IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CENTER FOR COMMUNITY ACTION & ENVIRONMENTAL JUSTICE; *et al.*, Petitioners, v. FEDERAL AVIATION ADMINISTRATION; *et al.*, Respondents, SAN BERNARDINO INTERNATIONAL AIRPORT AUTHORITY; EASTGATE BLDG 1, LLC, Intervenors-Pending.	No. 20-70272
STATE OF CALIFORNIA, by and through Xavier Becerra, in his official capacity as Attorney General, Petitioner, v. FEDERAL AVIATION ADMINISTRATION; *et al.*, Respondents.	No. 20-70464

On Petition for Review of an Order
By the Federal Aviation Administration

PETITIONER STATE OF CALIFORNIA'S MOTION FOR STAY PENDING JUDICIAL REVIEW

Relief Requested by April 17, 2020

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TABLE OF CONTENTS

Page

INTRODUCTION 1
FACTUAL BACKGROUND 3
I. The Project 3
II. Significant Impacts on the Community and the Environment 4
III. Inadequate Environmental Review 6
IV. Project Construction and Operations 7
V. Procedural Background 8
ARGUMENT 9
I. California is Likely to Succeed on the Merits of Its Petition Because the FAA Order Approving the Project is Arbitrary, Capricious, or Otherwise Not in Accordance with Law 10
A. The Order Must Be Set Aside Because the FAA and the Airport Authority Failed to Prepare an EIS as Required by NEPA 10
B. The FAA Order Is Based on an Unlawful EA that Contains Inconsistencies and Insufficiently Justifies Its Determinations 13
II. California is Likely to Suffer Irreparable Harm Absent a Stay 15
III. No Party to this Litigation Will Be Harmed if the Court Grants a Stay, and the Public Interest Strongly Favors a Stay 19
CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

All. for the Wild Rockies v. Cottrell
632 F.3d 1127 (9th Cir. 2011) 20

Beame v. Friends of the Earth
434 U.S. 1310 (1977) 15

Bennett v. Spear
520 U.S. 154 (1997) 9

Bob Marshall All. v. Hodel
852 F.2d 1223 (9th Cir. 1988) 11, 13

California v. Bureau of Land Mgmt.
286 F. Supp. 3d 1054 (N.D. Cal. 2018) 16, 20

Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.
538 F.3d 1172 (9th Cir. 2008) 10, 13

Massachusetts v. EPA
549 U.S. 497 (2007) 18

N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.
545 F.3d 1147 (9th Cir. 2008) 10, 12

Nat. Res. Def. Council v. EPA
437 F. Supp. 2d 1137 (C.D. Cal. 2006) 18

Nat'l Ass'n of Farmworkers Orgs. v. Marshall
628 F.2d 604 (D.C. Cir. 1980) 16, 17, 20

Native Ecosystems Council v. U.S. Forest Serv.
428 F.3d 1233 (9th Cir. 2005) 11, 12

TABLE OF AUTHORITIES
(continued)

Page

Nken v. Holder
556 U.S. 418 (2009)....................9

Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.
265 F.3d 1028 (9th Cir. 2001).................... 12

S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of the Interior
588 F.3d 718 (9th Cir. 2009).................... 20

Sierra Club v. U.S. Dep't of Agric.
841 F. Supp. 2d 349 (D.D.C. 2012).................... 16

United States v. NCR Corp.
688 F.3d 833 (7th Cir. 2012).................... 20

Winter v. Nat. Res. Def. Council, Inc.
555 U.S. 7 (2008)....................9

STATUTES

5 U.S.C. § 706....................9

42 U.S.C. § 4332.................... 6, 10

42 U.S.C. § 7506....................8

49 U.S.C. § 40103....................6

49 U.S.C. § 44718....................6

49 U.S.C. § 46110....................8

49 U.S.C. § 47107....................6

2017 Cal. Legis. Serv. Ch. 136.................... 10

TABLE OF AUTHORITIES
(continued)

Page

FEDERAL REGULATIONS

40 C.F.R. § 93.153 8

40 C.F.R. § 1500.1 10

40 C.F.R. § 1501.4 .... 11, 13

40 C.F.R. § 1502.1 11

40 C.F.R. § 1508.9 .... 11, 13

COURT RULES

Circuit Rule 27-1 2

Fed. R. App. P. 18(a) 1

OTHER AUTHORITIES

California Environmental Quality Act (CEQA) Guidelines
§ 15002(a)(1) 11

FAA Order 5050.4B § 900 11

INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 18(a), Petitioner the State of California, by and through Attorney General Xavier Becerra, moves for a stay pending judicial review of the Federal Aviation Administration (FAA) Order issued on December 23, 2019, approving the Eastgate Air Cargo Facility (Project) at the San Bernardino International Airport in San Bernardino, California. California also moves the Court to enjoin all Project construction and operations.

The December 23, 2019 Order issued by Respondent the FAA is unlawful because the FAA approved the Project with only a cursory environmental review. The FAA's illegal Order undermines the purpose of the National Environmental Policy Act (NEPA), which requires agencies to perform detailed analysis to foster informed decision-making and public participation *before* approving projects that, like this one, may significantly impact the environment. This airport expansion would involve constructing a 658,500 square-foot air cargo warehouse that would generate at least 500 more truck trips and 52 additional cargo aircraft takeoffs and landings daily at the airport, in an air basin already designated by the United States Environmental Protection Agency (EPA) as in extreme nonattainment for ozone and serious nonattainment for diesel particulate matter. The Project is adjacent to environmental justice communities burdened by high rates of asthma, including the San Bernardino-Muscoy community, which was selected by the California Air

Resources Board for the development of an emissions reduction program under Assembly Bill 617 because the community already bears heavy air pollution.

Pursuant to Circuit Rule 27-1(3), California respectfully requests relief as soon as possible and at the latest within 30 days, by April 17, 2020—to stay the FAA Order and enjoin all Project construction and operations. In spite of public comments from California and others that the Project would have significant environmental impacts, and a finding one year earlier by Respondent the San Bernardino International Airport Authority—the same entity that prepared the FAA's inadequate environmental analysis—that the Project would have significant and unavoidable impacts, the developer, Respondent Hillwood Enterprises, began construction on January 21, 2020. Daily construction has involved land clearing, demolition, excavation, embankment, and grading, just 150 feet from the nearest residences. Trucks hauling construction debris offsite have continuously traversed nearby communities, which already experience some of the worst air pollution in the country. Respondents themselves estimated that 214.05 tons of toxic air pollution from construction and operations would be emitted this year, with operations potentially having already started. Moreover, there is evidence that Hillwood Enterprises is not complying with required mitigation measures to reduce these emissions.

Project construction and operations will irreparably harm California, including by increasing risks of death and serious damage to human health, triggering and exacerbating heart attacks and asthma attacks in communities that already suffer from high rates of heart and lung diseases, including asthma, and impeding California's decades-long efforts to improve air quality and meet EPA-mandated emissions reduction targets. The public interest strongly weighs in favor of halting the Project and requiring the FAA to conduct the review that NEPA prescribes. Accordingly, California seeks relief from this Court, which can prevent these significant and irreparable harms by staying the FAA Order and enjoining construction and operations while it considers this case.

FACTUAL BACKGROUND

I. The Project

The San Bernardino International Airport Authority, which owns and operates the San Bernardino International Airport, and Hillwood Enterprises, the Project proponent, agreed in 2018 to develop the Eastgate Air Cargo Facility within the airport boundaries to "satisfy an unmet need for large-scale air cargo facilities in the San Bernardino area." Ex.A-12 & 16. The Project would develop a package distribution center with an air cargo hub on approximately 100-acres on the northern side of the airport, 150 feet from the nearest residences. Ex.A-18; Ex.C-177. The proposed facilities would include a 658,500 square-foot

warehouse, an area for aircraft to taxi and park that would concurrently support 14 airplanes ranging from Boeing-737 to Boeing-767, 12 acres of ground support equipment parking and operational support areas, two 25,000 square-foot maintenance buildings, and more than 2,300 parking stalls. Ex.A-18. The facilities would operate seven days a week, adding 24 cargo aircraft takeoffs and landings on opening day—projected to be as early as December 2019—ramping up to 52 takeoffs and landings a day within five years. Ex.A-19. The projected average daily vehicle roundtrips generated by the Project is about 3,500 on opening day, including at least 192 by heavy duty trucks, more than doubling within five years to over 7,500 roundtrips, including at least 500 by trucks. Ex.A-37.

II. Significant Impacts on the Community and the Environment

The communities adjacent to the Project already rank in the top 5 percent in California for environmental pollution. Ex.C-178; Ex.D-192. Ambient air in the area contains among the highest background levels in the South Coast Air Basin of diesel particulate matter, a toxic air contaminant generated by truck and aircraft engines that cause increased cancer risks, heart disease, and lung disease. Ex.D-192. The EPA has designated the air basin as in "extreme" nonattainment for ozone and "serious" nonattainment for particulate matter 2.5 (PM2.5, or particulate matter less than or equal to 2.5 microns in diameter). Ex.A-23, -55; Ex.J-494-95. Ozone is the main ingredient of smog and formed from volatile organic

compounds (VOC) and nitrogen oxides—chemicals generated by cars, trucks, and airplanes—reacting in the presence of sunlight, and can cause premature deaths and cause and exacerbate asthma attacks.[1] PM2.5 can include organic chemicals, dust, soot, and metals that come from cars, trucks, and construction activities, and cause lung disease, heart disease, and asthma.[2] The Project is sited close to sensitive receptors, including four elementary schools and a high school. Ex.C-177; Ex.D-192-93. One elementary school, located within a mile of the airport's run way, is directly beneath the flight paths of all airport air traffic. Ex.I-470 ¶ 10.

In addition, the Project is located just over a mile to the east of the San Bernardino-Muscoy Assembly Bill 617 environmental justice community, which will be impacted by pollution from the Project's construction and operations.[3] Ex.C-177; Ex.D-192-93, 199. The community's asthma rates are among the highest 2 to 16 percent in California, which both is caused by exposure to air

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[1] California Office of Environmental Health Hazard Assessment (OEHHA), Air Quality: Ozone, https://oehha.ca.gov/calenviroscreen/indicator/air-quality-ozone (last visited March 16, 2020); Ex.J-478-79 & n.2.

[2] OEHHA, Air Quality: PM2.5, https://oehha.ca.gov/calenviroscreen/indicator/air-quality-pm25 (last visited March 16, 2020); Ex.J-478.

[3] The California Legislature enacted Assembly Bill 617 to remedy the disproportionate impact of air pollution in environmental justice communities, requiring local air districts to help reduce air pollution and toxic air contaminants from commercial and industrial sources, including by developing emissions reduction programs in communities selected under the Bill. 2017 Cal. Legis. Serv. Ch. 136.

pollution and can make the community more vulnerable to the exposure. Ex.D-192 & n.4. The community's 90,000 residents identify as 13 percent African American and 73 percent Hispanic. Ex.D-192. In addition, nearly 20 percent of the population are children under the age of 10, a group particularly sensitive to the health effects of air pollution. Ex.D-192.

III. Inadequate Environmental Review

In 2018, the Airport Authority prepared an Environmental Impact Report (EIR) for the Project pursuant to the California Environmental Quality Act (CEQA) and found significant and unavoidable air quality, climate, and noise impacts. Ex.F-329-32, 366-67. The EIR concluded that construction and operational air emissions would exceed regional thresholds of significance even after implementing all mitigation measures. Ex.F-366, 441, 444.

Because the proposed construction at the Project also requires the FAA approval of an airport layout plan, and such a federal agency action requires compliance with NEPA, the Airport Authority began a NEPA review of the Project in 2019 and published a Draft Environmental Assessment (Draft EA) in July 2019. Ex.E-206-07, 224-25; 42 U.S.C. § 4332(2)(C); 49 U.S.C. §§ 40103(b), 44718, 47107(a)(16). Despite having concluded in its EIR the previous year that the Project would cause significant and unavoidable environmental impacts, the Airport Authority found no significant impacts in its Draft EA, and therefore it did

not prepare an Environmental Impact Statement (EIS) required by NEPA. Ex.E-226-327.

On November 26, 2019, California Attorney General Xavier Becerra submitted comments identifying numerous deficiencies with the Draft EA. Ex.D-191-99. The Airport Authority failed to address most of the concerns. Ex.D-200-04.

The FAA approved the EA on December 20, 2019, and issued its Record of Decision and Finding of No Significant Impact on December 23, 2019.[4] A week later, on December 30, the Airport Authority and developer Hillwood Enterprises entered into a ground lease agreement for the Project site. Ex.G-455-58.

IV. Project Construction and Operations

On January 21, 2020, Hillwood Enterprises began construction at the Project site, and has been conducting land clearing, demolition, excavation, embankment, and grading. Ex.H-462 ¶ 4; *see* Ex.A-34 tbl. 4-1. Trucks hauling construction debris regularly traverse the Project site and drive through the nearby communities. Ex.I-471 ¶ 13. Debris and dust from uncovered trucks are escaping into the

[4] The December 23, 2019 Record of Decision and Finding of No Significant Impact constitutes the FAA Order that is the subject of this petition for review. *See* ECF No. 1-5 (Case No. 20-70464).

adjacent neighborhoods, contrary to an assumption in the EA that emissions would be mitigated by covering trucks to reduce PM emissions. Ex.I-471 ¶ 13; Ex.A-58.

According to the EA, 214.05 tons of toxic air pollution, or 0.58 tons a day, will be emitted into the air during the first year of construction and operations.[5] Ex.A-52-53. The EA anticipates that these emissions will exceed the *de minimis* emissions thresholds in the nonattainment South Coast Air Basin set by the EPA under the Clean Air Act to protect human health. *See* 42 U.S.C. § 7506(c)(1); 40 C.F.R. § 93.153(b); Ex.A-51-53.

V. Procedural Background

On February 20, 2020, California filed a petition in this Court pursuant to 49 U.S.C. § 46110(a) to review the FAA's December 23, 2019 Order approving the Project. On the same day, California requested the FAA to stay its Order, and requested the Airport Authority and Hillwood Enterprises to halt all work on the Project, including any construction or preconstruction work. *See* Fed. R. App. P. 18(a)(1); Ex.K-532-33. On March 2 and 3, 2020, the FAA and Hillwood

[5] The EA assumed that construction would begin in 2019 and be completed within 12 months, in 2020. *See* Ex.A-50. Because construction did not begin until January 2020, construction emissions projected in the EA for 2020 are added to the combined construction and operations net emissions projected for 2019 to estimate total emissions for the year. Ex.A-52-53 (excluding PM2.5 emissions from this total because those should be captured by the PM10 emissions projected by the EA).

Enterprises declined California's request. *See* Fed. R. App. P. 18(a)(2)(A)(ii); Ex.L-535-38. The Airport Authority has not responded.

On March 11, 2020, the Court granted California's unopposed motion to consolidate this action with *Center for Community Action & Environmental Justice v. FAA*, No. 20-70272 (9th Cir. filed Jan. 27, 2020). On the same day, California notified counsel for Respondents of its intention to file a motion for stay pending review in this Court. *See* Fed. R. App. P. 18(a)(2)(C). The FAA opposes this motion; the Airport Authority and Hillwood Enterprises are reserving their rights to take a position on this motion.[6] California now moves the Court to stay the FAA Order and enjoin all work at the Project pending judicial review of the consolidated petitions to avoid irreparable harm to the State.

ARGUMENT

To obtain a judicial stay, California must demonstrate that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of a stay; (3) the balance of equities favors a stay; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The final two factors "merge" where, as here, the federal government is the opposing party.

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[6] On March 16, 2020, California asked counsel for respondents whether Project construction or operations are paused in light of the COVID-19 pandemic. Counsel for FAA said he was not aware of a pause to such activities. Counsel for Hillwood Enterprises responded that there are no plans to pause construction.

Nken v. Holder, 556 U.S. 418, 435 (2009). Below, California establishes that it is likely to succeed on the merits because the FAA Order violates NEPA and therefore is a final agency action that must be set aside as "arbitrary, capricious, . . . or not otherwise in accordance with law." 5 U.S.C. § 706(2)(A); *Bennett v. Spear*, 520 U.S. 154, 174 (1997). Furthermore, a stay is necessary to prevent irreparable harm caused by Project construction and operations conducted without adequately considering environmental impacts. Moreover, it is in the public interest to halt these activities while the Court considers the consolidated petitions.

I. California is Likely to Succeed on the Merits of Its Petition Because the FAA Order Approving the Project is Arbitrary, Capricious, or Otherwise Not in Accordance with Law.

A. The Order Must Be Set Aside Because the FAA and the Airport Authority Failed to Prepare an EIS as Required by NEPA.

NEPA is a "basic national charter for the protection of the environment." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008) (quoting 40 C.F.R. § 1500.1). It does not impose substantive requirements on federal agencies but does impose procedural requirements. *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008). These procedural requirements are intended to enforce NEPA's mandate that agencies will avail themselves of, and will carefully consider, detailed information on significant environmental impacts, and that the relevant information will be made available to the public. *See id.*

NEPA requires federal agencies to analyze in an EIS the potential environmental impacts of any major federal actions "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The threshold for determining whether an EIS is required is a low one—the agency must prepare an EIS whenever "there are substantial questions about whether a project may cause significant degradation of the human environment." *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1239 (9th Cir. 2005). An EIS's primary purpose is to be an "action-forcing tool" to ensure federal government programs and actions meet NEPA's goals and policies. 40 C.F.R. § 1502.1; FAA Order 5050.4B § 900. To determine whether an EIS is necessary for a project, the agency may prepare an EA, which should provide sufficient evidence and analysis to justify the agency's determination whether to prepare an EIS or make a finding of no significant impact (FONSI). 40 C.F.R. §§ 1501.4, 1508.9; *see also Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1225 (9th Cir. 1988).

During the Airport Authority's CEQA review in 2018, it prepared an EIR, CEQA's analog to the EIS, based on its finding that the Project may have significant environmental impacts. Ex.F-329-332. The EIR concluded that the Project would have significant and unavoidable air quality, climate change, and noise impacts. Ex.F-332, 366-67, 441, 444. That finding alone—in an

environmental review process closely approximating NEPA[7]—raises "substantial questions" in the NEPA review about whether this Project may cause significant environmental effects, and thus triggers the FAA's NEPA obligation to prepare an EIS. *See Native Ecosystems Council*, 428 F.3d at 1239. Indeed, giving detailed consideration of environmental impacts in an EIS where substantial questions exist about whether a project may harm human and environmental health is the exact type of procedural safeguard mandated by NEPA to promote informed decision-making and public participation. *See id.*; *N. Idaho Cmty. Action Network*, 545 F.3d at 1153.

Perplexingly, the EA prepared by the Airport Authority and approved by the FAA failed to discuss the CEQA process or the Airport Authority's own conclusion—a year earlier—that the Project would have significant, unavoidable impacts on air quality, climate change, and noise. It is arbitrary and capricious to conclude in one environmental review that the Project would have significant, unavoidable impacts, then inexplicably to conclude the opposite in an analogous review of the identical project. A final agency action is arbitrary and capricious, and must be set aside, if it does not "consider[] the relevant factors and articulate []

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[7] Environmental review under CEQA is analogous to the process required by NEPA—the "basic purposes of CEQA [is] to [i]nform governmental decision makers and the public about the potential, significant environmental effects of proposed activities." CEQA Guidelines, § 15002(a)(1).

a rational connection between the facts found and the choice made." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001). The FAA Order is arbitrary and capricious, and must be set aside.

B. The FAA Order Is Based on an Unlawful EA that Contains Inconsistencies and Insufficiently Justifies Its Determinations.

NEPA documents on which agency actions are based, such as EAs, must foster both informed decision-making and informed public participation. *See Ctr. for Biological Diversity*, 538 F.3d at 1194. But here, the FAA Order is based on an inconsistent and inaccurate EA, undermining those NEPA goals.

For example, the EA underestimates mobile source emissions generated by the Project. As a result, it underestimates the Project's air quality and climate change impacts. First, without explanation, the EA uses an estimate for truck trips that is 23 percent lower than the estimate used for the Project's CEQA analysis. The EA estimates that the Project would generate 192 truck trips in its initial year of operations and 500 truck trips in full operations. Ex.A-37. However, according to the EIR from the CEQA process, the Project will generate significantly more truck trips—248 truck trips in the initial year of operations and 652 truck trips in full operations. Ex.F-336. The failure to provide a basis for the reduced estimates, which California and others raised in public comments, violates NEPA's requirement that agencies provide sufficient evidence and analysis to justify their final determinations. 40 C.F.R. §§ 1501.4, 1508.9; *see also Bob Marshall All.*, 852

F.2d at 1225. Furthermore, if the EIR's higher estimates are accurate, the EA significantly underestimates the emissions generated by the Project.

In addition, the EA appears to model only half of the mobile source emissions because it counts each truck trip as a one-way trip, not a roundtrip. The EA estimated emissions using CalEEMod, a program that models emissions of one-way trips. Ex.D-196. The truck trip estimates in the 2018 EIR, however, were roundtrips. Ex.F-336; Ex.J-486-87. If the reduced truck trips considered in the EA were also roundtrips, then the number of trips should be doubled before using CalEEMod to estimate emissions. There is no evidence the EA did this. Ex.B-152, 168; Ex.D-202 (referencing "further analysis" but failing to show the trip numbers were doubled).

Together, these two errors—using a lower estimate of truck trips without any explanation, and modeling emissions for only half of each roundtrip—potentially underestimate the Project's mobile source emissions by more than 60 percent, rendering flawed any determination of significant impacts based on those emissions estimates, such as air quality and climate change impacts.[8]

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[8] If the EA based its emissions estimates on only 192 truck trips when it should have based estimates on the 248 truck trips from the EIR, and if it modeled 192 trips in CalEEMod when it should have modeled 496 trips (doubling the EIR's 248 truck trips to account for roundtrips), then the EA would have modeled only 39 percent of the actual number of truck trips in the initial year of operations. Similarly, for full operations, basing emissions estimates on only 500 truck trips

II. California is Likely to Suffer Irreparable Harm Absent a Stay.

If the FAA Order is not stayed and the ongoing construction and operations on the Project halted, air emissions from these activities will increase the risks of premature deaths, heart attacks, asthma attacks, and heart and lung diseases in the nearby communities that are already exposed to significantly higher levels of air pollution and suffering from higher rates of air pollution-related illnesses than the rest of California. A stay is necessary to prevent these serious, irreparable harms.

The Project's EA anticipates that construction would be completed within 12 months, by the end of 2020, and that the air cargo flight operations added by the Project may have begun as early as December 2019, prior to completion of the construction. Ex.A-20, 34. By the time this case is briefed, argued, and decided on the merits, much or all of the 12-month period likely will have elapsed and the Project will be fully operational. Thus, absent a stay, many of the significant impacts the FAA is required to disclose and evaluate in an EIS will already have occurred.

The risks of early deaths and widespread morbidity caused by air pollution unquestionably qualify as irreparable harm. *E.g.*, *Beame v. Friends of the Earth*, 434 U.S. 1310, 1314 (1977) (Marshall, J., in chambers) (recognizing the

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rather than the EIR's 652 trips (or 1,307 one-way trips in CalEEMod) means that the EA modeled only 38 percent of the actual truck trips.

"irreparable injury that air pollution may cause during [a two month] period, particularly for those with respiratory ailments"); *California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1076 (N.D. Cal. 2018) (recognizing public health harms and incremental increase in air pollution as irreparable harm); *Sierra Club v. U.S. Dep't of Agric.*, 841 F. Supp. 2d 349, 358-59 (D.D.C. 2012) (finding "risk of severe health problems (including premature death)" from exposure to particulate matter air pollution constitutes irreparable harm); *Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 613-614 (D.C. Cir. 1980) (holding that risk of exposure to pesticides constitutes irreparable harm). It is undisputed that emissions of VOC, nitrogen oxides, and particulate matter (PM) will be generated by the Project construction and air cargo flight operations. Ex.A-52-53. The EA itself estimates that the combined Project construction and proposed Project operational emissions of VOC are expected to be over 34 tons and that the nitrogen oxides emissions are expected to be about 200 tons in the first year. Ex.A-52-53. These tonnages severely exceed the EPA-designated *de minimis* thresholds of 10 tons per year. Ex.A-52-53; Ex.J-488-90.

The types of emissions that occur during construction and air cargo flight operations are extremely harmful to human health. Nitrogen oxides recombine with VOC to form ground-level ozone, a gas that irritates and damages respiratory organs. *See supra* pp. 4-5. Ozone exposure is associated with increases in

respiratory-related hospital admissions, respiratory symptoms, and medication use by those who suffer from asthma. *See id*. at 4-6. PM from diesel exhaust in car, truck, and airplane engines and from construction-related activities is easily inhaled in the bronchial and alveolar regions of the lung, children and the elderly are particularly vulnerable, and exposure is associated with cardiovascular and respiratory hospitalizations, cancer, and early deaths.[9]

The South Coast Air Basin, in which the Project is sited, is already severely polluted by ozone and particulate matter. *See* Ex.A-55. Furthermore, residents in the areas immediately adjacent to the Project suffer from asthma at rates higher than 84 percent of California. Ex.D-192 & n.4. Children, who are particularly sensitive to air pollution, attend schools within a mile of the airport—in one case, directly underneath the air traffic's flight path. Ex.I-470 ¶ 10. Local schools report high rates of asthma among their enrolled students. Ex.I-471 ¶ 14.

Respondents might argue that mitigation measures imposed in the EA will reduce the risk of irreparable harm, but there is evidence that at least one of the mitigation measures, designed to mitigate fugitive dust (PM) emissions, is not being implemented. The EA specifies that when transporting material from the construction off-site, all material should be covered to limit dust emissions. Ex.A-

[9] OEHHA, Diesel Particulate Matter, https://oehha.ca.gov/calenviroscreen/indicator/diesel-particulate-matter (last visited March 16, 2020); Ex.D-192 & n.2.

57-58. However, residents near the construction have observed truck trips transporting material out of the construction site with uncovered loads. Ex.I-471 ¶ 13. The assumption in the EA that covered truckloads would mitigate this impact is thus without merit. It also casts doubt on whether Respondents are complying with other mitigation measures.

Project construction and operations also will cause irreparable harm to California's quasi-sovereign interests in the quality of the "air within its domains" and in "protect[ing] its citizens from air pollution." *See Massachusetts v. EPA*, 549 U.S. 497, 518-19 (2007). Project construction and operations contribute to air pollution, which in California has been identified as a source of premature deaths, heart attacks, asthma attacks, and other irreparable harm. *See supra* pp. 4-6.

Emissions of nitrogen oxides, VOC, and PM2.5 from Project construction and operations will also cause irreparable harm to California by impeding its attainment and maintenance of EPA-mandated National Ambient Air Quality Standards for ozone and PM, and undermining costly efforts California has made to reduce these harmful pollutants. *See* Ex.J-479-80, 501-02; *Nat. Res. Def. Council v. EPA*, 437 F. Supp. 2d 1137, 1152-53 (C.D. Cal. 2006) (citing *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004)) (recognizing that making California's compliance with the federal air standards more "difficult and onerous" than it would otherwise is a cognizable injury). The excess PM emissions from

Project-related trucking and air cargo flight operations next to the San Bernardino-Muscoy community also will undermine California's efforts to implement Assembly Bill 617—a statute the California Legislature adopted to reduce pollution in environmental justice communities. In accordance with that Bill, San Bernardino-Muscoy has already finalized a community emissions reduction plan that calls for reducing truck traffic through the community. Ex.D-197. The Project is directly at odds with this objective.

Given the risks of severe health effects imposed on California residents and the undermining of California's efforts to reduce air pollution, particularly in its environmental justice communities, the Court should stay the FAA Order and halt all Project construction and operations to prevent irreparable harm.

III. No Party to this Litigation Will Be Harmed if the Court Grants a Stay, and the Public Interest Strongly Favors a Stay.

In contrast to the irreparable harm that California and its residents face if Project construction and operations are not stayed, any harm to the Respondents would be purely economic due to the delay of the Project. The FAA Order and the ongoing Project-related activities risk the lives and health of the over 90,000 residents who live near the Project. The "real potential for hundreds of premature deaths" from exposure to excess air pollution outweighs any "speculative harm" from disruption of construction. *Nat'l Ass'n of Farmworkers Orgs.*, 628 F.2d at 617; *see also id.* ("Plainly, any possible reduction in the price of produce that

might result from denying preliminary relief would be only short term, and would never approach the value of children's health to the nation."); *California*, 286 F. Supp. 3d at 1076 ("Weighed against the likely environmental injury, which cannot be undone, the financial costs of compliance are not as significant as the increased gas emissions, public health harms, and pollution."); *United States v. NCR Corp.*, 688 F.3d 833, 842-43 (7th Cir. 2012) (finding that public interest in preventing injuries from exposure to toxic chemicals outweighs harm to company in paying more than its share of cleanup costs).

Furthermore, Congress enacted NEPA to protect the public interest—by requiring "careful consideration of environmental impacts *before* major federal projects may go forward." *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of the Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (emphasis added). Suspending this Project until that consideration occurs serves the public interest. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011).

The balance of equities and the public interest clearly support a stay of the FAA Order and halting all Project construction and operations.

CONCLUSION

For these reasons, California respectfully requests this Court to grant a stay pending judicial review.

Respectfully submitted this 18th day of March 2020.

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s/ Yuting Chi
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CERTIFICATE OF COMPLIANCE

I hereby certify that **PETITIONER STATE OF CALIFORNIA'S MOTION FOR STAY PENDING JUDICIAL REVIEW** contains 4247 words and is 20 pages, excluding the items exempted by Federal Rules of Appellate Procedure 27(a)(2)(B) and 32(f), and thus complies with this Court's type-volume and length requirements under Appellate Rules 27(d)(2)(A) and 32(g), and Circuit Rule 27-1(d). I further certify that, with 14-point Times New Roman font and 1-inch margins, this motion complies with the requirements of Appellate Rules 32(a)(4) through (6).

Executed on March 18, 2020, in Oakland, California.

s/ Yuting Chi
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