No. S223603

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CLEVELAND NATIONAL FOREST FOUNDATION; SIERRA CLUB; CENTER FOR BIOLOGICAL DIVERSITY; CREED-21; AFFORDABLE HOUSING COALITION OF SAN DIEGO; AND PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs and Cross-Appellants,

vs.

SAN DIEGO ASSOCIATION OF GOVERNMENTS; SAN DIEGO ASSOCIATION OF GOVERNMENTS BOARD OF DIRECTORS,

Defendants and Appellants.

Court of Appeal of the State of California
Fourth Appellate District, Division One, Case No. D063288
Superior Court of the State of California, County of San Diego
Case No. 37-2011-00101593-CU-TT-CTL,
The Honorable Timothy B. Taylor Presiding

APPLICATION TO FILE AMICI CURIAE BRIEF AND BRIEF OF BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, *ET AL.*, AS AMICI CURIAE IN SUPPORT OF SAN DIEGO ASSOCIATION OF GOVERNMENTS AND SAN DIEGO ASSOCIATION OF GOVERNMENTS' BOARD OF DIRECTORS

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Associated General Contractors of America, San Diego Chapter
California Building Industry Association
California Chamber of Commerce
California Construction and Industrial Materials Association
Construction Industry Air Quality Coalition
Golden State Gateway Coalition
Los Angeles Chamber of Commerce
San Gabriel Valley Economic Partnership
Southern California Contractors Association

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APPLICATION TO FILE

Pursuant to Rule 8.502, subdivision (f) of the California Rules of Court, the Building Industry Legal Defense Foundation (BILD), American Council of Engineering Companies (ACEC), Associated General Contractors of California (AGC-Cal), Associated General Contractors of America, San Diego Chapter (AGC-San Diego), California Building Industry Association (CBIA), California Chamber of Commerce (Cal Chamber), California Construction and Industry Materials Association (CalCIMA), California Infill Federation (CIF), Construction Industry Air Quality Coalition (CICWQ), Fresno Council of Governments (Fresno COG), Golden State Gateway Coalition (GSGC), Los Angeles Area Chamber of Commerce (LA Chamber), and the San Gabriel Valley Economic Partnership (SGVEP) (hereinafter, collectively the "Applicants" or "*Amici*") respectfully request leave to file the accompanying brief in this proceeding in support of the San Diego Association of Governments ("SANDAG").

This brief was entirely drafted by counsel for the *Amici* and no party or counsel for a party in the pending case authored the proposed amicus brief in whole or in part or made any monetary contribution intended to fund its preparation. (*See* Cal. Rules of Court, rule 8.502, subd (c).)

INTEREST OF APPLICANTS

The Applicants join Metropolitan Planning Organizations ("MPOs") and other public entities in California in support of SANDAG in addressing the Court's question - "Must the environmental impact report for a regional transportation plan include an analysis of the plan's consistency with the greenhouse gas emission reduction goals reflected in Executive Order No. S-3-05 to comply with the California Environmental Quality Act?"

Our interest in this proceeding is in preserving the discretion historically vested in lead agencies to determine appropriate thresholds of significance for environmental studies. A determination that an environmental impact report for a regional transportation plan must include a consistency analysis with the green house gas (GHG) emission reduction goals reflected in Executive Order No. S-03-05 would not only usurp that discretion, but it would also create the potential for extending the same reasoning to require that other executive orders or opinions from the executive branch be treated as mandatory thresholds of significance in future environmental studies for other public and private projects, and would renew the uncertainty and opportunities for litigation regarding the analysis of GHG impacts, and potentially increase project costs related to environmental studies and mitigation for projects that would otherwise have been able to utilize a more abbreviated environmental process to satisfy the requirements of CEQA.

The *Amici* believe that this brief will assist the Court in addressing the narrow issue to be reviewed, and will provide additional background and context regarding the importance of the outcome and the need to preserve the discretion vested in local lead agencies to ensure that appropriate thresholds of significance are utilized in environmental analyses. The preservation of this discretion is essential to maintaining the certainty needed for public agencies and private entities pursuing projects subject to CEQA – a requirement to ensure the stability necessary for the continued economic growth in the State of California.

For these reasons, Applicants respectfully request permission to file the accompanying brief as *Amici Curiae* in this matter in support of the San Diego Association of Governments and its Board of Directors.

Building Industry Legal Defense Foundation (BILD), formed in 1987, is the premier legal advocate for the building and construction

industry in California. BILD is a non-profit mutual benefit corporation with its own Board of Directors and a wholly-controlled affiliate of the Building Industry Association of Southern California, Inc. ("BIA/SC"). BIA/SC, in turn, is a non-profit trade association representing approximately 1,200 member companies. The purposes of BILD are: to initiate or support litigation (including through the filing of *amicus curiae* briefs such as this one) or agency action designed to improve the business climate for the building industry; to monitor legal developments and legislation critical to the building industry; and to educate the industry, public officials, and the public of legal and policy issues critical to sustaining the building industry. BILD exists to ensure that the building industry thrives, and that projects are able to move forward timely, with sustained profitability for all sectors of the industry, while protecting the rights of the industry and its customers, and while continuing to value natural resources.

American Council of Engineering Companies of California is a more than fifty year-old non-profit association of private consulting engineering and land surveying firms. As a statewide organization, it is dedicated to enhancing the consulting engineering and land surveying professions, protecting the general public, and promoting use of the private sector in the growth and development of California. Its members provide services for all phases of planning, designing, and constructing projects, including civil, structural, geotechnical, electrical and mechanical engineering, and land surveying for all types of public works, residential, commercial and industrial projects.

Associated General Contractors of California is the largest statewide construction trade association, representing over 1,000 contractors and construction related firms throughout California.

Associated General Contractors of America, San Diego Chapter (AGC-San Diego), with over 1,000 member firms, is a construction trade association dedicated to improving the construction industry by employing the finest skills, promoting the latest technology, and advocating building the best quality projects for public and private owners.

California Building Industry Association (CBIA) is a statewide non-profit trade association comprising approximately 3,000 members involved in the residential development industry. CBIA and member companies directly employ over one hundred thousand people. CBIA is a recognized voice in all aspects of the residential real estate industry in California. CBIA acts to improve the conditions for the State's residential development community and frequently advocates before the courts in amicus curiae briefs in cases involving issues of concern to its members.

California Chamber of Commerce (CalChamber) is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the State's economic and jobs climate, by representing business on a broad range of legislative, regulatory, and legal issues. CalChamber often advocates before federal and state courts by filing *amicus curiae* briefs and letters in cases, like this one, involving issues of paramount concern to the business community.

California Construction and Industrial Materials Association (CalCIMA) is a trade association for the construction and industrial material industries in California, which produces sand, gravel, crushed stone, and ready-mixed concrete. The construction materials industry is a

multi-billion dollar component of California's economy. CalCIMA's members operate more than 750 facilities and employ thousands of works throughout the State. In addition to being the trade association for the industry, CalCIMA also offers extensive information on construction and industrial material industries to the public, government, teachers and students, business, the media, our members, and other organizations; addresses legislative and regulatory issues affecting the industry; provides members with safety, technical, and compliance training; works with allied industry groups; and provides communications tools for the industry.

California Infill Federation includes both non-profit and market-rate builders who support development in infill settings, consistent with sustainable community planning. The California Infill Federation supports planning and development to minimize greenhouse gases associated with passenger vehicle travel and to maximize housing near job centers to reduce greenhouse gas emissions, promote social quality of life benefits, and build stronger, more vibrant communities.

Construction Industry Air Quality Coalition (CIAQC) is a California non-profit group founded in 1989 by four southern California trade associations: Associated General Contractors of California, Building Industry Association of Southern California, Engineering Contractors of California, and Southern California Contractors Association. Its membership has since grown statewide to represent approximately 2,500 member companies. Its member associations build much of the public and private infrastructure and land development projects in California. CIAQC acts as a conduit for information from construction industry members to regulatory agencies and legislative bodies concerning the effect of proposed regulations and environmental legislation on the construction industry.

Fresno Council of Governments is a voluntary association of local governments in Fresno County. It is a state-designated Regional

Transportation Planning Agency and federally-designated Metropolitan Planning Organization for Fresno County region.

Golden State Gateway Coalition is a non-profit transportation education and advocacy organization based in Santa Clarita whose members include community, business and government leaders who live in, work in, and represent the interests of the fastest growing sub-region in Los Angeles County. The Golden State Gateway Coalition's goal is to improve roadway mobility, safety and goods movement throughout northern Los Angeles County. The Interstate 5 corridor is the Coalition's priority, as an important regional transportation facility and is a key economic lifeline linking job centers, cities, ports, agriculture, and tourist attractions throughout California.

Los Angeles Chamber of Commerce was founded in 1888 and is the largest business organization in Los Angeles County. It has 1700 member companies who employ 650,000 people in Los Angeles County. All of the major industries in the County are represented in its membership and Board of Directors. Its priorities include business advocacy, economic development, education and workforce development, leadership development, international trade, and the nurturing of small businesses and entrepreneurs.

San Gabriel Valley Economic Partnership is a regional, non-profit committed to the successful economic development of the San Gabriel Valley. Its mission is to "enrich the quality of life and economic vitality of the San Gabriel Valley." As a collaboration of businesses, local government, and education institutions, the San Gabriel Valley Economic Partnership pursues this commitment by fostering the success of business, engaging in public policy, marketing the San Gabriel Valley region and facilitating cooperation among leaders to work towards solutions for the region's benefit.

Dated: September 3, 2015

Respectfully Submitted,

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I. INTRODUCTION

The Court has asked, "[m]ust the environmental impact report for a regional transportation plan include an analysis of the plan's consistency with the greenhouse gas emission reduction goals reflected in Executive Order No. S-3-05 to comply with the California Environmental Quality Act (Pub. Resources Code, § 21000 *et seq.*)?" The undersigned Amici Curiae urge the Court to determine that the simple answer is "No."

Should the Court determine that such a consistency analysis is required, it would undermine the discretion of all local agencies to select thresholds of significance for environmental impacts and eliminate the certainty Section 15064.4 of the CEQA Guidelines was meant to provide, creating the potential for litigation and costly environmental analysis and undermining the ongoing economic recovery in California.

II. POLICY FRAMEWORK

The Regional Transportation Plan ("RTP") is the mechanism used in California by federally designated Metropolitan Planning Organizations ("MPOs"), such as the San Diego Association of Governments ("SANDAG"), to conduct long-range transportation planning in each region. (AR 218: 17685.) Every four to five years, MPOs are required to adopt an RTP addressing no less than a twenty year planning horizon. (23 C.F.R. § 450.322, subd. (a).)

In June of 2005, Governor Schwarzenegger signed Executive Order S-03-05 ("EO S-03-05") which set overall greenhouse gas ("GHG") reduction targets for the *entire* state. The reduction targets established three general benchmarks: (1) reduce emissions to 2000 levels by 2010; (2) reduce GHG emissions to 1990 levels by 2020; and (3) reduce GHG emissions to 80% below 1990 levels by 2050. (Governor's Exec. Order No. S-03-05 (June 1, 2005).) EO S-03-05 also required the Secretary of the

California Environmental Protection Agency to oversee efforts to meet the targets with the Secretary of the Business, Transportation and Housing Agency, Secretary of the Department of Food and Agriculture, Secretary of the Resources Agency, Chairperson of the Air Resources Board, Chairperson of the Energy Commission, and the President of the Public Utilities Commission. (*Id.*)

In 2006, the California Global Warming Solutions Act ("AB 32") was passed by the Legislature, which directed the California Air Resources Board ("CARB") to "determine what the statewide greenhouse gas emissions level was in 1990, and approve in a public hearing, a statewide greenhouse gas emissions limit that is equivalent to that level, to be achieved by 2020." (Health & Saf. Code, § 38550.) The Legislature also directed CARB to prepare a "scoping plan" to identify how to best reach the 2020 benchmark set forth in EO S-03-05. (Health & Saf. Code, § 38561, subd. (a).) AB 32 did not, however, direct CARB to identify how to best reach the 2050 benchmark set forth in EO S-03-05.

CARB approved its Climate Change Scoping Plan ("Scoping Plan") in 2008, which specifically addresses how reductions from the land use and transportation sectors should be achieved, and establishes a statewide GHG emission reduction target for 2020. (AR 3767, 27907-27911.) These targets in the Scoping Plan are only one part of the "comprehensive reduction strategy that combines market-based regulatory approaches, other regulations, voluntary measures, fees, policies, and programs" to reduce emissions across the economy – in transportation, electricity production, recycling and waste disposal, and agriculture, commercial and residential energy sector, the industrial sector, and the forest sector." (AR 27861.)

Also in 2008, the State Legislature adopted the Sustainable Communities and Climate Protection Act of 2008, commonly known as "SB 375," which further directed CARB to develop region-by-region GHG

emission reduction targets for passenger vehicles. (Gov. Code, § 65080, subd. (b)(2)(A).)[1] Under SB 375, CARB must update these reduction targets every 8 years. (Gov. Code, § 65080, subd. (b)(2)(A).) In turn, the State's MPOs are required to develop a "Sustainable Communities Strategies" ("SCS") as a component of their RTPs, consistent with these CARB targets.[2] (Gov. Code, § 65080, subd. (b)(2).) The SCS must demonstrate how the region will meet its GHG reduction target through integrated land use, housing, and transportation planning.[3] (Gov. Code, § 65080, subd. (b)(2)(B).)

CARB's Scoping Plan sets forth a framework for future regulatory action on how California will achieve the goals of AB 32 through sector-by-sector regulation, recognizing that achieving SB 375's GHG reduction targets will be the main process for achieving the 2020 emissions reduction target from the land use and transportation sectors. (AR 8b: 3768; AR 319(1): 26185-26189.) The Scoping Plan also recognizes that to meet the targets in AB 32, other sectors must play a significant role; the land use and transportation sectors are not required to achieve the reduction targets single-handedly. (AR 319(1): 26155.)

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[1] At the time of adoption by SANDAG of its RTP in October 2011, in fact even as of the writing of this Amici brief, CARB has only established targets for 2020 and 2035, despite updating its 2008 Scoping Plan on May 22, 2014.

[2] If the SCS is unable to reduce greenhouse gas emissions to achieve the targets established by CARB, the MPO must prepare an Alternative Planning Strategy ("APS") to the SCS. (Gov. Code, § 65080, subd. (b)(2)(I).)

[3] SANDAG was the first MPO in the State to adopt an RTP that included an SCS (AR 8a: 2075). Pursuant to SB 375, CARB determined that the SCS will fully achieve the 2020 and 2035 GHG emission reduction targets for the San Diego region. (Gov. Code, § 65080, subd. (b)(2)(J)(ii); AR 192:16863-16881; AR 329: 29360-29363.)

In addition, effective March 2010, the CEQA Guidelines[4] were updated by the Governor's Office of Planning and Research ("OPR") to address the analysis and mitigation of the potential effects of GHG emissions under CEQA.[5] (AR 319(1): 25836.) This update included the addition of Section 15064.4 to the CEQA Guidelines, which directs lead agencies on how to calculate or estimate the amount of GHG emissions resulting from a project, and what factors must be considered when assessing the significance of impacts from GHG emissions on the environment. (CEQA Guidelines, §15064.4.)

III. ARGUMENT

The record clearly reflects that SANDAG undertook an extensive, thirty-eight page, GHG analysis in its EIR, analyzing the impacts of the RTP on GHG emissions, finding that the GHG emissions associated with the RTP would create a significant and unavoidable impact, and adopting mitigation measures and a statement of overriding considerations. (AR 8a: 2572, 2575, 2578.)

Despite this, however, the trial and appellate courts found that SANDAG's EIR supporting the RTP/SCS deficient, as it "does not find that the RTP/SCS's failure to meet the Executive Order's goals to be a significant impact," and failed "to analyze the transportation plan's

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[4] CEQA's implementing regulations are set forth at California Code of Regulations, Title 14, Sections 15000, *et seq.*, and are referred to herein as the "CEQA Guidelines."

[5] In 2007, the Legislature adopted Senate Bill 97, signed by Governor Schwarzenegger on August 24, 2007, directing OPR to prepare, develop, and transmit to the Resources Agency guidelines for the mitigation of GHG emissions or the effects of GHG emissions. (Stats. 2007, ch. 185, §1 ("SB 97").)

consistency with state climate policy." (See JA (75)1054-1057; Slip Opinion ("Opn." at p.15.)

The undersigned Amici ask this Court to determine that neither SANDAG, nor any other MPO in the state, is required to determine that an RTP is consistent with the GHG reduction goals for 2050 contained in EO S-03-05. As explained further below, such a determination would undermine the discretion of all local agencies to select thresholds of significance for environmental impacts – a discretion expressly recognized by the courts and within CEQA itself – and further eliminate the certainty Section 15064.4 of the CEQA Guidelines was meant to provide, creating the potential for litigation and additional costly environmental analysis, and undermining the State's economic recovery.

A. Requiring a Determination of Consistency with EO S-03-05 Would Usurp the Well-Established Discretion Vested in Lead Agencies.

As recognized by Appellate Justice Benke in her dissenting opinion, to require consistency with EO S-03-05 is the equivalent of establishing a new threshold of significance under CEQA[6], against which the impacts of a project must be measured. (Dis. Opn. at p. 3.) Yet there is no authority supporting the view that the power to establish thresholds of significance resides in the Governor. (*Ibid.*) The authority of executive orders is limited to subordinate executive offices and cannot invade the province of the legislature,[7] which has clearly demonstrated its intent to retain control over the regulation of environmental planning. (*Id.* at pp.3-4.)

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[6] CEQA is set forth at Public Resources Code sections 21100, *et seq*. All statutory cites herein are to the Public Resources Code, unless otherwise noted.

[7] (Cal. Const., art. IV, §1; 63 Ops. Cal. Atty. Gen. 583 (1980); 75 Ops. Cal. Atty. Gen. 2673 (1992).)

A "threshold of significance," as defined in the CEQA Guidelines, is "an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant." (CEQA Guidelines, §15064.7.) If a threshold of significance is to be adopted for general use as part of the lead agency's environmental review process, it "must be adopted by ordinance, resolution, rule or regulation, and developed through a public review process and supported by substantial evidence. (*Id.*)

As outlined extensively in SANDAG's Opening Brief, the CEQA Guidelines and the courts have firmly established that lead agencies have discretion to select their own thresholds of significance. (SANDAG Opening Brief at pp. 32-34.) Section 15064 of the Guidelines provides that "the determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved." (CEQA Guidelines. 14, § 15064, subd. (b).)

Section 15064.4, subdivision (b)(2), of the CEQA Guidelines adopted by the California Natural Resources Agency ("Resources Agency") in response to SB 97, reaffirmed this discretion. (CEQA Guidelines, § 15064.4, subd. (b)(2).) Section 15064.4 directs lead agencies to consider, in evaluating the significance of GHG impacts, whether the project emissions "exceed a threshold of significance *that the lead agency determines applies to the project.*" (*Id.* [emphasis added].) This discretion is expressly acknowledged in the "Final Statement of Reasons for Regulatory Action" issued by the California Natural Resources Agency in 2009 ("Final Statement") when it adopted Section 15064.4 and other amendments to the CEQA Guidelines to address the analysis and mitigation of GHG emissions. (AR 319(1): 25823.) In its Final Statement, the Resources Agency states "the proposed amendments recognize a lead agency's existing authority to develop, adopt and apply their own thresholds of

significance or those developed by other agencies or experts." (AR 319(1): 25910.)

This discretion was upheld in a 2011 appellate court decision, *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327 ("*CREED*"). In *CREED*, the plaintiffs challenged Chula Vista's use of AB 32 as a significance threshold for its GHG analysis, suggesting that there are other potential thresholds that the project did not meet, including a threshold set by San Diego County. (*Id.* at p. 337.) The Court stated that, pursuant to Section 15064.4 of the CEQA Guidelines, a lead agency is "allowed to decide what threshold of significance it will apply to a project." (*Id.* at p. 336; see also *Friends of Oroville v. City of Oroville* (2013) 219 Cal. App.4th 832, 841 ("*Friends of Oroville*") [confirming that a lead agency may adopt AB 32's emissions reduction targets as a threshold of significance] and *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1068 [finding that a lead agency has the discretion to adopt its own project-specific thresholds].)

1. Even if Executive Order S-03-05 was endorsed by the Legislature in AB 32 or SB 375, This Does Not Mandate that SANDAG Use It As a Threshold of Significance.

The majority opinion of the Appellate Court asserts that EO S-03-05 was "validated and ratified" by the Legislature through AB 32 and SB 375. (Opn. at p. 14.) This claim, however, is incorrect. AB 32 directed CARB to develop a Scoping Plan to enable the State to meet the *2020* goal in the Executive Order – it did not adopt the 2050 emissions reduction target set forth in the Executive Order, nor did it direct CARB to establish a plan to meet the Governor's goal for 2050. (Health & Saf. Code, § 38550; Dis. Opn. at p. 5.) Similarly, SB 375 directed CARB to develop GHG reduction

targets for the auto and light truck sector for 2020 and 2035. (Gov. Code, § 65080, subd. (b)(2)(A).) SB 375 makes no mention of EO S-03-05.

But even if AB 32 or SB 375 could be interpreted to have endorsed the Executive Order's goal of reducing GHG emissions statewide to 80% below 1990 levels by 2050, SANDAG would still retain its discretion to determine whether that goal was an appropriate threshold of significance under CEQA. (CEQA Guidelines, § 15064.4, subd. (b)(2); see also *CREED, supra*, 197 Cal.App.4th at p. 336; cf. *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1397 [lead agency can determine not to follow regulatory agency comments on an EIR].)

a. *The Natural Resources Agency "Deliberately Avoided" Linking CEQA, AB 32, SB 375, and CARB's Scoping Plan.*

In its "Thematic Responses" to comments on its proposed amendments to the CEQA Guidelines, promulgated in response to SB 97, the Resources Agency states that it "deliberately avoided" linking the determination of significance under CEQA to compliance with AB 32 or SB 375. (AR 319(1): 25923-25924 [Final Statement].) The Resources Agency recognized that, "while there is some overlap between the statutes, each contains its own requirements and serves its own purposes." (AR 319(1): 25923.)

The Resources Agency does not dispute that AB 32 and SB 375 were adopted to reduce GHG emission in the State following EO S-03-05. (AR 25833-25835 [Final Statement].) Despite this, the Resources Agency specifically declined to link the determination of significance under CEQA to compliance with these statutes. (*Ibid.*)

And yet, Petitioners now ask that this Court link the determination of significance of GHG emissions under CEQA to the goals stated in EO S-03-05, citing only the justification that EO S-03-05 "utilizes now-

undisputed science" to articulate a "long-term greenhouse gas reduction goal for the State" in furtherance of the "objective of climate stabilization." (Plaintiff's Answer Brief at p. 54; People of the State of California's Answer Brief on the Merits at pp. 31-34.) Having declined to mandate the use of standards in AB 32 and SB 375 as thresholds of significance under CEQA, the Amici are confident that that the Resources Agency did not intend to link the determination of significance to EO S-03-05 either.[8]

Petitioners also criticize SANDAG for failing to recognize that CARB's Scoping Plan emphasizes EO S-03-05's "scientific basis" and for failing to assess whether the emissions trajectory of the RTP/SCS conflicts with the provisions of the Scoping Plan, arguing that CEQA requires an analysis of the State's long-term policy of reducing emissions, as set forth in the Scoping Plan. (Plaintiff's Answer Brief at pp. 31-33.) However, in response to a joint comment letter submitted by the Center for Biological Diversity, the Sierra Club, and various other entities to the Resources Agency in 2009, regarding its proposed amendments to the CEQA

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[8] While two of the Petitioners, Sierra Club and Center for Biological Diversity, did comment on the Resources Agency's proposed revisions to the CEQA Guidelines addressing GHG emissions, at that time they did not suggest that lead agencies should be required to determine whether a project's GHG emissions were consistent with the goals reflected in EO S-03-05. (*Comments on Proposed Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB 97* (August 27, 2009) [http://resources.ca.gov/ceqa/docs/proposed_amendments_comments/Center_for_Biological_Diversity_et_al.pdf]; *Comments on Revised Text of Proposed Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB 97* (November 10, 2009) [http://resources.ca.gov/ceqa/docs/proposed_revisions_comments/Center_for_Biological_Diversity_et_al..pdf].)

Guidelines pursuant to SB 97, the Resources Agency specifically stated that because the "Scoping Plan does not contain binding regulations or requirements," "'compliance' with the Scoping Plan would not be a basis for determining significance under section 15064.4 (b)(3)." (*Resource Agency's Response to Comment Letter 71*, at p. 32 [http://resources.ca.gov/ceqa/docs/summaries_ and_responses_to_ public_comments_july-august/Letter_71_-_Center_for_Biological_ Diversity_et_al_-_Response.pdf].) Nonetheless, Section 15064.4 of the CEQA Guidelines fully vests in the lead agency full discretion in its selection of a threshold, as supported by substantial evidence, and notably did not preclude any particular potential threshold from that broad discretion. (CEQA Guidelines, §15064.4, subd. (b)(2); AR 319(1): 25910 [Final Statement].)

Yet Petitioners ask the Court to *mandate* that lead agencies apply EO S-03-05, which (like the Scoping Plan) contains no binding regulations or requirements, in the same way the Resources Agency itself would have declined to apply it – as a basis for determining significance of GHG emissions.[9] (See CEQA Guidelines, §15064.4, subd. (b)(2); AR 319(1): 25910 [Final Statement].)

Consistent with the Resources Agency's position, the Court should decline to link the 2050 goal in EO S-03-05 to the thresholds of significance under CEQA by requiring a consistency analysis. To do so would directly contravene the Legislature's direction set forth in Section

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[9] While the Resources Agency acknowledged that compliance with applicable *regulations* implementing CARB's Scoping Plan may be relevant to determining significance, it did not mandate the use of any particular regulation, and stated only that such regulations must be adopted by the relevant public agency through a public review process. (AR 25924 [Final Statement]; CEQA Guidelines, §15064.4, subd. (b)(3).) EO S-03-05 is not such a regulation.

21083.1, which states "[i]t is the intent of the Legislature that courts, consistent with generally accepted rules of statutory interpretation, shall not interpret this division or the state guidelines adopted pursuant to Section 21083 in a manner which imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines." (§ 21083.1.)

b. *EO S-03-05 Has No Binding Effect on Local Agencies.*

As discussed in detail in SANDAG's Opening Brief, the CEQA Guidelines "indicate the consideration of consistency with applicable *regulations* or with relevant *regional* or *local* plans may be relevant in assessing the significance of a project's environmental effects.... the Executive Order does not fall within these categories." (SANDAG's Opening Brief at p.38, citing CEQA Guidelines, §§ 15125, subd. (d), 15064.4, subd. (b)(3).) Again, Section 21083.1 specifically states that it is the intent of the Legislature that courts shall not interpret CEQA or its Guidelines in a manner that would impose procedural or substantive requirements beyond those explicitly stated therein. (§ 21083.1.) To mandate that the 2050 goal stated in EO S-03-05 be utilized as a threshold of significance would explicitly contravene this stated legislative intent.

Furthermore, under the principle of separation of powers, the authority of executive orders is limited to subordinate executive offices and cannot invade the province of the Legislature. (Cal. Const., art. III, §3; 63 Ops.Cal.Atty.Gen.583 (1980); 75 Ops.Cal.Atty.Gen. 2673 (1992).) The power to make law is vested in the Legislature – not the Governor. (Cal. Const., art. IV, §1.) Because the Governor is not empowered to legislate, executive orders are not law. (75 Ops.Cal.Atty.Gen. 2673 (1992).) The Governor only has authority to make law if the Legislature delegates a portion of its legislative authority to the Governor through a legislative enactment. (See *Prof'l Engineers in Cal. Gov't v. Schwarzenegger* (2010)

50 Cal.4th 989, 1015.) However, the Legislature did not delegate such authority to the Governor with respect to GHG emissions or CEQA; instead, it specifically delegated authority to CARB to determine appropriate GHG reduction goals, and delegated authority to OPR and the Resources Agency to determine the appropriate method for analyzing and mitigating for GHG emissions under CEQA. (Health & Saf. Code, § 38550 [AB 32]; Gov. Code, § 65080, subd. (b)(2)(A) [SB 375]; Stats. 2007, ch. 185, §1 [SB 97].)

B. Requiring a Determination of Consistency with EO S-03-05 Precipitates Unreasonable Consequences.

If the Court determines that the EIR for an RTP must include a consistency analysis with the GHG emission reduction goals in Executive Order No. S-3-05, not only would the Court make a major departure from CEQA by removing a lead agency's discretion to determine appropriate thresholds of significance, but the practical consequences of such a decision would be untenable. (Dis. Opn. at pp. 8-9.)

Such a determination would not only require an MPO to perform a consistency analysis for their RTP/SCSs, it would also surely be extended to other executive orders (or even statements of policy issued by State agencies), and to other projects. It would also renew uncertainty in the CEQA process, creating the potential for additional litigation, and increasing project costs related to environmental studies and mitigation for projects that, but for this renewed uncertainty regarding the significance of GHG emissions, could have used a negative declaration or a mitigated negative declaration to satisfy the requirements of CEQA.

1. The 2050 Goal in EO S-03-05 Would Apply to All Projects Analyzed Under CEQA.

The question the Court has asked – must an EIR for an RTP include a consistency analysis with EO S-03-05 under CEQA – is a narrow one.

But the reasoning urged by Petitioners and the Attorney General, and the reasoning of the Appellate Court, would not limit the need for a consistency analysis to an EIR for an RTP. Rather, *any project* subject to CEQA involving a potential impact on GHG emissions would be required to use consistency with the 2050 goal in EO S-03-05 as a threshold of significance.

As recognized by Appellate Justice Benke in her dissenting opinion, EO S-03-05 is a broad policy statement of *statewide* emissions reduction goals issued by the Governor – the Legislature has not ratified the Executive Order's qualitative or quantitative goals for 2050. (Dis. Opn. at pp. 3, 5.) It also applies to all sectors of the economy that involve the production of GHG emissions, not just transportation – including electricity production, recycling and waste disposal, and agriculture, commercial and residential energy sector, the industrial sector, and the forest sector. (AR 27861, 27871 [CARB's Scoping Plan].)

Arguably every project not otherwise exempt from CEQA will have some impact on one of these sectors. For example: a housing subdivision has impacts on transportation, the energy sector, and recycling and waste disposal; a road improvement project will impact transportation; a new prison will impact electricity needs and recycling and waste disposal; a hospital will impact the energy sector, transportation, and recycling and waste disposal; and a city annexation or general plan amendment would potentially impact all of the sectors listed.

If this Court requires a consistency analysis because the 2050 goal "utilizes science" to articulate a "long-term greenhouse gas reduction goal for the State," there would be no basis for limiting the application of EO S-03-05 as a threshold of significance to EIRs for RTPs prepared by MPOs. It would undoubtedly be applied to any project subject to CEQA that has any potential impact on GHG emissions in any one of the sectors reflected in

CARB's Scoping Plan. (See *Friends of Oroville*, *supra*, 219 Cal. App.4th at pp. 843-44 [requiring City to take into account existing GHG emissions from all sectors in Scoping Plan in determining impact].) If the Court eliminates the discretion of a lead agency granted under the CEQA Guidelines to determine whether to analyze a project's consistency with EO S-03-05, this Court will, in effect, establish a statewide threshold of significance for all projects subject to CEQA. (See *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 [an agency must determine whether "any of the *possible* significant impacts of the project will, in fact, be significant"].)

a. *The Resources Agency Declined to Establish a "Statewide Threshold of Significance" – So Should This Court.*

Again, in the Resources Agency's "Thematic Responses" to public comments on its proposed amendments to the CEQA Guidelines to address GHG emissions, the Resources Agency specifically declined to establish a statewide threshold of significance. (AR 319(1): 25910-25911 [Final Statement].)

Explaining this decision, the Resources Agency cited the fact that "no state agency has developed a statewide threshold." (Resources Agency's Responses to Comment Letter 27, at p. 1 [http://resources.ca.gov/ceqa/docs/summaries_and_responses_to_public_comments_july-august/Letter_27-_Southern_California_Assoication_of_Governments_-_Response.pdf] ("Response to Letter 27").) Presumably the Resources Agency did not consider that EO S-03-05, issued years before the Resources Agency promulgated new CEQA Guidelines in response to SB 97, was an appropriate statewide threshold of significance, or it would have taken that opportunity to include it in the Guidelines. (Cf. *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852 [The expression of some things in

a statute necessarily means the exclusion of other things not expressed].) Furthermore, consistent with Justice Benke's dissenting opinion, the Resources Agency's response reflects that appropriate thresholds of significance are those developed by *agencies* through a public process, with an opportunity for public input – not an Executive Order issued by the Governor. (See Dis. Opn. at p. 3.)

The Resources Agency went on to state that "requiring application of a particular threshold in the CEQA Guidelines would represent a major departure from CEQA. CEQA leaves the determination of significance to the lead agency. The precise methodology used to determine significance is also left to lead agencies." (Response to Letter 27 at p. 1, citing *Eureka Citizens for Responsible Gov't v. City of Eureka* (2007) 147 Cal.App.4th 357, 371-373.) The Amici urge the Court to exercise the same restraint shown by the Resources Agency and decline to establish a statewide threshold for GHG emissions reductions.

2. A "Consistency Analysis" Is Not Sufficient to Support a Significance Determination.

To analyze a project's consistency with EO S-03-05, a lead agency would first be required to identify the GHG emissions resulting from a project, by either quantifying GHG emissions, or by relying on a qualitative analysis or performance based standards. (CEQA Guidelines, §15064.4, subds. (a)(1)-(2).) But then the lead agency would have to assess whether those GHG emissions were "consistent" with the goal stated in EO S-03-05 – to reduce GHG emissions statewide to 80% below 1990 levels by 2050.

It is unclear how a lead agency can, in the absence of guidance or regulations from CARB or a regional air district, assess the significance of a particular project's emissions in the context of a statewide goal – the achievement of which involves a "comprehensive reduction strategy that combines market-based regulatory approaches, other regulations, voluntary

measures, fees, policies, and programs" to reduce emissions across the economy, including emissions related to transportation and land use, but also including electricity production, recycling and waste disposal, agriculture, commercial and residential energy sector, the industrial sector, and the forestry sector. (See Dis. Opn. pp.6-7; see also AR 27861, 27871 [CARB's Scoping Plan].)

While a lead agency must be able to determine whether a project will result in an increase [or decrease] in GHG emissions, identifying that effect, alone, is not sufficient to support a significance determination in the absence of scientific and factual information regarding the point at which particular quantities of greenhouse gas emissions become significant in the context of the entire economy and across the State in the year 2050. (See *Friends of Oroville, supra,* 219 Cal.App.4th at 844 [finding that the relevant question in an EIR is not the relative amount of GHG emitted, but whether emissions should be considered significant in light of the threshold of significance standard in AB 32].)

Lead agencies frequently evaluate projects' estimated emissions by comparing the project's estimated emissions to the GHG emissions reduction target adopted in AB 32 – reduce emissions to 1990 levels by 2020. (*CREED, supra,* 197 Cal.App.4th at 335-37.) CARB's 2008 Scoping Plan estimated that GHG emissions in the State needed to be reduced by approximately 29%, as compared to the emissions levels otherwise projected for 2020 (or "business as usual"), in order to meet the 2020 goal of AB 32. (AR 27880-27881.) Using this threshold of significance under AB 32, if a project meets or exceeds a 29% reduction in emissions from what is otherwise projected for 2020, its GHG impacts are less than significant. (*CREED, supra,* 197 Cal.App.4th at 336-37.)

To determine whether a project is consistent with the 2050 reduction goal in EO S-03-05, a similar method of analysis would be required. But

because CARB has yet to establish how much GHG emissions in the State need to be reduced, as compared to the emissions levels otherwise projected for 2050, or as compared to existing conditions, in order to meet the 2050 goal of 80% below 1990 levels, a lead agency would be required to attempt to make that determination on its own. Only after attempting to calculate this target, could the lead agency compare its project's emissions against that target to determine whether the project meets or exceeds the necessary reduction to be "consistent with" the EO S-03-05 goal for 2050. (See *Friends of Oroville, supra,* 219 Cal.App.4th 832, 844.)

Petitioners also insist that SANDAG, by analyzing the RTP's emissions against the more specific reduction targets CARB developed for 2020 and 235, pursuant to SB 375, provided a misleading picture of the GHG impacts of the RTP/SCS – despite the fact that the 2020 and 2035 reduction targets CARB provided were specific to the San Diego region and the transportation/land use sector. (Plaintiff's Answer Brief at pp. 28-30.) However, the Resources Agency specifically acknowledged that these targets, while not *mandatory* thresholds of significance, could be appropriate thresholds of significance under Section 15064.4, subdivision (b)(2) of the Guidelines, if supported by substantial evidence. (AR 25924-25926 [Final Statement].)

Yet, in the absence of either a reduction target from CARB for 2050 or regulations adopted to achieve the 2050 reduction goal in EO S-03-05, Petitioners insist that MPOs and other lead agencies should be left in the precarious position of determining, based on scientific and factual data, whether the GHG emissions from a project are consistent with the goal of reaching 80% below 1990 levels of GHG emissions by 2050, taking into account the type of project under review, as well as the fact that GHG reduction requirements vary between sectors of the economy. (Dis. Opn. at pp.6-7) Mandating such an analysis, rather than allowing agencies to rely

on the methods set forth in Section 15064.4 of the CEQA Guidelines, would result in the return of all the uncertainty in GHG analyses that existed prior to the 2010 update to the CEQA Guidelines in response to SB 97 and prior to the adoption of other, more specific, regulations and reduction targets from CARB. (See AR 25836 [Final Statement – acknowledging the uncertainty that had developed in GHG analyses prior to the 2010 update].)

a. *Requiring a Determination of Consistency with EO S-03-05 Would Endanger the Ability of Agencies to Rely on Negative Declarations and Categorical Exemptions.*

The practical effect of requiring a consistency analysis will be that an EIR will be prepared for every non-exempt project subject to CEQA that may have any impact, positive or negative, on GHG emissions.

As this Court knows, there is a strong presumption in favor of preparing EIRs built into CEQA, which is reflected in the "fair argument" standard. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75 ["*No Oil*"].) This standard requires that an agency prepare an EIR whenever substantial evidence in the record supports a "fair argument" that a project may have a significant effect on the environment. (CEQA Guidelines, § 15064, subd. (f)(1); *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602.)

For this reason, as stated in the CEQA Guidelines, "[d]etermining whether a project may have a significant effect plays a critical role in the CEQA process." (CEQA Guidelines, §15064, subd. (a).) If a project is subject to CEQA and there is substantial evidence that a project *may* have a significant effect on the environment, an EIR must be prepared, rather than a more summary Negative Declaration or a Mitigated Negative Declaration. (§21082.2, subd. (d) [emphasis added], § 21151; see also *No Oil*, 13 Cal.3d at 83-85.) A Negative Declaration may only be prepared if there is *no*

substantial evidence that the project may significantly affect the environment. (CEQA Guidelines, §15064 (f)(3) [emphasis added].) A project "may" have a significant effect on the environment if there is a "reasonable possibility" that it will result in a significant impact. (*No Oil, supra*, 13 Cal.3d at p. 83, n.16.) If any aspect of a project may have a significant impact, an EIR must be prepared, even if the overall environmental impact of the project is beneficial. (CEQA Guidelines, §15063, subd. (b)(1).)

"The determination of whether a project may have a significant effect on the environment calls for "careful judgment" on the part of the public agency involved, based to the extent possible on scientific and factual data." (CEQA Guidelines, §§15064, subd. (b), 15064.4, subd. (a).) An agency's determination of whether a project may have a significant effect on the environment must be based on substantial evidence in light of the whole record, including facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (§ 21082.2, subd. (c).) According to a recent appellate court decision, factual, non-expert evidence of impacts can be enough to create a "fair argument" that an impact will occur, despite a project's compliance with local ordinances. (*Keep Our Mountains Quiet v. County of Santa Clara (Candice Clark Wozniak, as Trustee, Real Party in Interest)* (6th Dist. 2015), 2015 WL 2152905.)

As SANDAG recognized in its Consolidated Reply Brief, in the absence of an accepted methodology for reducing GHG emissions to 80% of 1990 by 2050, against which a project's GHG emissions can then be measured, lead agencies would be left to determine how to analyze consistency with the 2050 goal in a meaningful way – they would have to determine which technologies to include in their emissions projections and what percent of the total statewide reduction may be appropriate to try to

achieve, based on the type of project involved and other practical considerations. (SANDAG's Consolidated Reply Brief at p. 41.)

Given the strong presumption in favor of the preparation of an EIR, coupled with the uncertainty surrounding how to establish what level of GHG emissions for a particular project would be consistent with EO S-03-05's dramatic 2050 goal for GHG reductions, any project that does not decrease GHG emissions would almost certainly be found to have a significant and unavoidable impact on GHG emissions and climate change. (See *No Oil, supra*, 13 Cal.3d at p. 83, n.16 [an EIR is required if there is a "reasonable possibility" the project will result in a significant impact].) Even projects that are estimated to reduce GHG emissions could require an EIR because a lead agency will be unable to accurately establish what that the proposed reduction in GHG emissions from the project must be to be sufficiently "consistent" with the GHG emissions reductions required in EO S-03-05 for 2050. (See CEQA Guidelines, §15063, subd. (b)(1).)

This would also impact the ability of projects that are typically exempt from CEQA, such as single family homes, to utilize such exemptions. (CEQA Guidelines, §15303 [providing a categorical exemption for small projects such as single-family homes]; but see 15300.2, subd. (b) [exception to exemption if there is a potential for a significant cumulative impact from successive projects of the same type].)

Similarly, requiring a consistency analysis would likely limit the ability of lead agencies to utilize Mitigated Negative Declarations ("MND") for projects that have potential GHG impacts. (See CEQA Guidelines, § 15070, subd. (b) [an MND may only be adopted if all potentially significant effects of the project will be avoided or reduced to insignificance].) If a lead agency cannot determine what level of GHG emissions for a particular project would be consistent with EO S-03-05's 2050 goal for GHG reductions, it would also be unable to determine whether the reduction in

GHG emissions to be achieved by a proposed mitigation measure will be sufficient to render an impact "less than significant," to support a determination that the project, after incorporating mitigation measures, has no significant impact on GHG emissions. (See *Ibid.*)

Given the uncertainty that will surround any attempt by an agency to determine what level of GHG emissions for a particular project would be consistent with EO S-03-05's 2050 goal for GHG reductions, lead agencies will unnecessarily require the preparation of an EIR for every project involving impacts to GHG emissions in an effort to avoid costly and time consuming litigation, even when a lower level of environmental review would be more appropriate and efficient for a given project.

b. *Requiring a Determination of Consistency with EO S-03-05 Would Increase the Costs of Environmental Analysis and Required Mitigation.*

Requiring a project proponent to prepare an EIR, rather than a Mitigated Negative Declaration or a Negative Declaration, or eliminating the ability of a project to rely on a categorical exemption, would unnecessarily increase the costs of compliance with CEQA. Such costs would not be limited to consultant charges for the preparation of environmental documents, but also costs resulting from project delays to allow for the extra time required to prepare and circulate an EIR rather than relying on a more summary environmental process.

And because CEQA requires agencies to adopt feasible mitigation measures when approving a project to reduce or avoid its significant impacts, whenever it is feasible to do so, a project proponent may incur unnecessary costs related to the mitigation of a project's GHG impacts, in addition to costs related to the environmental review process and accompanying project delay. (See §§ 21002, 21002.1, subd. (b), 21081, subd. (a); CEQA Guidelines, §§ 15091, subd. (a)(1), § 15126.4.)

Where a lead agency cannot sufficiently establish that a particular mitigation measure or combination of measures will achieve the necessary level of GHG emissions reductions to render the impact consistent with EO S-03-05's 2050 goal for GHG reductions, due to their inability to establish what level of GHG emissions for a particular project would be consistent with EO S-03-05 in the first place, project proponents will be financially responsible for implementing more mitigation measures that would otherwise be necessary, up to and including every feasible mitigation measure that would address GHG emission impacts. (See *Sacramento Old City Ass'n v. City Council* (1991) 229 Cal.App.3d 1011, 1027 [agency conclusion that mitigation measures will be effective must be supported by substantial evidence]; §§21002, 21002.1, subd. (b) [an agency cannot approve a project as proposed if it is feasible to adopt mitigation measures that would reduce the project's significant impacts].) Under normal circumstances, a lead agency would be able to quantify the amount of GHG emissions mitigated by particular measures, and determine which measure(s) to adopt, rather than requiring all measures be implemented.

This over-mitigation could greatly increase the project owner's costs for mitigating projects beyond what would otherwise be required to establish that GHG emissions impacts would be eliminated in the absence of such uncertainties.

3. A Requirement for a Determination of Consistency with EO S-03-05 Could be Extended to Require Consistency with Other Executive Orders or Policy Statements, rather than Publicly Adopted Regulations.

The reasoning of the Petitioners, the Attorney General, and the Appellate Court would not only allow for the extension of this requirement to all projects with GHG impacts that are subject to CEQA, as discussed above, but it could also extend the requirement for a "consistency analysis" to other executive orders or policy statements from agencies within the

executive branch that are based in science. (See Plaintiff's Answer Brief at p. 54 [reasoning that EO S-03-05 "utilizes now-undisputed science" to articulate a "long-term greenhouse gas reduction goal for the State"; People of the State of California's Answer Brief on the Merits at pp. 31-34 [reasoning that EO S-03-05 furthers the State's "objective of climate stabilization."] Based on this broad reasoning, other executive branch policy statements, based in science, and furthering the State's objectives of climate stabilization or other environmental objectives, could also become mandatory thresholds of significance in future environmental studies for all public and private projects subject to CEQA, despite the absence of regulations promulgated under the Administrative Procedures Act that allow for public input and require an assessment of the economic impact of such requirements on California businesses. (Gov. Code, §§ 11340, et seq.; see also § 11346.3 [requiring an economic impact analysis].)

a. *Other Executive Orders Would also Become Thresholds of Significance.*

For example, on April 29, 2015, Governor Jerry Brown issued Executive Order B-30-15, setting a new statewide goal to reduce GHG emissions to 40% below 1990 levels by 2030, and directing CARB to update its Scoping Plan to quantify the 2030 reduction goal for the State, and directing state agencies to implement measures to meet the new 2030 interim goal, as well as the 2050 goal in EO S-03-05. (Governor's Exec. Order No. B-30-15 (April 29, 2015) ("EO B-30-15").) Pursuant to SB 375, however, in 2010 CARB established GHG reduction targets for 2035 for each of the 18 regions of the State managed by MPOs. (Gov. Code, § 65080, subd. (b)(2)(A).) These targets are currently being utilized by MPOs statewide as thresholds of significance under CEQA, consistent with Section 15064.4, subdivision (b)(2) of the CEQA Guidelines. (CEQA Guidelines, § 15064.4, subd. (b)(2); see also *Protect the Historic Amador*

Waterways v. Amador Water Agency, supra, 116 Cal.App.4th at 1107 ["thresholds can be drawn from existing environmental standards, such as other statutes or regulations"].) CARB is currently in the process of updating the next round of GHG reduction targets, consistent with the mandate in SB 375 that they be updated every eight years, but the current targets adopted in 2010 for 2035 may or may not be consistent with the Governor's new goal for 2030.

Should the Court determine that MPOs are required to analyze an RTP's consistency with EO S-03-05, such a decision could quickly extend to Executive Order B-30-15, and to any other executive orders that include a policy goal pertaining to an environmental issue covered under CEQA – GHG emissions or other air quality issues, water, transportation, utilities, etc. Contrary to the Legislature's directive in Section 21083.1, such policy statements from the Executive Branch (that have not been through a public vetting process) could immediately alter the requirements of CEQA. (See §21083.1.)

b. Other Policy Statements by State Agency Heads Could Become Thresholds of Significance.

Similarly, the reasoning of the Petitioners and the Appellate Court would open the door to arguments over whether policy statements issued by other agencies within the executive branch, prior to the promulgation of regulations, are sufficiently "rooted in science" to require a similar consistency analysis under CEQA.

If consistency with EO S-03-05, which is not a law or a regulation or binding on local agencies, must be analyzed under CEQA because it "utilizes science" and articulates a long-term goal of the State, there would be no rationale for limiting the requirement for a consistency analysis to consistency with environmental policies announced through Executive Orders by the Governor. Other environmental policy statements by heads of

state agencies, if sufficiently based on science, would undoubtedly be held up by certain stakeholders as appropriate thresholds of significance under CEQA. State agencies could potentially achieve immediate changes in environmental policy without undertaking to promulgate regulations subject to the public process otherwise mandated under the Administrative Procedures Act. (Gov. Code, §§ 11346-11348.)

4. A Requirement for a Determination of Consistency with EO S-03-05 Eliminates the Certainty Guideline 15064.4 Was Intended To Create and Increases Opportunities for Litigation.

In the Resources Agency's Final Statement, it recognized that "[w]hile AB 32 and SB375 target specific types of emissions from specific sectors, the California Environmental Quality Act ("CEQA") regulates nearly all governmental activities and approvals." (AR 319(1): 25836 [Final Statement].) And as awareness of causes and effects of GHG emissions increased, "uncertainty developed, however, among public agencies regarding how GHG emissions should be analyzed in environmental documents prepared pursuant to CEQA." (*Ibid.*)

Citing then-Governor Schwarzenegger's Signing Message that accompanied SB 97, the Resources Agency acknowledged that the purpose of the amendments to the Guidelines was to provide greater certainty to lead agencies. (AR 319(1): 25836.) The Governor had recognized that this uncertainty "led to legal claims being asserted" to stop infrastructure projects that would otherwise reduce congestion on roadways. (Governor Schwarzenegger's Signing Message, SB 97, http://opr.ca.gov/docs/SB-97-signing-message.pdf ("SB 97, Signing Message").) He also recognized that "[l]itigation under CEQA is not the best approach to reduce greenhouse gas emissions and maintain a sound and vibrant economy. To achieve these goals, we need a coordinated policy, not a piecemeal approach dictated by litigation. (*Ibid.*)

SB 97 advanced a coordinated policy for reducing GHG emissions by directing OPR and the Resources Agency to expedite the development CEQA Guidelines on how lead agencies should analyze and mitigate for GHG emissions. (SB 97, Signing Message.) Until these guidelines were in place, SB 97 provided that no transportation project funded under the Highway Safety, Traffic Reduction Air Quality, and Port Security Bond Act of 2006 (Gov. Code, §§ 8879.20, *et seq.*) could be challenged based on the failure to adequately analyze the effects of GHG emissions otherwise required to be reduced. (Stats. 2007, Ch. 185, § 2.)

Mandating a consistency analysis with the 2050 goal for GHG reduction from EO S-03-05, prior to the adoption of regional and economic sector specific regulations or the development of regional reduction targets by CARB pursuant to SB 375, or an update to CARB's Scoping Plan to provide guidance on the approach the State will take to reduce GHG emissions beyond 2020, will reintroduce all the uncertainty back into GHG analyses that Section 15064.4 of the CEQA Guidelines and the other GHG-specific regulations were intended to eliminate. Lead agencies will once again be subject to costly litigation alleging their failure to adequately analyze or mitigate for the effects of GHG emissions under CEQA whenever a group seeks to delay the implementation of a project or obtain concessions from the lead agency in the construction of a project.

In its responses to comments on the regulations promulgated in response to SB 97, the Resources Agency recognized that there is already "inherent risk that is involved with attempting to correctly consider, analyze, and mitigate the potential impacts associated with greenhouse gas emissions from a project. (Response to Letter 27 at p. 1.) But this risk will be exploited again if the Court requires lead agencies to analyze a project's consistency with EO S-03-05's goal for 2050 before any regulatory

guidance, based on science and facts, is developed by CARB or the regional air districts.

As recognized by then-Governor Schwarzenegger when he signed SB 97, to maintain a sound and vibrant economy, there is a balance to be struck between the need for environmental protection through the reduction of GHG emissions and the need for infrastructure projects. This balance is best achieved through coordinated policy, "not a piecemeal approach dictated by litigation." (SB 97, Signing Message.)

IV. CONCLUSION

The undersigned Amici Curiae urge the Court preserve the discretion of all local agencies to select thresholds of significance for environmental impacts and to preserve value of the guidance provided in Section 15064.4 of the CEQA Guidelines by determining that an EIR for an RTP need not include an analysis of the RTP's consistency with the GHG emission reduction goals in Executive Order No. S-03-05 to comply with CEQA.

Dated: September 3, 2015 MILLER & OWEN

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California Construction and Industrial Materials Association
Construction Industry Air Quality Coalition
Fresno Council of Governments
Golden State Gateway Coalition
Los Angeles Chamber of Commerce
San Gabriel Valley Economic Partnership

CERTIFICATE OF COMPLIANCE PURSUANT TO CAL. RULES OF CT 8.204, subd. (c)(1) FOR CASE NUMBER S223603

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I hereby certify that this brief contains 7,844 words, including footnotes, and uses a 13 point Times New Roman font. In making this certification, I have relied on the word count function of the computer program used to prepare the brief.

DATED this 3rd day of September, 2015.

Dated: September 3, 2015 Respectfully submitted,

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Construction Industry Air Quality Coalition
Fresno Council of Governments
Golden State Gateway Coalition
Los Angeles Chamber of Commerce
San Gabriel Valley Economic Partnership

DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: ***Cleveland National Forest Foundation; Sierra Club; Center for Biological Diversity; CREED-21; Affordable Housing Coalition of San Diego; and People of the State of California, vs. San Diego Association of Governments; San Diego Association of Governments Board of Directors***

Case No.: **California Supreme Court No. S223603**
Court of Appeal, 4th Appellate District,
Division 1, No. D063288
San Diego County Superior Court
Case No. 37-2011-00101593-CU-TT-CTL

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is 428 J Street, Suite 400, Sacramento, California 95814.

On September 3, 2015, I served the foregoing document(s) described as:

APPLICATION TO FILE AMICI CURIAE BRIEF AND BRIEF OF BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, *ET AL.*, AS AMICI CURIAE IN SUPPORT OF SAN DIEGO ASSOCIATION OF GOVERNMENTS AND SAN DIEGO ASSOCIATION OF GOVERNMENTS' BOARD OF DIRECTORS

In this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

On the above date:

X **BY U.S. MAIL**: The sealed envelope with postage thereon fully prepaid was placed for collection and mailing following ordinary business practices. I am aware that on motion of the party served, service is presumed invalid if the postage cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing set forth in this declaration. I am readily familiar with Miller & Owen's practice for collection and processing of documents for mailing with the United States Postal Service and that

the documents are deposited with the United States Postal Service the same day as the day of collection in the ordinary course of business.

X BY ELECTRONIC MAIL DELIVERY: By causing a true copy of the within documents to be mailed electronically to the offices of the addressees set forth below, on the date set forth above.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **September 3, 2015**, at Sacramento, California.

By: Emily D. Ford
Emily D. Ford

SERVICE LIST

Cleveland National Forest Foundation, et al. vs. San Diego Association of Governments, et al.
(Case No. S223603)

Court of Appeal **Fourth Appellate District, Div. 1** 750 B Street, Suite 300 San Diego, CA 92101 *(Case No. D063288* *(via mail only)*	**Superior Court – San Diego County** The Honorable Timothy B. Taylor 330 West Broadway San Diego, CA 92101 *(Case No. 37-2011-00101593-CU-TT-CTL)* *(via mail only)*
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