—four years after disclosing its failure to implement the 2008 EIR measures—the Port issued the final supplemental EIR (SEIR) for the China Shipping terminal. (AR9672.) The SEIR evaluates the environmental impacts of the "continued operation of the Berths 97-109 China Shipping (CS) Container Terminal under new and/or modified mitigation measures," which the Port calls the "Revised Project." (AR7787.) These "modified" mitigation measures delete and weaken mitigation measures that the Port found feasible in the 2008 EIR. (AR88240–AR88241.)

Similar to the 2008 EIR, the SEIR states that the mitigation measures "would be included in the new lease amendment." (AR10529.) But it did not clearly explain what would happen if China Shipping continued to refuse to amend its lease to incorporate the mitigation measures. (AR7775–AR7776.) In response to questions about this issue, the Port later stated, without explanation, that "[i]f there is ultimately no new lease, the revised project will not be implemented." (AR92734.)

Notwithstanding China Shipping's past refusal to amend the lease, the Port assumed in its analysis of environmental impacts that the lease would be amended in 2019, and thus, the modified mitigation measures would become effective that year.

(AR7824–AR7825; AR7904.) Even with that assumption, however, the Port concluded that operation of the terminal would expose the public to significant levels of pollution. Specifically, the Port found that the terminal would contribute to climate change by releasing significant amounts of greenhouse gas from ships, trains, cargo handling equipment, trucks, and other sources. (AR7902; AR7924–AR7927 [showing that operation of the terminal would release over 18 times the significance threshold of 10,000 metric tons of CO_2e per year, in the peak year of 2030].)

The Port similarly found that operation of the terminal would harm regional air quality due to significant emissions of VOCs, CO, and NO_x. (AR10052.) The Port also concluded that emissions from the terminal would have significant *local* impacts on air quality in the areas immediately surrounding the terminal. (AR10056.) According to the Port, emissions from the terminal would make it significantly more likely that people living near the terminal will develop cancer. (AR7890.)

Despite these significant effects, on October 8, 2019, the Board of Harbor Commissioners certified the SEIR. That certification was not accompanied by an amendment to the lease or any other binding legal instrument making the mitigation measures enforceable. (See AR23–AR25.) Community Petitioners timely appealed the Board's certification of the SEIR, as did the Air District and the California Air Resources Board (CARB). (AR92134–AR92140; AR92484–AR92488; AR92569–AR92576.)

The City Council denied those appeals on August 12, 2020. (AR23–AR25.)

III. Procedural History

Community Petitioners filed this petition for a writ of mandate and complaint for declaratory and injunctive relief in Los Angeles County Superior Court on September 16, 2020. (AA012.) That same day, the Air District filed a similar petition and complaint in the same court. (AA044.) The cases were deemed related and shortly thereafter, CARB and the People intervened in the Air District's lawsuit. (AA076; see AA079.) In April 2021, the trial court granted the Port's motion to transfer venue and transferred the case to San Diego County Superior Court. (AA125; AA127.)

After some motion practice, the trial court heard the merits of the case on June 24, 2022. On June 27, the court issued an order granting the three petitions in part and denying them in part (Order). The trial court found that "the Port has gone forward with the Revised Project – i.e., the continued operation of the Terminal – without implementing the mitigation measures to combat emissions. The absence of such mitigation measures for project activity constitutes a profound violation of CEQA." (AA457.) The court also found that the SEIR's analysis of air pollution was misleading (AA452–AA453), and that the Port had failed to support with substantial evidence its findings that certain mitigation measures were infeasible (AA455, AA458 [AMP]; AA457 [electric yard tractor pilot]). At the same time, the trial court denied the three petitions on five grounds relevant

here, as they related to zero-emission top handlers and forklifts; a greenhouse gas mitigation fund; an independent oversight committee; cleaner drayage trucks; and ship speed limits. (AA458; AA453–AA456.) As to remedy, the trial court denied Petitioners' request for briefing on that subject and held that "[a]bsent a consent decree, the court may only declare an earlier CEQA document invalid and order it set aside." (AA459.) Shortly thereafter, on July 15, the trial court issued a peremptory writ of mandamus (Writ) and judgment. (AA470–AA473; AA494–AA497.)

Together, these orders require the Port to set aside the SEIR and provide a schedule for preparing a revised SEIR on the issues Petitioners prevailed on. (AA459–AA460; AA472–AA473; AA496–AA497.) They also implicitly let the terminal continue to operate without enforceable mitigation measures from the SEIR or 2008 EIR. (See AA459.)

On August 23, 2022, Community Petitioners filed a notice of appeal. (AA535.) One day later, the Air District also filed a notice of appeal. (AA551–AA552.)

STATEMENT OF APPEALABILITY

This appeal is from a final judgment of the San Diego County Superior Court and is authorized by Code of Civil Procedure section 904.1, subdivision (a)(1).

STANDARD OF REVIEW

In CEQA cases, a court of appeal "independently review[s] the administrative record under the same standard of review that governs the trial court." (*Federation of Hillside and Canyon*

Assns., *supra*, 83 Cal.App.4th at p. 1259.) "[T]he appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427.)

Courts review an agency's CEQA determinations for abuse of discretion. (Code Civ. Proc., § 1094.5, subd. (b); *American Canyon*, *supra*, 145 Cal.App.4th at p. 1070.) An agency abuses its discretion if it "has not proceeded in the manner required by law" or its findings "are not supported by evidence." (Code Civ. Proc., § 1094.5, subd. (b).) Courts determine de novo whether an agency has followed proper procedures, whereas factual conclusions are reviewed for substantial evidence. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512.) Substantial evidence is "evidence of ponderable legal significance, reasonable in nature, credible, and of solid value." (*American Canyon*, *supra*, 145 Cal.App.4th at p. 1070.) It includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (Pub. Resources Code, § 21082.2, subd. (c).) "Argument, speculation, unsubstantiated opinion or narrative, [or] evidence which is clearly inaccurate or erroneous . . . is not substantial evidence." (*Ibid.*)

Conversely, an agency's "use of an erroneous legal standard" is a question of law. (*No Oil*, *supra*, 13 Cal.3d at p. 88.) Likewise, the Court of Appeal reviews a trial court's legal interpretation of its remedy powers under section 21168.9 de

novo. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 287.)

ARGUMENT

I. This Court should reverse the trial court's erroneous remedy decision and require compliance with CEQA

Once a court finds a CEQA violation, the law requires the court to issue a writ ordering the agency to remedy that violation and gives it broad power to do so. (Pub. Resources Code, § 21168.9, subds. (a), (b).) Here, the trial court found that the Port committed a "profound" violation of CEQA by failing to make any mitigation measures enforceable. (AA457.) But when it came to imposing a remedy for that violation, the trial court perplexingly concluded that it could "only" direct the Port to set aside the SEIR—and nothing more. (AA459.) That remedy allows the Port to continue its illegal operation of the terminal without enforceable mitigation measures, and consequently does not redress the violation the court found. The trial court's limited interpretation of its powers was legally flawed and should be overturned.

As explained below, this Court should order specific relief to ensure that the Port rectifies its CEQA violations. *First*, in addition to requiring a revised SEIR, this Court should mandate that the Port make enforceable any mitigation measures found feasible in that revised SEIR, and require the trial court to retain jurisdiction over the case until the Port shows it has done so. *Second*, the Court should require the Port to immediately make enforceable certain mitigation measures—including those the Port itself found to be feasible—while it prepares the revised

SEIR. This will ensure there is at least some enforceable mitigation during the many months it will take to prepare a revised SEIR. *Third*, the Court should suspend operations at the terminal unless the Port takes the above two actions as soon as possible. Each of these remedies is necessary to achieve compliance with CEQA and reduce the toxic pollution that nearby residents are forced to breathe.

A. The trial court's ruling that it could "only" set aside the SEIR was wrong as a matter of law

1. Section 21168.9 provides courts broad authority to compel CEQA compliance

"The judicial remedies for a CEQA violation are governed by section 21168.9." (*POET*, *supra*, 218 Cal.App.4th at p. 756.) Under that section, after finding a violation, the court "shall" issue "a peremptory writ of mandate specifying what action by the public agency is necessary to comply" with CEQA. (Pub. Resources Code, § 21168.9, subd. (b); see also *San Bernardino Valley Audubon Society*, *supra*, 89 Cal.App.4th at pp. 1103, 1107 [reversing trial court order that failed to require CEQA compliance].) The statute also requires trial courts to "retain jurisdiction over the public agency's proceedings by way of a return to the peremptory writ until the court has determined that the public agency has complied with this division." (Pub. Resources Code, § 21168.9, subd. (b).) This requirement is designed to ensure that the agency actually complies with a court order directing specific action to remedy a CEQA violation.

Subdivision (a) of section 21168.9 sets forth three types of "mandates" a court can order an agency to undertake: "(1) to void,

in whole or in part, a determination, finding or decision, (2) to 'suspend any or all specific project activity or activities' if certain conditions exist, or (3) to take specific action necessary to bring the determination, finding or decision tainted by the CEQA violation into compliance with CEQA." (*POET, supra*, 218 Cal.App.4th at p. 757, quoting section 21168.9, subd. (a).) Section 21168.9 also makes clear that a court retains its traditional equitable powers to remedy violations: "Except as expressly provided in this section, nothing in this section is intended to limit the equitable powers of the court." (Pub. Resources Code, § 21168.9, subd. (c).)

The "commonly applied remedy" for CEQA violations is to direct the agency and project proponent not to implement the project unless and until the CEQA violations have been corrected. (*King and Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 898, as mod. on den. of rehg. (Mar. 20, 2020) [weighing equities and concluding ordinance "should not be allowed to remain in effect"].) Nonetheless, in certain "extraordinary" cases, courts can exercise their inherent equitable authority to allow the project to "remain operative" while the agency remedies the CEQA violation. (See *ibid.*) In doing so, however, a court must weigh the equities and make certain findings under subdivision (a)(2) of section 21168.9. (See, e.g., *POET, supra*, 218 Cal.App.4th at pp. 762–763 [allowing the project to remain operative because in that "unusual" case, the "environment will be given greater protection" by doing so].) In other words, the "choice of a lesser remedy" requires a court's

"consideration of equitable principles." (*San Bernardino Valley Audubon Society*, *supra*, 89 Cal.App.4th at p. 1104.) A court that allows a project to continue operating pending CEQA compliance must also retain jurisdiction over the case until the agency files a final return showing it has fully complied with the law. (See *POET, supra*, 218 Cal.App.4th at pp. 767–768.)

In short, section 21168.9 provides courts with wide-ranging powers to shape appropriate remedies, but it nonetheless requires a writ that compels compliance with the law. It "was enacted to provide a trial court with flexibility in fashioning remedies to ensure compliance with [CEQA]; it does not authorize a trial court to circumvent the mandatory provisions thereof." (*Farmland Protection Alliance v. County of Yolo* (2021) 71 Cal.App.5th 300, 312.)

2. The trial court held that the Port violated CEQA but found that it could "only" set aside the SEIR

Calling it the "central issue" of the case (AA450), the trial court found that the Port's failure to make mitigation measures enforceable was a "profound" violation of CEQA (AA457). The law is clear that "[m]itigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments." (Guidelines, § 15126.4, subd. (a)(2); see also Pub. Resources Code, § 21081.6, subd. (b).) This enforceability requirement in CEQA ensures that "feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded." (*Federation of Hillside and Canyon Assns.*, *supra*, 83 Cal.App.4th

at p. 1261, italics omitted.) Likewise, under CEQA, mitigation "cannot be deferred past the start of the project activity that causes the adverse environmental impact." (*POET*, *supra*, 218 Cal.App.4th at p. 740.)

In this case, it is undisputed that the Port did not adopt the mitigation measures as amendments to the lease or as part of another enforceable legal instrument, but rather made them "contingent on their inclusion in a new lease amendment" with China Shipping. (AA447.) In other words, the Port merely provided a *promise* that the mitigation measures eventually would be incorporated into the lease via amendment—the same promise the Port had previously made and broken. As the trial court noted, "the Port's own executive director knew full well in 2020 that the SEIR was destined to be struck down by the courts." (AA451.)

Not surprisingly, the trial court "readily" found that "the mitigation measures are not legally enforceable, and thus do not pass muster under CEQA." (AA451.) The trial court chastised the Port for its continued operation of the project "without implementing the mitigation measures to combat emissions," calling the absence of such mitigation measures "a profound violation of CEQA." (AA457.) The trial court also rejected the Port's argument that various "unusual circumstances" excused its failure to adopt enforceable mitigation: "[t]he record before this court establishes beyond any doubt that the only 'unusual circumstances' present here are the Port's repeated failures over many years to adopt a negotiating position with China Shipping

which places compliance with California environmental law and the health of harbor workers and residents ahead of (or at least on equal footing with) its desire to appease its largest tenant." (AA451.)

Despite this scathing rebuke, the trial court failed to order a remedy that forces the Port to comply with CEQA. Instead, the trial court took a cramped view of its powers that left Community Petitioners without the relief they deserve under the law. In turning to remedy, the trial court first denied Petitioners' requests for briefing on that subject, stating that "[f]urther briefing in this court will simply delay review by the Court of Appeal." (AA460.) It then held that "[a]bsent a consent decree, the court may only declare an earlier CEQA document invalid and order it set aside. The court has done so here." (AA459.) The trial court likewise opined that any relief setting aside the lease (Permit No. 999) "does not appear cognizable in this court" because the "main thrust of this case is the SEIR, not the original EIR." (AA459.)

Consistent with this reasoning in the Order, the trial court's Writ commands the Port to set aside the SEIR and provide a schedule for preparing a revised SEIR for the issues on which Petitioners prevailed. (AA496 ¶¶ 1–2.) The Writ also includes a provision in paragraph 3 that purports to require the Port to "[e]nsure" that "any future" decisions to approve a project at the terminal "fully comply with CEQA," including "by ensuring that any adopted mitigation measures are fully enforceable." (AA496 ¶ 3.) Although this language is promising on its face, it

has two problems. First, it applies only to "future" approvals, and thus does nothing to remedy the fact that the terminal is currently operating without enforceable mitigation measures. Second, even as to future approvals, that language is unlikely to have any substantive effect because the trial court ordered the Port to file a final return to the Writ within *60 days* (AA459; AA497 ¶ 5), and it is impossible for the revised SEIR to be completed by then.[9] It is therefore clear that the trial court plans to discharge the Writ *before* the Port completes the revised SEIR and makes any mitigation measures enforceable. In fact, the trial court rejected Community Petitioners' proposed writ, which would have explicitly required the court to retain jurisdiction beyond the 60 days and until the Port proved that it had complied with CEQA by making mitigation measures enforceable. (See AA464–AA465.)

Taken together, the practical result of the trial court's Order and Writ is that the Port and China Shipping can continue with the most damaging aspect of the project—operation of the terminal, with all of its polluting ships, trucks, and cargo handling equipment—without any enforceable CEQA mitigation measures. Once the Port has filed a final return showing that it

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[9] Among other things, CEQA mandates public comment periods totaling at least 75 days, which does not even account for the time it would take to draft the revised SEIR and respond to comments. (Guidelines, § 15082, subd. (b) [30-day agency comment period for the notice of preparation of the draft EIR]; Pub. Resources Code, § 21091, subd. (a) [at least 45-day public comment period for this type of draft EIR].)

has set aside the SEIR and proposed a schedule for a revised SEIR, the trial court will discharge the Writ—before the Port has achieved full CEQA compliance. And that, of course, will leave the unlawful status quo in place at the end of this lawsuit.

3. The trial court's remedy fails to require the Port to comply with CEQA by making the mitigation measures enforceable

The "primary defect" in the trial court's Order and Writ is the "failure to require CEQA compliance." (*San Bernardino Valley Audubon Society*, *supra*, 89 Cal.App.4th at p. 1107; see also Pub. Resources Code, § 21168.9, subd. (b).) As the trial court acknowledged, the "central issue" in this case is not the flawed SEIR (though the SEIR has plenty of flaws, see *infra* Argument II), but rather the Port's failure to make mitigation measures enforceable. (AA451 [stating that this violation, "standing alone," was "enough to require that the petitions be granted"].) Despite accurately identifying that enforceability violation, the trial court did not provide a clear command directing the Port to make the mitigation measures enforceable, much less to do so before it would discharge the writ. (Cf. Pub. Resources Code, § 21168.9, subd. (a)(3) [stating that the court may direct the agency to "take specific action as may be necessary" to bring its decision into compliance with CEQA]; *id.*, § 21168.9, subd. (b) [requiring the court to "retain jurisdiction" until it has determined the agency has complied with CEQA].) The trial court also allowed the project to continue operating without enforceable mitigation measures, without considering the factors in subdivision (a) of

section 21168.9 or attempting to weigh the equities. (See *id.*, § 21168.9, subds. (a)(2), (c).)

The trial court's narrow interpretation of its remedy powers was wrong as a matter of law. (See *Preserve Wild Santee*, 210 Cal.App.4th at p. 287 ["We review the trial court's interpretation of section 21168.9 de novo."].) Section 21168.9 not only requires the courts to compel compliance with CEQA, it gives them broad powers to do so. Yet the trial court categorically rejected consideration of any relief beyond setting aside the SEIR (AA459), even though additional relief was necessary to redress the key violation in this case.[10]

Notably, the "trial court did not identify which subsection of section 21168.9, subdivision (a) it purportedly applied" in ordering relief, and "indeed, it did not identify section 21168.9, subdivision (a) at all." (See *Farmland Protection Alliance*, *supra*, 71 Cal.App.5th at pp. 311–312 [finding reversible error under these circumstances].) The trial court's only two references to section 21168.9 were pro forma citations to subdivisions (b) and

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[10] In many cases, setting aside an EIR and related project approvals will have the effect of halting a project and thus remedying any CEQA violations. However, that is not the case here, for two reasons. First, the Port prepared the SEIR not for an initial project approval, but rather solely to weaken previously approved mitigation. (See *Lincoln Place Tenants Assn.*, *supra*, 130 Cal.App.4th at p. 1509 [requiring a supplemental EIR before deletion of mitigation].) Second, although the trial court ordered the Port to set aside the SEIR certification *and* "related project approvals," it is clear from context that relief does not include setting aside approval of Permit No. 999 itself or otherwise halting project operations. (See AA459.)

(c), stating that it would retain jurisdiction only until the Port set aside the SEIR and would not direct the Port to carry out its obligations under CEQA in any particular way. (AA459.)

As to that latter subdivision, the trial court apparently (and mistakenly) believed that ordering any relief beyond directing the Port to set aside the SEIR would improperly usurp agency discretion. (AA459 [citing Pub. Resources Code, § 21168.9, subd. (c)].) But requiring the Port to make the mitigation measures enforceable does not require the Port to exercise its discretion in a particular way. Rather, it simply commands the Port to comply with CEQA, should the terminal continue operating. The Port does not have discretion to continue violating CEQA—compliance with the statute is mandatory.

In sum, section 21168.9 allows courts to do much more than just set aside the EIR at issue, and the trial court's limited view of its powers is contrary to the law. The trial court's truncated remedy decision deprives Community Petitioners of the relief they are entitled to by law and renders meaningless the environmental protections in CEQA. This Court should reverse the trial court's holding that it could "only" set aside the SEIR because that remedy does not fully redress the CEQA violations in this case.

B. This Court should impose remedies consistent with CEQA

To ensure that the Port complies with CEQA's requirement to make mitigation measures enforceable, this Court should impose three remedies:

1. The Port must revise the SEIR and make any measures found feasible in that document enforceable as soon as possible

First, as the trial court already ordered, if the terminal continues to operate, the Port must prepare a revised SEIR to correct the flaws in that document.[11] (Cf. *John R. Lawson Rock and Oil, Inc. v. State Air Resources Bd.* (2018) 20 Cal.App.5th 77, 103 [stating that courts can order an EIR where "under the circumstances of that case, the agency lacks discretion to proceed in a different fashion"].)

But as explained above, that remedy alone is not enough. The Court should *also* impose a deadline for completion of the revised SEIR and require the Port to make enforceable any feasible mitigation measures in that revised SEIR. The Court should further require the trial court to retain jurisdiction over the case until the Port files a return showing it has complied with CEQA. (See *supra* Argument I.A.; *Laurel Heights*, *supra*, 47 Cal.3d at pp. 424 fn. 24, 428 [stating that the trial court must retain jurisdiction over the case until the agency files a final return showing it has completed the revised EIR and complied with CEQA]; *POET, supra*, 218 Cal.App.4th at pp. 767–768 [similar]; *San Bernardino Valley Audubon Society*, *supra*, 89 Cal.App.4th at pp. 1103, 1108 [stating that the court "must

[11] The Port must prepare a revised SEIR regardless of how this Court rules on the SEIR issues on appeal (see *infra* Argument II) because Petitioners also prevailed on issues that the Port has not appealed. (AA452–AA453 [analysis]; AA455, AA458 [AMP]; AA457 [electric yard tractor pilot].)

specify what action by the agency is necessary to comply with CEQA" and retain jurisdiction until that action is taken].) Given that the Port has already flouted CEQA for more than two decades, the Court should order the Port to complete the revised SEIR—and to make enforceable any mitigation measures found feasible in that revised SEIR—within 18 months.[12]

2. The Port must make certain mitigation measures enforceable immediately, while it revises the SEIR

Second, the Court should require the Port to make certain mitigation measures enforceable immediately—within three months—while it prepares the revised SEIR, a process that could take many more months. As explained above, the trial court allowed the project to continue operating pending CEQA compliance, and to do so *without* enforceable mitigation measures. This contravenes CEQA's rule that mitigation "cannot be deferred past the start of the project activity that causes the adverse environmental impact." (*POET*, *supra*, 218 Cal.App.4th at p. 740.)

Accordingly, if the terminal continues to operate, this Court should require that the Port immediately make enforceable the mitigation measures adopted in the SEIR. (See AR10531–AR10536 for a list of the SEIR mitigation measures.) Indeed,

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[12] The Court should order this relief at the very least. But because this relief will still unlawfully allow the terminal to operate without mitigation for the many months it will take the Port to prepare a revised SEIR, further relief is necessary. (See *infra* Argument I.B.2.)

these are the very mitigation measures that the Port itself claimed were feasible in the SEIR and defended as feasible in the trial court. (AA352 [Port's trial court briefs stating that the "Board and City Council have determined, based on the SEIR, that these changes to the mitigation measures are feasible and appropriate"].) Having conceded that it must make the SEIR measures enforceable (AA352), and stated that it would do so "once these current lawsuits are resolved" (AA354), the Port cannot reasonably object to a writ directing it to do exactly that after this appeal is over.

Additionally, there are a handful of mitigation measures for which the trial court has already rejected the Port's attempts to weaken the 2008 EIR version of the measure, or for which this Court may do so on appeal. Specifically, the trial court found that the Port's deletion of the 2008 electric yard tractor pilot project and modification of the 2008 alternative maritime power or "AMP" measure were not supported by substantial evidence. (AA457 [electric yard tractor pilot]; AA455, AA458 [AMP].) The Port has not appealed those findings. This Court should require that the Port immediately make the 2008 version of those measures—which the Port previously found feasible in the 2008 EIR and the trial court has reinstated—enforceable. Similarly, on appeal, Community Petitioners and the Air District are arguing that the Port unlawfully modified the 2008 ship speed limit

measure. (See Air District Opening Br. Argument III.)[13] If the Court reinstates that measure, it should also require the Port to make it enforceable immediately.

Requiring the Port to make these measures enforceable while it prepares a revised SEIR would best protect the environment and effectuate CEQA's purpose, because *some* enforceable mitigation measures are clearly better than *none*. (See *Laurel Heights*, *supra*, 47 Cal.3d at p. 390 [CEQA should "be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language"].) And it would put Community Petitioners in the position they would have been in had the Port complied with CEQA's enforceability requirement to begin with. There is no basis for allowing the Port to benefit from its failure to make the measures enforceable in the first instance. (See *id.* at p. 425 ["It would be untenable for [the agency decisionmakers] to rely on the result of their own noncompliance as a basis for determining their future action."].)

For example, the 2008 EIR included mitigation measure AQ-9, which required 100 percent of China Shipping ships, as

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[13] The Air District also argues in Argument II.B. of its opening brief that the Court should reinstate the 2008 EIR's requirement to phase in liquified natural gas trucks. But it is now feasible to phase in *zero-emission* trucks, which would reduce significantly more emissions. Thus, for the reasons in Argument II.A. of the Air District's brief, the Court should find that the Port unlawfully failed to consider mitigation requiring zero-emission trucks, rather than find that the Port should reinstate the 2008 measure.

well as all other ships that are retrofitted, to use AMP. (AR7724.) In the SEIR, the Port weakened that measure by revising it to require 95 percent of all ships to use AMP and adding in various exceptions that swallow the rule. (See AR7724; AR10531.) Petitioners argued both that the Port had illegally modified the 2008 measure and that the Port had failed to consider additional mitigation in the form of requiring 100 percent of all ships to use AMP with limited exceptions only for true emergencies. (AA228–AA236.) The trial court found for Petitioners on both grounds (AA455; AA458), and the Port has not appealed that ruling. Hence, while the Port prepares the revised SEIR, it should immediately make either the 2008 measure or, failing that, the SEIR measure—which the Port itself claimed was feasible—enforceable. The law does not allow the Port to refuse to make *either* AMP measure enforceable while it completes the revised SEIR simply because it failed to properly adopt an enforceable measure in the first place. The same goes for the other measures.

In short, the Court should order the Port to make the SEIR measures plus the reinstated 2008 measures enforceable immediately, within three months, while it prepares a revised SEIR.

3. The Court should suspend terminal operations if the Port does not take the above two actions as soon as possible

Third, and finally, the Court should order the Port to suspend operations at the terminal unless the Port takes the above two actions as soon as possible. As explained above, the Court should further specify that "as soon as possible" means

three months for making the SEIR and reinstated 2008 measures enforceable (see *supra* Argument I.B.2.) and *18 months* to prepare a revised SEIR and make any additional measures found feasible in that revised SEIR enforceable (see *supra* Argument I.B.1.).[14]

Subdivision (a)(2) of section 21168.9 plainly authorizes this relief—indeed, it authorizes immediate suspension of project operation until CEQA compliance is achieved. That subdivision states that the court may mandate that public agencies and real parties "suspend any or all specific project activity" that "could result in an adverse change or alteration to the physical environment" when that activity "will prejudice the consideration or implementation of particular mitigation measures or alternatives to the project." (Pub. Resources Code, § 21168.9, subd. (a)(2).)

These factors are met here. First, there is no dispute that the project activities cause an "adverse change or alteration to the physical environment." (See Pub. Resources Code, § 21168.9, subd. (a)(2).) Even the Port's flawed SEIR found that the continued operation of the terminal—*with* the modified mitigation measures that the Port has not yet made enforceable—would cause significant emissions of VOCs, NO_x,

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[14] This Court has the authority to specify these deadlines and should exercise that authority here given that the terminal continues to spew toxic pollution without proper mitigation every single day. However, in the alternative, Community Petitioners request that the Court remand the issue of what constitutes "as soon as possible" to the trial court.

CO, and greenhouse gases (AR7902; AR10052), and would make it significantly more likely that people living near the terminal will develop cancer (AR7890).

Second, allowing the terminal to continue to operate prejudices the timely consideration and implementation of mitigation measures. (See Pub. Resources Code, § 21168.9, subd. (a)(2).) This is because the terminal continuously spews toxic emissions each and every day, and the Port can neither consider nor implement mitigation for air pollution that has already been emitted. Even if the Port were to eventually adopt enforceable mitigation, that mitigation cannot reach back in time and reverse the damage people have already suffered from the pollution they have already breathed.

Although the "agency's good faith is not a factor identified in section 21168.9," the courts "consider it relevant" to the exercise of their "discretionary authority to fashion appropriate appellate relief." (*POET, LLC v. State Air Resources Bd.* (2017) 12 Cal.App.5th 52, 100–101.) Here, the Port secretly waived mitigation required by the parties' prior settlement and the 2008 EIR. When it was found out, the Port dragged its feet through a four-year supplemental EIR process only to *again* certify an EIR in 2019 without making the mitigation measures enforceable. Rather than do what it must to ensure enforceable mitigation—including pay for mitigation or terminate the lease, if necessary—the Port instead forced Community Petitioners to sue to obtain a ruling on that issue. (AA451 [trial court noting the Port's "repeated failures over many years to adopt a negotiating

position with China Shipping which places compliance with California environmental law and the health of harbor workers and residents ahead of (or at least on equal footing with) its desire to appease its largest tenant"]; AA451 [trial court noting that "the Port's own executive director knew full well in 2020 that the SEIR was destined to be struck down by the courts"].) That is not good faith.

The requirements of subdivision (a)(2) of section 21168.9 are met as a matter of law and therefore justify suspension of project activities. As explained above, an order directing the agency and real parties not to proceed with the project until they comply with the law is "the commonly applied remedy" for a CEQA violation. (*King and Gardiner Farms*, *supra*, 45 Cal.App.5th at p. 898; see also *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 741–743, as mod. on den. of rehg. (Sept. 12, 1994) [citing subdivision (a)(2) of section 21168.9 and directing the trial court "to suspend all activity" that "could result in any change or alteration to the physical environment of the site until full compliance with CEQA is effected"].)

Here, Community Petitioners do not even seek this ordinary remedy in the first instance; rather, they request suspension of terminal activity only as a backstop if the Port continues to refuse to make mitigation enforceable as soon as possible. Thus, insofar as the Port cannot come into compliance with CEQA overnight, Community Petitioners seek a remedy that already builds in time for the Port to achieve compliance.

Even if the law does, in certain limited circumstances, allow for projects to continue operating pending compliance with CEQA, it does not allow them to do so *indefinitely* and without any enforceable CEQA mitigation whatsoever.

For example, in *POET*, the Court of Appeal allowed the challenged regulations to remain in effect pending the agency's compliance with CEQA. (218 Cal.App.4th at pp. 762–764.) In doing so, the Court of Appeal required the trial court to "retain jurisdiction over the proceedings by way of a return to the writ." (*Id*. at p. 767.) It further ordered that if the agency "fail[ed] to proceed in good faith with diligence" to remedy the violations, the trial court "immediately shall vacate the portion of the writ that preserves the status quo" and thus suspend operation of the regulations. (*Id*. at pp. 767–768.)

Likewise, in *Laurel Heights*, the Supreme Court, in interpreting section 21168.9 for the first time, found that the statute gave it authority to stay all activities to fulfill the goals of CEQA. (*Laurel Heights*, *supra*, 47 Cal.3d at pp. 422–423.) After weighing the equities, it allowed continuation of current project activities, which would "be mitigated," but prohibited any future project activities until the agency prepared a legally adequate EIR. (*Id*. at pp. 424–425.) The Supreme Court further made clear that the trial court must retain jurisdiction and should reconsider "equitable relief terminating [current] operations" if the agency failed to "promptly" prepare and certify a legally adequate EIR to comply with CEQA. (*Id*. at pp. 424 fn. 24, 428).

This Court should similarly suspend terminal operations if the Port fails to comply with CEQA as soon as possible. The relief sought here is much like that in *POET* and *Laurel Heights*, where the courts allowed project activities to continue pending CEQA compliance, but made clear that if the agency did not comply as soon as possible, project activities would be halted. Indeed, in a prior iteration of this case, the Court of Appeal entirely suspended operations at the China Shipping terminal pending CEQA compliance. (*NRDC*, *supra*, 103 Cal.App.4th at pp. 280, 286; see also *supra* Statement of the Case II.B.) It should do so again if the Port refuses to comply with CEQA as soon as possible.

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The trial court found that the Port's violations of CEQA were "profound," yet the court's remedy fails to rectify those violations. This Court should therefore reverse the trial court's holding that it could "only" set aside the SEIR, and 1) direct the Port to prepare a revised SEIR and make any feasible mitigation measures in that revised document enforceable, 2) order the Port to make the SEIR and reinstated 2008 mitigation measures enforceable while it prepares the revised SEIR, and 3) suspend terminal operations should the Port fail to take those two actions as soon as possible. The Court should also ensure that the trial court retains jurisdiction over this case until the Port has fully complied with the law. Ordering this relief is necessary to redress the Port's violation of CEQA's enforceability requirement and

ensure that China Shipping's unmitigated pollution does not continue to needlessly harm the people living near the terminal.

II. The Port's SEIR violates CEQA

In addition to the enforceability problem, the trial court found numerous flaws in the SEIR, including flaws related to specific mitigation measures and the Port's overall analysis of emissions. (AA452–AA453 [analysis]; AA455, AA458 [AMP]; AA457 [electric yard tractors].) However, there are several areas where the trial court erred in determining that the SEIR passes muster under CEQA. First, the Port failed to support with any evidence—let alone substantial evidence—its rejection of a zero-emission demonstration project that would help clean up heavily polluting top handlers and large forklifts. Second, the Port improperly rejected further mitigation for the terminal's climate impacts, claiming that its deficient greenhouse gas "lease measure" need not meet CEQA's standards. Third, the Port failed to respond adequately to Community Petitioners' many requests that it appoint a third-party monitor to ensure compliance with mitigation measures in light of the Port's repeated failures to implement mitigation in the past.

Additionally, for the reasons stated in sections II.A. and III of the opening brief filed by the Air District, the Port also improperly rejected zero-emission truck measures and ship speed limit measures that would substantially reduce pollution at the terminal. Community Petitioners accordingly incorporate those sections of the Air District's opening brief. The Court should reverse the trial court's rulings on these issues and ensure that

the Port adopts all feasible mitigation for the terminal's toxic air pollution.

A. The Port's rejection of a zero-emission demonstration project for top handlers and large forklifts was not supported by substantial evidence

Top handlers (also called top picks) and large (18-ton) forklifts are two types of cargo handling equipment used to stack and move containers at the terminal. Both are traditionally diesel-fueled (see AR7790–AR7791), and top handlers in particular are extremely polluting (see AR41299). Therefore, the adoption of zero-emission top handlers and large forklifts would eliminate a substantial amount of air pollution at the terminal.

The Port did not implement the 2008 EIR's measure requiring cleaner diesel top handlers and large forklifts. (AR7790–AR7791; AR7797.) But because zero-emission technology has advanced considerably since 2008, in their SEIR comments, Community Petitioners requested that the Port focus on accelerating the development and deployment of zero-emission technologies at the terminal. (AR88250.) For top handlers and large forklifts specifically, Community Petitioners suggested that, *at the very least*, the Port should require zero-emission top handler and large forklift *demonstration* projects, with deployment contingent on the success of those projects. (AR88250; AR88258; AR88260.) Alternatively, Community Petitioners suggested that the Port require deployment of zero-emission equipment at the terminal based on the results of

demonstration projects currently happening at *other* terminals. (AR88250; AR88258; AR88260.)

CEQA requires an EIR to analyze mitigation measures that are facially feasible. (*Napa Citizens*, *supra*, 91 Cal.App.4th at p. 360.) Before rejecting suggested mitigation measures, the agency must provide a "good faith, reasoned analysis" explaining why the requested mitigation "was not feasible." (*Covington v. Great Basin Unified Air Pollution Control Dist.* (2019) 43 Cal.App.5th 867, 881–883.) Yet, inexplicably, the SEIR does not even consider whether it would be feasible to require zero-emission top handlers and large forklifts after a successful demonstration project. (AR9713–AR9714.) Rather, the SEIR merely repeats its conclusion that zero-emission top handlers and large forklifts are not currently feasible without addressing whether the Port should require a demonstration project. (AR9713–AR9714.)

Likewise, the trial court failed to address this argument head on. Rather, the trial court misstated Community Petitioners' argument as being about the *current* feasibility of the equipment and, on that basis, rejected the argument. (AA458 [holding that "the SEIR thoroughly addresses zero-emissions technologies [] and concludes that such technologies are infeasible for top handlers and forklifts"].)

Notably, the trial court *did* address the issue of demonstration projects in another context, for a different type of cargo handling equipment: yard tractors. And in that instance, it found that the Port's rejection of a demonstration project for yard tractors was "not supported by substantial evidence." (AA457.)

However, as to top handlers and large forklifts, the trial court apparently just misunderstood or overlooked the issue.

Even assuming for argument's sake that zero-emission top handlers and large-capacity forklifts are *currently* infeasible, that does not mean *demonstration* projects for those technologies are also infeasible. If anything, current infeasibility only bolsters the argument for demonstration projects. Given the unique facts of this case—the rapidly changing technological landscape (AR42425), the 40-year life of the project (AR7747), and the Port's own goal of all zero-emission cargo handling equipment by 2030 (AR41250–AR41251)—the Port should have adopted flexible mitigation aimed at accelerating the development of these technologies and requiring their use as soon as they are commercially available.

And indeed, zero-emission top handler and large forklift demonstration projects *are* facially feasible. As of 2018, at least 12 large-capacity electric forklifts were scheduled to be tested at the Ports of Los Angeles and Long Beach over the next few years. (AR42437; AR42507.) So, too, for top handlers. As of 2018, 10 zero-emission top handlers were scheduled to be demonstrated at the two ports. (AR42506.) According to the Port, the "[r]esults of these demonstrations will indicate whether the current top handler zero-emissions technology is capable of performing at the activity levels needed in modern container terminals." (AR9713.)

So, based on the Port's own reasoning, it *would* be feasible to implement a mitigation measure requiring the terminal to use zero-emission top handlers and large forklifts contingent on the

success of a demonstration project. There was no "good faith, reasoned analysis" in the SEIR or elsewhere in the record explaining why this additional mitigation for cargo handling equipment "was not feasible." (See *Covington*, *supra*, 43 Cal.App.5th at pp. 881–883.) Because the Port "made no attempt to explain" why demonstration projects were infeasible, its rejection of those measures was not supported by substantial evidence. (*Ibid*.)

B. The Port's greenhouse gas fund measure fails to meet CEQA's standards

The Legislature has "emphatically established as state policy the achievement of a substantial reduction in the emission of gases contributing to global warming." (*Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 62 Cal.4th 204, 215.) "This policy is implemented in CEQA." (*Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467, 484.) CEQA therefore requires a lead agency 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." (Guidelines, § 15064.4, subd. (a).) If those emissions are significant, the agency must mitigate them to the extent feasible. (See Pub. Resources Code, § 21002.1, subd. (b); Guidelines, § 15021, subd. (a).)

Here, even the flawed analysis in the SEIR concludes that the operation of the terminal will emit a "significant" amount of greenhouse gases. (AR7902; AR9902.) The Port found that the terminal (after mitigation that it has yet to fully implement)

would release up to 183,424 metric tons of CO_2e per year in the peak year of 2030—primarily from ships, trains, cargo handling equipment, and trucks—far exceeding the significance threshold of 10,000 metric tons per year. (AR7924–AR7927 [table showing greenhouse gas emissions by source and total emissions per year].)

To purportedly address this significant impact over the next two decades, the SEIR includes a "lease measure," called "LM GHG-1," that requires China Shipping to make yearly contributions of $250,000 for eight years (for a total of $2 million) to a "Greenhouse Gas Fund." (AR10535.) The SEIR states that this fund will be used for Port-approved emissions reduction projects or to purchase credits from a CARB-approved offset registry.[15] (AR10535.) Even assuming a mitigation fee program is appropriate here, this "lease" measure is deficient, for two reasons.

First, the amount is woefully insufficient. According to the Port, it calculated this $2 million figure by multiplying a portion of the project's estimated greenhouse gas emissions in 2030

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[15] "Offsets" are "activities that reduce or eliminate [greenhouse gas] emissions or increase carbon sequestration." (*Golden Door*, *supra*, 50 Cal.App.5th at p. 485.) "Carbon emissions are sequestered, for example, by trees, which absorb carbon from the atmosphere." (*Id.* at p. 485 fn. 6.) As explained above and in the Air District's brief, the Port failed to adopt all feasible on-site measures to reduce the terminal's emissions. Only once all feasible on-site measures are implemented can the Port consider offsets, which do nothing to protect nearby residents from harmful co-pollutants, such as PM, NO_x, VOCs, and CO.

(129,336 metric tons of CO_2e) by the current market value of carbon credits ($15.62). (AR10079.) On its face, this leaves the majority of greenhouse gas emissions from the decades-long project unmitigated. The Port does not explain why China Shipping should pay for only a *single* year's worth of climate effects, rather than for *all* years' worth. The Port's failure to provide evidence for why it could not require more was unlawful. (See *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 731 [finding that, even if obligation to pay money was enforceable, it was unsupported by substantial evidence because it was "incomplete" and left out "part of the impact that could be mitigated"].)

Second, the measure is also flawed because it lacks sufficient restrictions on where any offsets may come from, and accordingly fails to ensure those offsets are real, "enforceable," and "not otherwise required." (Guidelines, § 15126.4, subds. (a)(2), (c)(3).) Although the SEIR states that contributions will be made to a "CARB approved offset registry" (AR10535), that alone is insufficient to ensure that the credits are enforceable and not otherwise required. Indeed, in *Golden Door*, the court struck down a similar mitigation measure because it did not require CARB-approved "protocols," which "ensure that the reductions are quantified accurately, represent real GHG emissions reduction, . . . are not double-counted within the system," and do not occur outside the country. (*Golden Door*, *supra*, 50 Cal.App.5th at pp. 508–509.) The court concluded that the proposed offsets, even if from a "CARB-approved registry," lacked

safeguards to ensure they would be valid and enforceable. (See *id.* at pp. 511–512.) So too here.

In the proceedings below, the Port did not dispute that this measure fails to satisfy CEQA's requirements. Rather, it claimed that CEQA's requirements do not apply because the greenhouse gas fund measure is a "lease measure" rather than a CEQA "mitigation measure." (AA347–AA349.) The trial court agreed with this argument, stating that the measure was not relied on as CEQA mitigation. (AA458.)

As an initial matter, the Port's claim—and the trial court's finding—that the Port did not rely on the measure to reduce the project's significant impacts under CEQA is wrong and contradicted by the record. In its Findings of Fact and Statement of Overriding Considerations, the Port explicitly found that the greenhouse gas fund measure would help reduce the project's significant impacts. (AR237 ["The Board hereby finds that changes or alterations have been required in, or incorporated into, the Revised Project, in the form of . . . LM GHG-1 . . . that lessen the significant environmental effect identified in the Final SEIR."].) The Port cannot have it both ways: It cannot cite to this "lease measure" as evidence that it is mitigating greenhouse gas emissions, but then recast the measure as something other than CEQA mitigation when its flaws are exposed.

That the Port relied on the measure to reduce impacts in its findings proves that the measure is CEQA mitigation and must meet CEQA's requirements. But even if the Port had not actually relied on the measure to reduce the project's significant impacts,

its decision to adopt the greenhouse gas fund as a "lease measure"—rather than an actual mitigation measure—still violates CEQA. CEQA requires agencies to adopt all feasible mitigation to reduce a project's significant impacts. (See Pub. Resources Code, § 21002.1, subd. (b); Guidelines, § 15021, subd. (a).) By including the greenhouse gas fund as a "lease measure," the SEIR implicitly concedes that it is feasible for China Shipping to pay *at least* $2 million to address greenhouse gases. But under CEQA, the Port must provide substantial evidence that more mitigation is not feasible. And that money must be spent on legally adequate mitigation, not speculative offsets. (See Guidelines, § 15126.4, subd. (c)(3) [mitigation measures for greenhouse gas emissions may include offsets "that are not otherwise required"]; *Cal. Clean Energy Com. v. City of Woodland* (2014) 225 Cal.App.4th 173, 197 [noting that fee-based mitigation programs may constitute adequate mitigation measures if there is evidence that mitigation will actually result].)

Because the SEIR "adopts inadequate mitigation" for greenhouse gas emissions, it "is defective." (*Cal. Clean Energy*, *supra*, 225 Cal.App.4th at p. 200.) The Port was required to include a legally adequate measure as "*actual mitigation*," to ensure that it would be implemented and enforced as required by the law. (*Id.* at p. 197, original italics, quoting *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1188.) Its failure to do so violated CEQA's mandate that the Port adopt all feasible mitigation.

C. The Port improperly ignored requests to appoint an independent third party to monitor compliance with mitigation measures

CEQA contains particular requirements for mitigation measures, as well as requirements for the lead agency to monitor implementation of those mitigation measures. As explained above, mitigation measures must be "fully enforceable through permit conditions, agreements, or other legally-binding instruments." (Guidelines, § 15126.4, subd. (a)(2); see also Pub. Resources Code, § 21081.6, subd. (b).) Equally important, the lead agency must also adopt a monitoring and reporting program to ensure that mitigation is properly implemented. (Pub. Resources Code, § 21081.6, subd. (a)(1).) That "program *shall* be designed to ensure compliance during project implementation." (*Ibid.*, emphasis added.) "The purpose of these requirements is to ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded." (*Federation of Hillside and Canyon Assns.*, *supra*, 83 Cal.App.4th at p. 1261, italics omitted.)

In their comments on the draft SEIR and recirculated draft SEIR, Community Petitioners recounted the Port's long history of waiving and ignoring mitigation measures, and emphasized that the "management failures that led to the current China Shipping situation must never recur." (AR56455; AR88275.) They pointed out that the SEIR "appears to incorporate the same program that proved ineffective in monitoring and enforcing the 2008 mitigation measures." (AR56455; AR88275.) Community Petitioners then requested that the Port develop a more robust

monitoring and reporting program, appoint an independent third party to oversee that program, and establish an oversight committee to audit compliance. (AR56455–AR56456; AR88275–AR88276.) Because Community Petitioners submitted these comments before the comment period closed on November 16, 2018, the Port had an obligation to respond to them.[16]

Yet in the final SEIR, the Port did not respond adequately to Community Petitioners' request. (Compare AR9860–AR9861 with AR9901–AR9902.) The Port tersely stated that the "comment is noted" and that the "elements requested" were not required under CEQA. (AR9901–AR9902.) The Port refused to engage at all with Community Petitioners' concerns that without such a monitor, history would repeat itself. (AR9901–AR9902.) Community Petitioners argued below that this lack of response violated CEQA, but the trial court echoed the Port's conclusory response in rejecting Community's Petitioners' claim. (AA453.)

CEQA requires a "good faith, reasoned analysis" in response to comments. (Guidelines, § 15088, subd. (c); see *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1124, as mod. on den. of rehg. (Feb. 24, 1994).) The agency must "set forth *in detail* the reasons why the particular comments . . . were rejected." (*People v. County of Kern* (1974) 39 Cal.App.3d 830, 841, italics added; see also Guidelines, § 15088,

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[16] Although the comment period originally closed on November 13, 2018, it was extended by three days to November 16, 2018. (See AR43724.) Community Petitioners also repeated these requests a *third* time in their comments on the final SEIR. (AR90612.)

subd. (c) ["Conclusory statements unsupported by factual information will not suffice."].)

The Port's response to Community Petitioners' comment was inadequate because the Port's reasoning was wrong as a matter of law. To be sure, there is no specific requirement in CEQA that compliance with mitigation be overseen by a third-party monitor. But there *is* a specific requirement that the monitoring and reporting program "*shall* be designed to ensure compliance" with mitigation measures. (Pub. Resources Code, § 21081.6, subd. (a)(1), italics added). To ensure compliance with mitigation measures, an adequate monitoring and reporting program must first ensure accurate and timely *monitoring* of compliance, and after more than 20 years of CEQA noncompliance, it is clear that neither China Shipping nor the Port can be trusted to do that. Nor can community members be responsible for monitoring the Port's and China Shipping's compliance with mitigation measures—members of the public do not have access to Port property, and even if they did, they do not have the resources necessary to assess the technologies at issue.

Community Petitioners' concerns are justified by the history of this case, as reflected in the administrative record. The Port not only failed to ensure that China Shipping was complying with prior mitigation measures—it actively *waived* those measures without notice to the public. (See *supra* Statement of the Case II.D.) From 2009 to 2013, the Port secretly allowed China Shipping to violate the requirement—incorporated into the lease pursuant to the parties' settlement and also included in the

2008 EIR—that most ships use AMP while docking at the terminal. As a result of these waivers, the number of ships using AMP at the terminal fell far below what was required, exposing nearby residents to excess harmful pollution. (See *id.*) The Port similarly failed to enforce China Shipping's compliance with other important mitigation measures, including ship speed limits and many requirements to phase in cleaner cargo handling equipment and drayage trucks. (See *id.*) And during this time, the Port never publicly disclosed its failure to implement this mitigation. Only after the press began to investigate in 2015 did the Port officially announce that many mitigation measures had not been fully implemented. (See *id.*)

Rather than seriously consider how compliance with mitigation measures would be monitored and reported this time around, the Port simply copied and pasted the relevant portions of the 2008 monitoring and reporting program into the SEIR. As Community Petitioners pointed out in their comments, the SEIR's final mitigation monitoring and reporting program is materially identical to the failed 2008 program. (Compare AR6561–AR6566 with AR10531–AR10536.) That SEIR program—like the 2008 EIR program before it—places the responsibility for monitoring and reporting solely on China Shipping and the Port. (AR10531 [stating that China Shipping must submit "bi-annual compliance forms" to the Port's Environmental Management Division and that "[e]nforcement shall include oversight by the Real Estate Division"].) The only apparent disclosures to the public about the status of

implementation would be passive and infrequent, through "[a]nnual staff reports . . . made available to the Board at a regularly scheduled public Board Meeting." (See, e.g., AR10531.) In its response to comments, the Port provided no explanation whatsoever for why it believed this recycled monitoring and reporting program would lead to a different result this time and actually "ensure compliance during project implementation." (Pub. Resources Code, § 21081.6, subd. (a)(1).)

The Port's summary dismissal of the request for a third-party monitor in light of the Port's history of noncompliance is not the "good faith, reasoned analysis" that CEQA requires. (Guidelines, § 15088, subd. (c).) The Port failed to set forth, in any detail, why Community Petitioners' requests were rejected. (*Ibid*.) The Port's willful disregard of its past legal obligations makes clear that the Port must either appoint a third-party monitor empowered to audit implementation of all mitigation measures or, at the very least, explain in detail why no such monitor is necessary to ensure compliance.

CONCLUSION

The Port has repeatedly violated CEQA over the last two decades. Those violations are not just flaws on paper—they have irreparably harmed the health of people, especially children and the elderly, living near the China Shipping terminal. When the Port approved the SEIR in 2019, it dismissed critical mitigation as infeasible, without a shred of evidence for that conclusion. It ignored Community Petitioners' reasonable requests for more oversight in the form of a third-party monitor. Most troubling, it

failed to make any CEQA mitigation measures—even the measures it deemed feasible—enforceable against China Shipping by incorporating them into the lease or another legally binding instrument. Yet despite the trial court's ruling that the Port ignored CEQA's enforceability requirement, the writ fails to remedy that violation, letting the terminal continue to operate without enforceable mitigation. That result renders CEQA's protections meaningless and allows the Port and China Shipping to subject nearby residents to air pollution at levels far exceeding those allowed under the law. For the foregoing reasons, the Court should reverse the trial court's erroneous remedy and SEIR rulings, and order the Port to comply with CEQA immediately.

Date: December 6, 2022

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c), I hereby certify that this brief contains 13,827 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Date: December 6, 2022

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PROOF OF SERVICE

I, Jaclyn Prange, declare that I am over the age of 18 and not a party to this action. I am employed in San Francisco, California. My business address is 111 Sutter St., Fl. 21, San Francisco, CA 94104, and my e-mail address is jprange@nrdc.org. On December 6, 2022, I served the foregoing:

COMMUNITY PETITIONERS' OPENING BRIEF

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☑ BY ELECTRONIC MAIL: I caused the foregoing document(s) to be transmitted electronically via TrueFiling to the electronic mail addresses as indicated above. The transmission was reported complete and without error.

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☑ BY U.S. MAIL: I placed or caused to be placed a true copy of the foregoing document(s) in a sealed envelope addressed to the party above, with postage fully prepaid, and deposited it with the United States Postal Service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 6, 2022, in Petaluma, California.

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