CASE NO. S223603

IN THE SUPREME COURT OF CALIFORNIA

CLEVELAND NATIONAL FOREST FOUNDATION

Plaintiffs and Appellants

v.

SAN DIEGO ASSOCIATION OF GOVERNMENTS

Defendant and Respondent

After a Published Decision by the Court of Appeal, filed December 16, 2014
Fourth Appellate District Case No. D063288

Appeal from the Superior Court of California, County of San Diego
Case Nos. 37-2011-00101593-CU-TT-CTL; 37-2011-00101660-CU-TTCTL
Honorable Timothy B. Taylor

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF

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APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS AND APPELLANTS SAN DIEGO ASSOCIATION OF GOVERNMENTS AND SAN DIEGO ASSOCIATION OF GOVERNMENTS BOARD OF DIRECTORS

Pursuant to Rule 8.520, subdivision (f), of the California Rules of Court, the California Association of Councils of Governments (CALCOG), the Southern California Association of Governments (SCAG), the Metropolitan Transportation Commission (MTC), the League of California Cities (League), the California State Association of Counties (CSAC), the American Planning Association California Chapter (APA California Chapter), the Association of Environmental Professionals (AEP), the Self-Help Counties Coalition (SHCC), and the Riverside County Transportation Commission (RCTC), submit this application to file an Amici Curiae Brief in support of the position of Respondents and Appellants San Diego Association of Governments (SANDAG) and the SANDAG Board of Directors in this matter.

APPLICANTS' STATEMENT OF INTEREST

(Cal. Rules of Court, Rule 8.520, subd. (f)(3).)

CALCOG is an association of 43 California Councils of Governments (COGs), including all 18 Metropolitan Planning Organizations (MPOs) in California that are responsible for adopting Regional Transportation Plans (RTPs) like the one at issue in this case. In addition, CALCOG represents

many transportation authorities and commissions that have programming responsibilities under RTPs, or are otherwise directly affected by RTPs.

SCAG and MTC serve as regional MPOs and are therefore tasked with preparing and updating RTPs for their respective regions. SCAG represents 191 cities and six counties in California. MTC represents 100 municipalities, eight counties, and one city and county in the greater San Francisco Bay Area. SCAG and MTC are among the few MPOs to date that, in addition to SANDAG, have adopted an RTP that includes a Sustainable Communities Strategy (SCS) as authorized under Government Code section 65080, as amended by the California Legislature in 2008 by Senate Bill 375 (SB 375).

Like other MPOs, SCAG and MTC must adopt a new RTP every four years and they have already started to plan for the adoption of new RTPs. They join as amicus here to provide depth and context to the points made in the accompanying Amici Curiae brief as two agencies that have participated in the same process that SANDAG undertook, and that is now challenged in this lawsuit. SCAG and MTC also have an abiding and continuing interest in the implementation of SB 375 and serve as "lead agencies" under the California Environmental Quality Act (CEQA) responsible for preparing environmental impact reports (EIRs). SCAG and MTC have direct and deep experience regarding the interplay between CEQA, SB 375, and other federal and state laws governing the preparation of RTPs.

/ / /

The League is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide significance. The Committee has concluded that this case has statewide significance.

CSAC is a non-profit corporation. Its membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide. The Committee has determined that this case raises important issues that affect all counties.

SHCC is an organization of 20 local county transportation agencies that receive funding from local, voter-approved sales tax measures that provide revenue for transportation operations and improvements. Almost two-thirds of all transportation investments in California come from local sales tax revenue generated in this fashion. SHCC works to develop sound policies for the transportation and infrastructure investments that are included by MPOs in their RTPs.

APA California Chapter is a state-wide association that consists of over 5,000 persons, including professional planners working in public agencies and private firms, citizen planners who serve on planning commissions, and other elected and appointed officials who work to build public and political support for planning decisions that improve the quality of life for all Californians. The mission of the APA California Chapter, the largest of the National American Planning Association's 47 chapters, is to foster better planning by providing vision and leadership in addressing important planning issues. To that end, the APA California Chapter's Amicus Curiae Committee, comprised of planners and land use attorneys, monitors litigation of concern to California planners and participates in cases of statewide or national significance that have implications for planning practice in California. The Committee has determined that this case raises important issues that affect the Chapter's members.

AEP is a non-profit organization representing over 1,700 of California's environmental professionals. AEP members are involved at every stage of the evaluation, analysis, assessment, and litigation of projects subject to CEQA. For over thirty years, AEP has dedicated itself to improving the technical expertise and professional qualifications of its membership, as well as educating the public on the value of California's laws protecting the environment, managing California's natural resources, and promoting responsible land use and urban growth. AEP's membership is broad and

diverse, incorporating representatives from public agencies, the private sector and non-governmental organizations. They include biologists, air quality and sound technicians, archaeologists and historians, land use planners, transportation engineers, and environmental attorneys, among others. AEP has determined that this case raises important issues that affect its members.

AEP and APA members regularly provide expert technical services and analysis in compliance with CEQA's requirements. In addition, AEP and APA members working as public agency planners often review CEQA documents and advise city or county decision-makers on whether those documents comply with CEQA's requirements.

The RCTC is responsible for long-term and regional transportation solutions within Riverside County. RCTC plans and implements billions of dollars of transportation and transit improvements, assists local governments with money for local streets and roads, and seeks to secure and improve transit and transportation for residents of the County. RCTC regularly prepares or directs the preparation of environmental review documents for transportation projects under CEQA. RCTC's projects are included in SCAGs' RTP/SCS. Thus, RCTC has an interest in the interpretation of CEQA in a manner that protects the environment and that allows for the efficient and effective delivery of transportation improvements for the residents of Southern California.

CALCOG, SCAG, MTC, the League, CSAC, APA California Chapter, AEP, SHCC, and RCTC have identified this case as having particular significance to their organizations, as well as to the cities and counties in California. All MPOs have a compelling interest in this case because it is the first to involve a challenge to the adequacy of an EIR prepared for an RTP/SCS. All cities and counties in California have a compelling interest in this case because of its potential for improperly intruding on the exercise of discretion over local planning decisions and the discretion afforded to lead agencies in conducting the environmental review required under CEQA.

HOW THE PROPOSED AMICI CURIAE BRIEF WILL ASSIST THE COURT

(Cal. Rules of Court, Rule 8.520, subd. (f)(3).)

This issues in the case have implications not only for SANDAG, but for other agencies involved in the RTP/SCS process, as well as those agencies that perform planning functions under a myriad of other programs. Our purpose in filing this brief is to provide the Court with our perspective on the following issues: (1) the appropriate standard of review to apply when reviewing the methodology used in performing the environmental analysis required under CEQA; and (2) whether an EIR prepared for an RTP must include an analysis of the plan's consistency with the greenhouse gas reduction goals reflected in Executive Order S-2-05 to comply with CEQA. We believe our analysis of these issues provides additional insight that will be helpful to the Court in making its decision in this case.

Another purpose of this brief to provide our perspective regarding how the long-range requirements and planning objectives embodied in an RTP, along with the regulatory structure of greenhouse gas reduction requirements and other "smart growth principles" embodied in an SCS, interrelate with the environmental review process required by CEQA. This effort necessarily involves striking a balance between complex and sometimes competing goals. Any decision that does not account fully for this complexity could have unintended consequences, cause inefficient environmental review, waste public resources, deprive COGs and MPOs of the discretion they must retain in order to make difficult policy decisions about how their communities should grow and evolve in the coming decades, and improperly interfere with the discretion of local elected officials to make local land-use decisions and to design environmental review documents required under CEQA.

IDENTIFICATION OF AUTHORS

(Cal. Rules of Court, Rule 8.520, subd. (f)(4).)

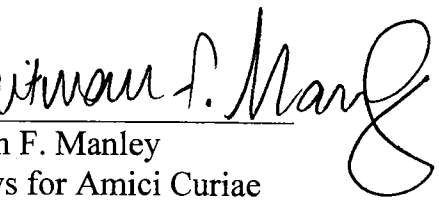
No party or counsel for a party in this case authored any part of the accompanying amicus curiae brief. No party or party's counsel made any monetary contribution to fund the preparation of the brief. This brief has been prepared "pro bono" solely on behalf of Amici Curiae.

* * *

Amici Curiae respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: September 4, 2015

REMY MOOSE MANLEY, LLP

By: 

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AMICI CURIAE BRIEF

I.
INTRODUCTION

In attacking the Environmental Impact Report (EIR) prepared by the San Diego Association of Governments (SANDAG) for its Regional Transportation Plan / Sustainable Communities Strategy (RTP/SCS), petitioners Cleveland National Forest Foundation, the Center for Biological Diversity, CREED-21, and Affordable Housing Coalition of San Diego County (collectively, CNFF) and intervener the California Attorney General (AG) significantly misapprehend the requirements of the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). The Court of Appeal majority opinion reflects these same errors.

These arguments have implications not only for SANDAG, but for other agencies involved in the RTP/SCS process, as well as those agencies that perform planning functions under a myriad of other programs throughout the state. The California Association of Councils of Governments (CALCOG), the Southern California Association of Governments (SCAG), the Metropolitan Transportation Commission (MTC), the League of California Cities (League), the California State Association of Counties (CSAC), the American Planning Association California Chapter (APA California Chapter), the Association of Environmental Professionals (AEP), the Self-Help Counties Coalition (SHCC), and the Riverside County

Transportation Commission (RCTC), file this brief in order to offer their own perspective on these issues.

First, CNFF and the AG misstate the standard of review applicable to the Court's review of whether SANDAG's EIR was required to include an analysis of the plan's consistency with the greenhouse gas (GHG) emission reduction goals reflected in Executive Order S-3-05. This issue concerns the methodology used to analyze GHG emissions – an inherently factual question. For this reason, the Court's review is limited to whether the analysis is supported by substantial evidence. By arguing that a "consistency analysis" is required as a matter of law, CNFF and the AG ask this Court to impose a new obligation on lead agencies that finds no support in CEQA or the CEQA Guidelines (Cal. Code Regs. Tit. 14, § 15000, et seq.). The Legislature has directed the courts to avoid fashioning new rules unless they are grounded in the statute or guidelines. (Pub. Resources Code, § 21083.1.) Yet, that is exactly what CNFF and the AG ask this Court to do.

Second, CNFF and the AG, in arguing that the EIR was required to include a "consistency" analysis, overlook the plain language of CEQA, the CEQA Guidelines, and abundant CEQA case law. Their arguments cannot be squared with guidance provided by the Governor's Office explaining how agencies should analyze a project's GHG emissions and climate change impacts. Simply put, nothing in CEQA or the CEQA Guidelines requires that an EIR must analyze whether a proposed project is consistent with the

Executive Order. Instead, agencies have broad discretion to design EIRs and to use their unique expertise in determining the appropriate methodology to analyze a particular environmental impact, including the appropriate standards or "thresholds of significance" to determine the severity of an impact. This discretion applies with equal force to the analysis of GHG emissions and climate change, as recent CEQA Guidelines amendments expressly recognize. Because SANDAG's methodology for analyzing GHG emissions is supported by substantial evidence, the EIR should be upheld.

Finally, while SANDAG's obligations under CEQA are obviously central to this case, CEQA is only one of many federal and state laws with which metropolitan planning organizations (MPOs) must comply in developing SCSs or RTPs. This brief, therefore, provides a summary regarding the nature of MPOs and the competing policy goals that MPOs must consider in developing RTPs and SCSs. Although this information is offered mainly as background information for the benefit of the Court, the complex legal framework and the competing policy considerations at play highlight why lead agencies – and not petitioners or the courts – are tasked with designing EIRs, and why they must be afforded substantial discretion in deciding how to perform this complex task.

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II.
ARGUMENT

A. The substantial evidence standard of review – not the "de novo" standard urged by CNFF and the AG – applies to the adequacy of the EIR's analysis of climate change and greenhouse gas emissions.

1. The substantial evidence test governs the Court's review.

Judicial review of an agency's action under CEQA extends only to whether the agency prejudicially abused its discretion. Under this standard, the court independently reviews an agency's compliance with CEQA's procedural requirements, but defers to the agency's factual decisions if they are supported by substantial evidence. (Pub. Resources Code, §§ 21168.5, 21168; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (*Vineyard*).) This deferential standard of review reflects constitutional separation of powers principles and an allocation of responsibility between the courts and the agencies charged with administering CEQA that is integral to the statutory scheme. (*Western States Petroleum Assn. v. Super. Ct.* (1995) 9 Cal.4th 559, 572–573 (*WSPA*).)

CEQA and the CEQA Guidelines set forth general requirements that all EIRs must follow. The EIR must provide agencies and the public with detailed information about the environmental effects of a proposed project, list ways in which the significant effects of the project might be minimized, and identify alternatives to the project that could meet the project's basic objectives while lessening its environmental effects. (Pub. Resources Code, §§

21061, 21100; Guidelines, §§ 15003, subd. (b)-(e), 15126.2; *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 391 (*Laurel Heights I*).) Furthermore, lead agencies "*should* [1] make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project." (CEQA Guidelines, § 15064.4, subd. (a), italics added.) And lead agencies "*should* consider" the factors listed in CEQA Guidelines section 15064.4 in assessing the significance of GHG emissions impacts. (CEQA Guidelines, § 15064.4, subd. (b), italics added.) An agency's failure to follow CEQA's mandatory requirements constitutes a failure to proceed in the manner required by CEQA and the courts owe no deference to the agency in such circumstances. (Pub. Resources Code, §§ 21068, 21068.5; see also *id.* at § 21083.1.)

Within CEQA's general categories of required and advisory information, however, the Act and the Guidelines leave to the broad discretion of implementing agencies the determination of *how* the broad statutory mandates and Guidelines commands should be carried out for individual projects. Lead agencies have the resources, experience, and expertise to assess and weigh scientific, technical, and policy-based information, so it is

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[1] / As used in the CEQA Guidelines, the word "should" creates an advisory, not mandatory, directive. (CEQA Guidelines, § 15005, (b).) The Guidelines direct that "[p]ublic agencies are advised to follow this guidance in the absence of compelling, countervailing considerations." (*Ibid.*)

appropriate that the Guidelines vest these decisions with the lead agencies, and not the courts. (See *Laurel Heights I, supra*, 47 Cal.3d at p. 393 [the courts have "neither the resources nor scientific expertise" to weigh conflicting evidence]; see also 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2015) §§ 20.81A, 20.81B, pp. 20-98 to 20-104 [describing rapidly evolving technical guidance and regulations pertaining to GHG emissions].)

In keeping with these principles, this Court has consistently held that the substantial evidence test applies to issues implicating the exercise of a lead agency's expertise or judgment concerning the methodology employed and the scope of an EIR. (*Laurel Heights I, supra*, 47 Cal.3d at pp. 415–416 [applying the substantial evidence standard to claim that EIR violated CEQA for failing to include additional analysis thought to be necessary by the petitioner]; *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 457 [determination of environmental setting for EIR impact analysis is primarily a factual assessment reviewed for substantial evidence]; *Ebbetts Pass Forest Watch v. Cal. Dept. of Forestry and Fire Protection* (2008) 43 Cal.4th 936, 950-951 [rejecting argument that agency's failure to use a larger geographic area for a cumulative impacts analysis raises "procedural" rather than a "factual" issues]; *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1164–1167 (*Bay-Delta*) [determination of whether

alternative consisting of reduced water exports meets project objectives reviewed under the substantial evidence standard]; *Vineyard, supra*, 40 Cal.4th at pp. 447, 439–440 [analysis of water supply availability reviewed under substantial evidence standard].)

That agencies have discretion to design their EIRs is especially obvious when it comes to GHG impacts. The Guidelines explicitly recognize that "determination of significance of GHG emissions calls for a careful judgment by the *lead agency*." (CEQA Guidelines, § 15064.4, emphasis added.) To that end, the Guidelines provide that lead agencies "*shall have discretion* to determine, in the context of a particular project" what method of analysis to employ, provided it is supported by substantial evidence. (CEQA Guidelines, § 15064.4, subd. (a), emphasis added.) Indeed, as correctly noted by SANDAG, "every court of appeal that has considered the standard of review for evaluating the scope or methodology of climate change or greenhouse gas analysis in an EIR has applied the substantial evidence test." (SANDAG Opening Brief, pp. 20–21 [listing cases].)

In the present case, SANDAG's climate change and GHG analysis complied with the procedural requirements explicit in the Act and the Guidelines. (See SANDAG Opening Brief, pp. 24–32.) The only question before this Court, therefore, is whether substantial evidence supports the methodology employed by SANDAG and the scope and breadth of the analysis. While the Executive Order is one piece of evidence that the Court

may consider in assessing the substantiality of the evidence supporting SANDAG's analysis, the Court must uphold the EIR if substantial evidence supports the analysis, even if an "opposite conclusion would have been equally or more reasonable." (*Bay-Delta, supra*, 43 Cal.4th at p. 1162; *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564.)

2. A petitioner ought not to transform the standard of review into the "de novo" standard, as CNFF and the AG attempt to do here, simply by recharacterizing the respondent agency's position as "purely" or "predominantly" legal.

CNFF and the AG argue the de novo standard of review applies because SANDAG claimed it had no legal duty to use the Executive Order as a threshold of significance. (Petitioners' Answer Brief, p. 19 ["SANDAG's interpretation of CEQA's requirements is a purely legal judgement that this Court must review de novo"]; AG's Answer Brief, p. 22 ["Because SANDAG's justification is predominantly legal, it is reviewed de novo"].)

This argument amounts to sleight of hand. CNFF and the AG are correct that the judiciary is the final arbiter of what a statute means. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11.) This principle applies to CEQA. (See, e.g., *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 128-130 [meaning of term "approval" under CEQA focused on process and, as such, is question of law]; *North Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal.App.4th 832, 851 [if case focuses on scope of statutory exemption under CEQA, review is de novo].)

Moreover, where an agency rejects a mitigation measure or alternative on purely legal grounds – finding, for example, that the agency lacked legal authority to address a project's impacts – review is de novo. (*City of San Diego v. Bd. of Trustees of the Cal. State Univ.* (2015) _ Cal.4th _ [slip op. dated August 3, 2015, p. 11]; *City of Marina v. Bd. of Trustees of Cal. State Univ.* (2006) 39 Cal.4th 341, 355 (*City of Marina*).)

Here, in describing the standard of review, CNFF and the AG attempt to characterize SANDAG's decision as legal in character. (AG's Answer Brief, pp. 21-22; Petitioners' Answer Brief, p. 19.) The only authentic "legal" issue, however, is whether SANDAG was required to adhere to the Executive Order in performing its GHG analysis – in particular, by making a "significance" determination based on the Executive Order's statewide goal for the year 2050. The record shows that SANDAG did not believe the Executive Order created a mandatory legal duty to make such a determination. (AR 003766-003770, 004430-004433.) In its opinion below, the Court of Appeal disagreed, concluding that the Legislature had implicitly incorporated the Executive Order into CEQA's statutory scheme. (See Court of Appeal Opinion ("Opinion"), slip op., pp. 10-14.) Both the dissenting opinion below and SANDAG's opening brief persuasively debunk this conclusion. (Dis. Opn. at pp. 12-17; SANDAG's Opening Brief, pp. 39-46.) This critique is so persuasive, in fact, that neither CNFF nor the AG attempts to defend the reasoning of the Court of Appeal majority; instead, CNFF and the AG pivot to

CEQA's general obligation to undertake good-faith analysis against the backdrop of the "scientific consensus" embodied by the Executive Order. They thus argue that de novo review is required to determine whether SANDAG's interpretation of the Executive Order was correct, and in the next breath concede that the Executive Order does not legally bind SANDAG.

Focusing, as we must, on the statute itself, the Legislature has prohibited the courts from construing CEQA in a manner that imposes requirements not *explicitly* stated in the Act or the Guidelines. (Pub. Resources Code, § 21083.1; *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1107–1108.)

Here, neither CEQA nor the Guidelines affirmatively requires an EIR to analyze a project's consistency with the Executive Order. To the contrary, the Guidelines explicitly grant lead agencies "*discretion* to determine, in the context of a particular project" how to analyze the significance of a project's impact on climate change. (CEQA Guidelines, § 15064.4, subd. (a), italics added.) Nothing in the Executive Order suggests it was intended to establish a significance threshold. Nor, despite the inventiveness of the Court of Appeal's decision (Opinion, p. 10-14), has the Legislature. Accordingly, the Court must review SANDAG's exercise of this discretion under the substantial evidence standard.

CNFF and the AG argue that Public Resources Code section 21083.1 does not apply because CEQA's "safe harbor" should not protect SANDAG

from disclaiming its "power and duty" to analyze impacts "based on erroneous legal assumptions." (AG's Answer Brief, p. 39; see also Petitioners' Answer Brief, p. 40.) As SANDAG observed, however, the EIR's statement that there is "no legal requirement" that a GHG analysis be based on the Executive Order is simply another way of saying that CEQA gives SANDAG discretion not to conduct the requested analysis and to instead rely on the analyses based on CEQA Guidelines section 15064.4. (SANDAG Reply Brief, p. 15–16.) "[A] petitioner cannot convert a substantial evidence question into an issue of law simply by labeling the dispute as over what is 'legally required.'" (SANDAG Reply Brief, p. 16, citing *Center for Biological Diversity v. Dept. of Forestry & Fire Protection* (2014) 232 Cal.App.4th 931, 947–948.)

For this reason, CNFF's and the AG's reliance on *City of Marina* is misplaced. In *City of Marina*, the Court applied de novo review to the respondent university's determination that certain mitigation measures were *legally infeasible*. (39 Cal.4th at pp. 355–56.) In contrast to the university's legal infeasibility determination, SANDAG does not claim that the law *prohibits* SANDAG from using the Executive Order as a threshold of significance (i.e., that the use of such a threshold is legally infeasible). Rather, SANDAG correctly argues that CEQA does not *require* it to use the Executive Order as a significance threshold. Instead, CEQA grants SANDAG discretion

to choose its standards of significance. The substantial evidence standard of review applies to such discretionary decisions.

CNFF and the AG further argue that de novo review is required by CEQA and that the CEQA Guidelines set forth general requirements concerning the adequacy of an EIR, such as a need for a "good faith" effort and the use of "careful judgement" in determining the significance of impacts. (See e.g., Petitioners' Answer Brief, pp. 1–3, AG's Answer Brief, p. 1.) To accept this argument would be to allow a petitioner to determine the standard of review merely by how it couches its arguments. That is improper; the standard of review ought to be determined by the nature of the claim, not by the petitioner's rhetorical gyrations. (*Center for Biological Diversity v. Dept. of Forestry & Fire Protection, supra*, 232 Cal.App.4th at pp. 947–948; *Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609, 1620; *Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1258-1259.)

3. The existence of a purported "scientific consensus" does not convert a factual claim into a procedural claim.

CNFF and the AG argue that a scientific consensus supports the use of the Executive Order's 2050 target, and therefore CEQA required SANDAG to use the 2050 target as a threshold as a matter of law. (See e.g., Petitioners' Answer Brief, pp. 5, 43; AG's Answer Brief, pp. 34–35.) As an initial matter, CNFF and the AG are incorrect that a scientific consensus has emerged

demonstrating the appropriateness of the Executive Order as a significance threshold. (See SANDAG Reply Brief, p. 34.) But even if such a consensus did exist, it would not create a procedural duty under CEQA requiring an agency to use the Executive Order as a threshold.

Unless the Legislature has adopted a law, the Natural Resources Agency has adopted a CEQA Guideline, or the lead agency has adopted a policy requiring the use of a particular threshold, a lead agency has discretion to analyze the significance of impacts in the manner it sees fit, provided the agency's thresholds and analyses are supported by substantial evidence. (See e.g., *Laurel Heights I, supra*, 47 Cal.3d at p. 409 [disputes about methodologies and conclusions of studies are subject to the substantial evidence test]; *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1068 [agency discretion to fashion significance threshold]; *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 898–899 [rejecting claim that under CEQA, as a matter of law, seismic impacts are significant unless buildings could be repaired and ready for occupancy after a major earthquake—the question of whether seismic impacts are significant is properly treated as one of fact]; *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 898.) Whether the agency's methodology reflects a consensus or a minority view is irrelevant to the question of what standard of review applies—all that CEQA requires is

that an agency follow CEQA's procedures and support its factual decisions with substantial evidence. (Pub. Resources Code, §§ 21068.5, 21068.)

The rule advocated by CNFF and the AG would create a procedural duty for lead agencies to employ a particular methodology any time a reviewing court determines that there is a consensus opinion about how to analyze an impact. Such a rule would incentivize project opponents to pack the administrative record with evidence of a scientific "consensus" about how to study an impact and leave it to the courts to decide whether such a consensus exists (and thereby, under CNFF's and the AG's rule, require the lead agency to conduct the study). The reviewing court would then have to wade through complex technical material to determine whether there is a scientific consensus, and if so, whether the lead agency acted consistently with that consensus. As this Court has explained, however, unlike agencies, the courts lack the "resources" and "scientific expertise" to engage in this type of weighing of technical and scientific evidence (*Laurel Heights I, supra*, 47 Cal.3d at p. 393.) Instead, CEQA requires a reviewing court to uphold an agency's analysis if it is supported by substantial evidence, even if "'an opposite conclusion would have been equally or more reasonable,' for, on factual questions,' [the court's] task 'is not to weigh conflicting evidence and determine who has the better argument.'" (*Vineyard, supra*, 40 Cal.4th at p. 435, quoting *Laurel Heights I, supra*, 47 Cal.3d at p. 393; see *Saltonstall v. City of Sacramento* (2015) 234 Cal.App.4th 549, 578-583 [upholding traffic

analysis, even though Caltrans commented that geographic scope of impacts might be greater than disclosed in EIR]; *North Coast Rivers Alliance v. Marin Mun. Water Dist. Bd. of Directors, (2013),* 216 Cal.App.4th 615, 639-643 [upholding agency's data gathering efforts despite sharp criticism from other resource agencies, based on conclusion that substantial evidence supported agency's approach].)

A rule that an agency must follow the "consensus view" for studying impacts would also introduce unnecessary uncertainty into the CEQA review process in that the reviewing court, and not the lead agency, would be the final arbiter of what that "consensus view" ought to be. The lack of predictability inherent in this non-deferential standard of review would lead to needless delay, expense, and waste. If the contents of an EIR are determined under a standard of review in which no deference is shown, then agencies and applicants would seldom be certain that an EIR will be found legally adequate. As this Court has recognized, "[a] project opponent or reviewing court can always imagine some additional study or analysis that might provide helpful information. It is not for them to design the EIR. That further study ... might be helpful, does not make it necessary." (*Laurel Heights I, supra*, 47 Cal.3d at p. 415.)

The rule proposed by CNFF and the AG would also conflict with basic separation of powers principles, under which the lead agency, and not the reviewing court, is charged with implementing CEQA. The court is only a

check on legislatively delegated administrative discretion, and should upset an agency's decision to approve an EIR only if the agency has failed to comply with the procedural requirements explicitly stated in the statute or CEQA Guidelines, or if the agency's decisions lack substantial evidentiary support. (*WSPA*, *supra*, 9 Cal.4th at pp. 572–573.)

For these reasons, the Court should continue to apply the substantial evidence standard of review to an agency's selection of analytic methodologies and thresholds of significance, and reject CNFF's and the AG's argument that the existence of a purported scientific consensus somehow creates a procedural duty beyond that explicitly recognized by the Act and the CEQA Guidelines. (See Pub. Resources Code, § 21083.1.)

B. Under CEQA, the lead agency has broad discretion to identify and rely upon appropriate standards or thresholds to determine the severity of an impact; that discretion extends to significance thresholds for a project's greenhouse gas emissions.

The Court granted review of the following issue: "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 (Pub. Resources Code, § 21000 et seq.)?"

The parties quibble over what this question actually means. Before the Court of Appeal, the parties treated this issue as whether SANDAG was required to use the goals set forth in the Executive Order as a "threshold of

significance" in the EIR (Opinion, pp. 12-20; Dis. Opn., pp. 1-30), and the Court of Appeal majority held that it was (Opinion, pp. 12-20).

Because the overwhelming weight of authority cuts against them, and perhaps fueled by Justice Benke's pointed dissent, CNFF and the AG now suggest the question posed by the Court is not really a "thresholds of significance" issue. CNFF and the AG reframe the issue in differing, sometimes imaginative, ways. As noted in SANDAG's reply brief, the AG goes so far as to suggest the case is not about the Executive Order at all. (SANDAG Reply, p. 14, citing AG's Answer Brief, p. 1.) CNFF adds an additional wrinkle by arguing the "consistency" determination is required under CEQA Guidelines section 15125, subdivision (d). (Petitioners' Answer Brief, p. 25.)

Despite these gymnastics, the arguments all revert back to the question of whether the EIR was required to use the Executive Order as the basis for its GHG emissions analysis. In simple terms, this is a "thresholds of significance" issue. Courts uniformly recognize that agencies are afforded broad discretion in assessing the severity of an impact – i.e., determining the appropriate standards or thresholds of significance to measure an impact's severity. That discretion extends to significance thresholds for a project's GHG emissions.

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1. The Courts uniformly, and properly, accord lead agencies with substantial discretion to make the policy determination regarding the thresholds they use to determine whether a project's impacts are significant.

"A threshold of significance 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 by the agency and compliance with which means the effect normally will be determined to be less than significant." (CEQA Guidelines, § 15064.7 subd. (a).) As explained in *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 110-111,[2] "[a] 'threshold of significance' for a given environmental effect is simply that level at which the lead agency finds the effects of the project to be significant; the term may be defined as a quantitative or qualitative standard, or set of criteria, pursuant to which the significance of a given environmental effect may be determined."

The threshold of significance used to assess a particular impact is left to the discretion of the lead agency. CEQA Guidelines section 15064.7 states that public agencies are "encouraged to develop and publish thresholds." CEQA does not, however, require the adopting of formal thresholds. (*Oakland Heritage Alliance v. City of Oakland, supra*, 195 Cal.App.4th at p. 896

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[2] / *Communities for a Better Environment v. California Resources Agency, supra*, was disapproved of on other grounds in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1109, fn. 3.

[agency has discretion to rely on adopted standards to serve as significance thresholds for a particular project].) A lead agency may also appropriately use existing environmental standards—like the region-specific GHG reduction targets established under SB 375—to determine a project's significant impacts. (*Communities for a Better Environment v. California Resources Agency*, *supra*, 103 Cal.App.4th at p. 111.) Even the decision not to adopt a formal threshold or use existing standards is an exercise of discretion. (*Save Cuyama Valley v. County of Santa Barbara*, *supra*, 213 Cal.App.4th at p. 1068 [formal adoption of project-specific threshold was not required].)

A lead agency's determination of whether to characterize impacts as significant necessarily requires the lead agency to make policy judgments. As the CEQA Guidelines explain:

> 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. An ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting. For example, an activity which may not be significant in an urban area may be significant in a rural area.
>
> (CEQA Guidelines, § 15064, subd. (b).)

The courts also recognize that differentiating between significant and insignificant impacts necessarily involves agency discretion, and that the exercise of such discretion is entitled to deference. (*North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors*, *supra*, 216

Cal.App.4th at pp. 625-628; *Save Cuyama Valley v. County of Santa Barbara*, *supra*, 213 Cal.App.4th at p. 1068; *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 208-209; *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 243; *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 541-544; *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 375-376; *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 492-493; *National Parks & Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1357.)

2. An agency's policy determinations with respect to significance thresholds applicable to the analysis of a project's GHG emissions are entitled to no less deference.

If anything, these principles apply with even greater force to "significance thresholds" applicable to the lead agency's analysis of GHG emissions and climate change. In recent years, state and local agencies and experts have grappled with determining whether the GHG emissions of a single plan or project contribute to the global phenomenon of climate change, and how to integrate that determination into the CEQA analysis for a single project. The authorities on this subject uniformly recognize that each lead agency retains discretion to adopt appropriate significance thresholds addressing this issue.

In fact, in 2008, the Governor's Office of Planning and Research (OPR) published guidance making clear that these principles apply to an agency's obligation to analyze GHG emissions and climate change:

> [N]either the CEQA statute nor the CEQA Guidelines prescribe thresholds of significance or particular methodologies for performing an impact analysis. This is left to lead agency judgment and discretion, based upon factual data and guidance from regulatory agencies and other sources where available and applicable. A threshold of significance is essentially a regulatory standard or set of criteria that represent the level at which a lead agency finds a particular environmental effect of a project to be significant. Compliance with a given threshold means the effect normally will be considered less than significant. Public agencies are encouraged but not required to adopt thresholds of significance for environmental impacts.
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> (Governor's Office of Planning and Research, Technical Advisory, *CEQA AND CLIMATE CHANGE: Addressing Climate Change through California Environmental Quality Act (CEQA) Review* (June 19, 2008) (OPR, *CEQA and Climate Change*), p. 4.)

In adopting SB 375, the Legislature expressly found that improved land use and transportation systems are needed to achieve AB 32's 2020 GHG emissions reduction target. (Stats 2008, ch. 728, § 1(c).) To this end, SB 375 requires MPOs to devise an SCS that would feasibly achieve GHG reduction targets established by CARB. (Gov. Code, § 65080, subd. (b).) Thus, although the Legislature drew a direct link between the SB 375 emission reduction targets and AB 32, the Legislature did not require that an RTP/SCS meet the

Executive Order's 2050 goals. [3] Rather, through SB 375 the Legislature established a separate target setting process for GHG emissions reductions to be used in the development of an RTP/SCS.

In this case, the Court of Appeal majority found that SANDAG erred by failing to rely upon Governor Schwarzenegger's 2005 Executive Order S-3-05 establishing 2050 goals for reducing GHG emissions. (See Opinion, pp. 12-20.) In its 2008 guidance, however, OPR stated that the adoption of appropriate significance thresholds is a matter of discretion for the lead agency. The guidance states:

> "[T]he global nature of climate change warrants investigation of a statewide threshold of significance for GHG emissions. To this end, OPR has asked ARB technical staff to recommend a method for setting thresholds which will encourage consistency and uniformity in the CEQA analysis of GHG emissions throughout the state. Until such time as state guidance is available on thresholds of significance for GHG emissions, we recommend the following approach to your CEQA analysis."
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> . . .
>
> **Determine Significance**
>
> - When assessing a project's GHG emissions, lead agencies must describe the existing environmental conditions or setting, without the project, which normally constitutes the baseline physical conditions for determining whether a project's impacts are significant.
>
> - As with any environmental impact, lead agencies must determine what constitutes a significant impact. In the absence

[3] / Because Executive Order S-3-05 was issued prior to SB 375, the Legislature could have referred to the Executive Order had it wanted to make the 2050 goals part of SB 375. The Legislature chose not to do so.

of regulatory standards for GHG emissions or other scientific data to clearly define what constitutes a "significant impact", individual lead agencies may undertake a project-by-project analysis, consistent with available guidance and current CEQA practice.

- The potential effects of a project may be individually limited but cumulatively considerable. Lead agencies should not dismiss a proposed project's direct and/or indirect climate change impacts without careful consideration, supported by substantial evidence. Documentation of available information and analysis should be provided for any project that may significantly contribute new GHG emissions, either individually or cumulatively, directly or indirectly (e.g., transportation impacts).

- Although climate change is ultimately a cumulative impact, not every individual project that emits GHGs must necessarily be found to contribute to a significant cumulative impact on the environment. CEQA authorizes reliance on previously approved plans and mitigation programs that have adequately analyzed and mitigated GHG emissions to a less than significant level as a means to avoid or substantially reduce the cumulative impact of a project.

(OPR, *CEQA and Climate Change*, pp. 4, 6.)

As these guidance documents make clear, OPR has not stated, or even implied, that local agencies must use Executive Order S-3-05 as a standard to measure GHG emissions under CEQA. Rather, OPR recognized that, until CARB establishes a state-wide standard, [4] selecting an appropriate threshold is within the discretion of the lead agency.

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[4] / When CARB establishes official thresholds of significance for GHG impacts, it will go through an extensive public process. In addition to public review, agencies with expertise on the subject will be able to comment on any proposed thresholds. This public process will result in thresholds of significance that are based on science and reflect policy concerns implicated

(Continued)

At the time SANDAG approved the RTP/SCS, CARB had not adopted a state-wide threshold to determine whether GHG emissions are significant for purposes of CEQA. In fact, CARB still has not adopted such a threshold. The issue was, and remains, a matter of discretion for the lead agency.

In December 2009, the California Resources Agency, under then-Governor Schwarzenegger, adopted amendments to the state CEQA Guidelines. Among other things, the Resources Agency adopted CEQA Guidelines section 15064.4, entitled "Determining the Significance of Impacts from Greenhouse Gas Emissions." The guideline, which took effect in March 2010, states:

> (a) The determination of the significance of greenhouse gas emissions calls for a careful judgment by the lead agency consistent with the provisions in section 15064. A lead agency should make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project. . . .
>
> (b) A lead agency should consider the following factors, among others, when assessing the significance of impacts from greenhouse gas emissions on the environment:
>
> (1) The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting;

(Continued)
by such thresholds. These protections are absent when the Governor issues an executive order.

(2) Whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project.

(3) The extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions. Such requirements must be adopted by the relevant public agency through a public review process and must reduce or mitigate the project's incremental contribution of greenhouse gas emissions. If there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding compliance with the adopted regulations or requirements, an EIR must be prepared for the project.

Nothing in CEQA Guideline section 15064.5 states, or implies, that agencies must use the emission reduction goals in Executive Order S-3-05 as "significance thresholds" for CEQA purposes. Thus, CNFF and the AG ask this Court to read into the Executive Order a meaning that even the Schwarzenegger administration did not intend.

CEQA case law addressing GHG emissions and climate change supports the conclusion that Executive Order S-3-05 does not establish mandatory "significance thresholds" under CEQA. Most notably, *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327 (*CREED v. City of Chula Vista*), involved the environmental review process for a proposal to replace an existing Target store with a newer, bigger one. The threshold used to analyze the project's GHG emissions was whether the project would "[c]onflict with or obstruct the goals or strategies of the California Global Warming Solutions Act of 2006

(AB 32) or its governing regulation." (*Id.* at p. 335.) The opponents argued the analysis should have considered other recognized thresholds as well. In rejecting this argument, the court stated:

> Effective March 18, 2010, the Guidelines were amended to address greenhouse gas emissions. (Guidelines, § 15064.4.) The amendment confirms that lead agencies retain the discretion to determine the significance of greenhouse gas emissions . . . . Thus, under the new guidelines, lead agencies are allowed to decide what threshold of significance it will apply to a project.
>
> (197 Cal.App.4th at p. 336.)

The Court held that, in light of this guideline, the city had discretion to focus on compliance with Assembly Bill 32 as its significance threshold. The Court went on to uphold the city's application of this guideline to the GHG emissions from the new Target store. (*Id.* at pp. 336-337; see also *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 841 [finding adoption of similar threshold proper]; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 937 [agency did not abuse its discretion in concluding GHG and climate change impacts were too speculative to allow for determination whether Wal-Mart store's GHG emissions were significant in light of absence of recognized threshold]; *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors*, *supra*, 216 Cal.App.4th at pp. 650-654 [upholding analysis of GHG emissions based on project's consistency with county goal of reducing GHG emissions by 15% below 1990 levels].) For these reasons, the Court of Appeal majority's ruling

on this issue misread the clear intent of both the Legislature and the Schwarzenegger administration. The Court should not perpetuate this error as urged by CNFF and the AG.

CNFF argues that *CREED v. City of Chula Vista* is inapposite because "the issue here is not whether the SANDAG should have applied a different threshold, but whether SANDAG produced a misleading EIR by not disclosing how significant the Plan's long-term impacts would be in relation to the scientifically determined targets of California climate policy." (Petitioners' Answer Brief, p. 48.) CNFF's attempt to reframe the issue is unavailing. Both CNFF and the AG demand an analysis of the significance of GHG emissions based on the Executive Order's emissions reduction goals. Again, this is a threshold of significance issue. *CREED v. City of Chula Vista* is on point. (197 Cal.App.4th at p. 336 ["under [CEQA Guidelines section 15064.4], lead agencies are allowed to decide what threshold of significance it will apply to a project."].)

CNFF's and the AG's argument suffers a further, more fundamental, flaw. The argument is premised on the notion that an executive order can establish state-wide policy, binding even on local agencies. This premise expands the Governor's authority beyond its constitutional bounds and raises serious separation of powers concerns. The Governor, as the state's "supreme executive," generally has the authority to issue executive orders regarding the actions of the various subdivisions of the executive branch of government.

(Cal. Const. art. V, § 1.) The Governor may also issue executive orders as specifically provided by statute that allows executive discretion over a particular matter. But the Governor has no authority to issue executive orders beyond what is provided in the Constitution or by statute. Moreover, under the separation of powers clause, the Governor cannot issue orders regarding actions of the legislative or judicial branches of government, unless specifically allowed by the Constitution. (Cal. Const. art. III, § 3.) Article IV, Section 1, vests legislative power in the California Legislature. (Cal. Const. art. IV, § 1.) Executive Order S-3-05 is not legislation. It was not adopted by the Legislature. It was not adopted under authority delegated to the Governor by the Legislature under SB 375 or any other statute. (See *Lukens v. Nye* (1909) 156 Cal. 498, 503.) Allowing the Governor to invade the province of the Legislature would violate the California Constitution. (Cal. Const. art. III, § 3.)

Further, treating an executive order as a state regulation of broad-based application also runs afoul of the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.). Unless expressly or specifically exempted, all state agencies not in the legislative or judicial branches must comply with APA rulemaking requirements when engaged in quasi-legislative activities. (*Center for Biological Diversity v. Cal. Dept. of Fish and Wildlife* (2015) 234 Cal.App.4th 214, 258-264 [mitigation measures establishing fish stocking policies were actually underground regulations that could be adopted only by

following APA procedures]; *Winzler & Kelly v. Dept. of Industrial Relations* (1981) 121 Cal.App.3d 120, 125-128.) While the Governor has the power to adopt executive orders applicable to state agencies, that power stops where, as here, the Executive Order meets the definition of a broadly applicable regulation under the APA. (See Gov. Code, § 11342.600.)

None of this suggests some other agency lacks discretion to rely on Executive Order S-3-05 as a significance threshold for GHG emissions. Perhaps another MPO or local agency would decide that the order should be relied upon in that manner. Perhaps even SANDAG itself might make that decision at some point in the future. Those decisions, too, would be entitled to deference. The point is not whether this particular executive order is or is not the "right threshold." Instead, the fundamental point is that one size does not fit all. Each local agency, like SANDAG, has discretion to select an appropriate threshold, provided that the decision is supported by substantial evidence. Here, SANDAG exercised that discretion, and explained in detail its thinking for selecting its significance thresholds that did not include the Executive Order. (AR003768-003770.) That was enough to comply with CEQA.

CNFF suggests the "consistency" analysis is separately required under CEQA Guidelines section 15125, subdivision (d). (Petitioners' Answer Brief, p. 25.) Not so. Section 15125 describes the requirements for an EIR's description of the "environmental setting" and states that an "EIR shall

discuss any inconsistencies between the proposed project and applicable general plans, specific plans, and regional plans." A plan is "applicable" when "it has been adopted and the project is subject to it[.]" (*Sierra Club v. City of Orange*, *supra*, 163 Cal.App.4th at p. 544; *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1145, fn. 7.) As explained above, the Executive Order is a policy statement by the Governor; it is not an adopted plan and SANDAG's RTP/SCS is not subject to it. Simply put, nothing in CEQA, the CEQA Guidelines, or any other law or regulation requires a lead agency to analyze a project's consistency with the Executive Order.

C. In developing RTPs and SCSs, MPOs must navigate a maze of federal and state statutory requirements, and are legally directed to consider a broad array of potentially competing goals and objectives.

The briefs filed by CNFF and the AG focus exclusively on the obligations of SANDAG under CEQA. They devote little attention to the other federal and state laws governing the preparation of RTPs and SCSs by SANDAG and other MPOs under federal law. While CEQA does apply to decision-making by California MPOs that may affect the environment, CEQA is only one of many laws with which MPOs must contend. Amici believe an understanding of the complexities involved in developing RTPs and SCSs may be helpful in this case. For this reason, we offer the following background information.

1. The nature of MPOs.

MPOs are organizations required by federal law to coordinate land-use and transportation policy across a metropolitan region. They thus occupy the space between federal, state, and local government. Each MPO [5] consists of local elected officials from cities and counties, representatives from "public agencies that administer or operate major modes of transportation in the metropolitan area," and certain state officials. (23 U.S.C. § 134(d)(2).) Because MPOs are planning organizations covering broad metropolitan areas with numerous local agencies as members, they are well-situated to consider, on a region-wide basis, transportation and planning issues. (See 23 U.S.C. § 134(d).) MPOs thus reflect the reality that transportation networks do not stop at the city limits, and that transportation policy is often best addressed in a coordinated, region-wide manner.

But MPOs are not designed to operate in isolation. They are not regional overlords. In fact, each MPO is encouraged "to consult with" local officials regarding local planning activities and relevant issues of "land use management, natural resources, environmental protection, conservation, and historic preservation." (23 U.S.C. § 134(g)(3)(A), (i)(5)(A).) Thus, an MPO's planning process must be coordinated with local policies and activities, "including state and local planned growth, economic development,

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[5] / Some MPOs operate as councils of governments (COGs), while others are freestanding entities.

environmental protection, airport operations, and freight movements." (23 U.S.C. § 134(g)(3)(A).)

Furthermore, Federal law does not delegate to MPOs broad authority over cities and counties. (See, e.g., 23 U.S.C. § 134(d)(3), (o).) Rather, MPOs are mandated to "'provide for consideration of projects and strategies that' serve a variety of goals . . . ." (*Darensburg v. Metropolitan Transp. Com.* (9th Cir. 2011) 636 F.3d 511, 516-517; see 23 U.S.C. § 134(h)(1).)

2. Policies applicable to MPOs.

SANDAG is one of 18 federally designated MPOs in California. SANDAG, like other MPOs, must address a variety of roles and responsibilities under both state and federal law in developing an RTP.

MPOs serve as the primary forum where the California Department of Transportation, transit providers, local agencies, and the public develop plans and programs to address regional and local transportation needs (an RTP is sometimes referred to as a metropolitan transportation plan, or MTP, under federal law). As a result, the RTP must balance a host of policy objectives in addition to those specifically identified in CEQA. (See generally California Transportation Commission, *Regional Transportation Plan Guidelines* (April

2010) (RTP Guidelines), Appendix C -- Regional Transportation Plan Checklist.) [6] The RTP must address the following issues:

- ***Must Plan for an Intermodal System Plan.*** The RTP must provide for the development, management, and operation of transportation systems (including accessible pedestrian and bicycle facilities) that will function as an intermodal transportation system. (23 U.S.C. § 134(c).) [7] The RTP must be developed in coordination with agencies responsible for local planning activities, and shall consider the related planning activities within each jurisdiction. (23 U.S.C. § 134(g)(3); 23 C.F.R. § 450.316(b).) [8]
- ***Must Address Specific Planning Factors.*** Planning factors that must be considered include: (1) supporting economic vitality; (2) increasing safety and security; (3) increasing accessibility and mobility of people and freight; (4) protecting and enhancing the environment and quality of life, promoting energy conservation and consistency between transportation improvements and state and local planned growth and

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[6] / The CTC's RTP Guidelines appear in the record of proceedings at pages AR017674-017927.

[7] / The citation "23 U.S.C. § 134(c)" refers to Title 23 of the United States Code at section 134, subdivision (c). This same citation format is used throughout this brief to refer to federal statutes.

[8] / The citation "23 C.F.R. § 450.316(b)" refers to Title 23 of the Code of Federal Regulations at section 450.316, subdivision (b). This same citation format is used throughout this brief to refer to federal regulations.

economic development patterns; (5) enhancing the integration and connectivity of transportation; (6) promoting efficiency; and (7) emphasizing the preservation of the existing system. (23 U.S.C. § 134(h); 23 C.F.R. § 450.306(a).)

- ***Must Include a Planning Baseline.*** MPOs must use the latest estimates and assumptions for population, land use, travel, employment, congestion, and economic activity. (23 C.F.R. § 450.322(e).) This information includes: (1) the projected transportation demand of persons and goods; (2) existing and proposed facilities (including major roadways, transit, multimodal and intermodal facilities, pedestrian walkways and bicycle facilities, and intermodal connectors) that should function as an integrated system; (3) operational and management strategies to improve performance of transportation facilities to relieve congestion and maximize safety and mobility; (4) consideration of the results of the congestion management process; (5) assessment of capital investments and other strategies to preserve the existing and projected infrastructure; (6) detailed design concepts and scope descriptions for existing and proposed facilities, (7) a discussion of potential mitigation; (8) pedestrian and bicycle facilities; (9) transportation and transit enhancement activities; and (10) a financial plan. (23 C.F.R. § 450.322(f); see also Gov. Code, § 14522.1; RTP Guidelines, p. 35.)

- ***Must Be Consistent with Other Plans.*** The RTP must be consistent with the California Transportation Plan, transportation plans of adjacent regions, short-range transit plans, air quality plans, airport plans, and plans for intelligent transportation systems. (23 C.F.R. § 450.306; Gov. Code, § 65081.1 (primary carrier airports); RTP Guidelines, § 2.5, p. 22.) In addition, MPOs must consider and incorporate the transportation plans of cities, counties, districts, private organizations, and state and federal agencies. (Gov. Code, § 65080, subd. (a).) The plan must also be consistent with the public transit-human services transportation plan. (49 U.S.C. §§ 5310, 5316, 5317; 23 C.F.R. § 450.306(g).)
- ***Must Be Based on Public Participation Plan that Includes Strategies for Underserved Communities.*** The RTP must implement a public participation plan that provides individual citizens, as well as representatives of public interest groups including public transportation employees, freight shippers, private transportation providers, public transportation users, pedestrian walkways and bicycle transportation facilities users, persons with disabilities, and other interested parties with a "reasonable opportunity" to comment on the RTP. (23 C.F.R. § 450.316.) The plan must also describe explicit procedures, strategies, and desired outcomes for seeking out and considering the needs of those traditionally underserved by existing transportation systems, such

as low-income and minority households, who may face challenges accessing employment and other services. (23 C.F.R. § 450.316(a)(1)(vii); see also Title VI of the federal Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.); Gov. Code, § 11135; U.S. Department of Transportation, Federal Transit Administration, Environmental Policy Guidance for Federal Transit Administration Recipients, Circular FTA C-4703.1 (August 15, 2012); U.S. Department of Transportation, Federal Transit Administration, Title VI Requirements and Guidelines for Federal Transit Administration Recipients, Circular FTA C-4702.1B (October 1, 2012).)

- ***Must Include Other State and Federal Agency Consultation.*** The RTP must be coordinated with all transportation providers, facility operators such as airports, appropriate federal, state, local agencies, Tribal Governments, environmental resource agencies, air districts, pedestrian and bicycle representatives, and adjoining MPOs or Regional Transportation Planning Agencies (RTPAs). The RTP must reflect consultation with resource and permit agencies (CTC's RTP Guidelines identify a minimum of 25 agencies) to ensure early coordination with environmental resource protection and management plans. (23 C.F.R. § 450.322(g)(1), (2); RTP Guidelines, § 4.9.)
- ***Must Meet Air Conformity Requirement.*** The Federal Clean Air Act requires RTPs in non-attainment areas to be coordinated with the

development of transportation control measures in the State Implementation Plan (SIP), and the RTP is subject to an air quality conformity determination by the MPO and United States Department of Transportation. (23 U.S.C. § 134(i)(3); 40 C.F.R. § 93.106(a); see generally 42 U.S.C. § 7504(b); 40 C.F.R. Parts 51 and 93.) Conformity to an implementation plan means (A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and (B) that such activities will not (i) cause or contribute to any new violation of any standard in any area; (ii) increase the frequency or severity of any existing violation in any area; or (iii) delay timely attainment of any standard or required interim emission reductions or other milestones in any area. (40 U.S.C. § 7506 (c).) Conformity must be demonstrated for all motor-vehicle related pollutants for which the area is designated as "non-attainment" or has a maintenance plan, which may include ozone, carbon monoxide, nitrogen dioxide, particulate matter (PM_{10}) and fine particulate matter ($PM_{2.5}$). (40 C.F.R. § 93.102). The MPO in these areas must use reasonable land development assumptions that are consistent with the future transportation system alternatives for which emissions are estimated. (RTP Guidelines, p. 44, citing 40 C.F.R. § 93.122(b)(1)(iv).) Non-attainment regions must also use a capacity-

sensitive methodology that can differentiate between peak- and off-peak volumes and speeds on each roadway segment represented in the network-based travel model. (RTP Guidelines, p. 45, citing 40 C.F.R. § 93.122 (b)(2).)

- ***Must be Consistent with Financial Programming Documents***. The RTP is the long term plan that identifies improvements for the Federal Transportation Improvement Program (or "FTIP," the financially constrained four year program listing of all federally-funded and regionally-significant projects in the region), the State Transportation Improvement Program (or "STIP," a biennial program adopted by the California Transportation Commission), the Regional Transportation Improvement Program (or "RTIP," a five-year program of transportation projects usually adopted on a county basis), the Interregional Transportation Plan (or "ITIP," a five-year list of projects prepared by the Department of Transportation), and the Overall Work Program (or "OWP," a listing of transportation planning studies and tasks to be performed by the MPO for the next year). (RTP Guidelines, § 2.4.)
- ***Must Respond to Changing Circumstances through Frequent Updates***. While the RTP is a long term plan, the plan is required to undergo continuing updates and refinements to account for changes in funding and forecasted needs. (Gov. Code, § 65080, subd. (d)

[requiring updated regional transportation plans to be submitted to the California Transportation Commission and the Department of Transportation every four to five years].) Similarly, "the regional greenhouse gas emission reduction targets [must be updated] every eight years consistent with each metropolitan planning organization's timeframe for updating its regional transportation plan under federal law until 2050." (*Id.* § 65080, subd. (b)(2)(A)(iv).) Therefore, between today and the year 2050, SANDAG's RTP will be updated approximately nine times and the greenhouse gas targets will be updated four times.

- ***Must Include Congestion Management Process in Urbanized Areas.*** Urbanized areas with a population over 200,000—called Transportation Management Areas or TMAs—must develop a Congestion Management Process (CMP) as part of the regional planning process. The CMP represents a systematic process for managing traffic congestion, designed to provide for the safe and effective management and operation of new and existing transportation facilities, and information on transportation system performance. In TMAs designated as ozone or carbon monoxide non-attainment areas, the Federal guidelines prohibit projects that increase capacity for single occupant vehicles unless the project comes from a CMP. (23 C.F.R. § 450.320(c).)

- ***Must Include a Sustainable Communities Strategy (SCS).*** The SCS must: (i) identify the general location of uses, residential densities, and building intensities within the region; (ii) identify areas within the region sufficient to house all the population of the region, including all economic segments of the population, over the course of the planning period of the regional transportation plan taking into account net migration into the region, population growth, household formation and employment growth; (iii) identify areas within the region sufficient to house an eight-year projection of the regional housing need for the region pursuant to Government Code Section 65584; (iv) identify a transportation network to service the transportation needs of the region; (v) gather and consider the best practically available scientific information regarding resource areas and farmland in the region as defined in Government Code section 65080.01, subdivisions (a) and (b); (vi) consider the state housing goals specified in Government Code sections 65580 and 65581; (vii) set forth a forecasted development pattern for the region, which, when integrated with the transportation network, and other transportation measures and policies, will reduce the GHG emissions from automobiles and light trucks to achieve, if feasible, the GHG emission reduction target approved for the region by the California Air Resources Board (CARB); and (viii) allow the RTP to comply with Section 176 of the Federal Clean Air Act (42 U.S.C. §

7506). (Gov. Code, § 65080 (b)(2)(B).) In preparing the SCS, an MPO must "utilize the most recent planning assumptions considering local general plans and other factors." (*Ibid.*) After an SCS is adopted, CARB must review the adopted SCS to confirm and accept the MPO's determination that the SCS would meet regional GHG targets. (Gov. Code, § 65080 (J)(ii), (iii).) If the combination of measures in the SCS would not meet the regional targets, the MPO must prepare a separate "alternative planning strategy" (APS) to meet the targets. (Gov. Code, § 65080 (I).)

- ***Must Be Fiscally Constrained.*** RTPs are also financially constrained. The MPO must show in its financial plan that it is reasonable to assume that funds will be available to pay for the projects included in the plan. Federal and state laws require that the RTP/SCS must constrain its budget by only including revenues that can reasonably be expected.[9] Therefore, the revenue assumptions contained in an RTP assume that current sources of revenue will continue into the future at rates of growth consistent with historical trends and projected future economic

[9] / One of SANDAG's revenue sources for transportation projects, for example, is TransNet. TransNet is a half-cent sales tax for local transportation projects that was first approved by voters in 1988, and then extended in 2004 for another 40 years, each time by a two-thirds majority. SANDAG selected the 2050 horizon date for its RTP, in part, because the TransNet Extension expires in 2048.

conditions. A financial plan shall demonstrate how an adopted RTP can be implemented, indicate resources that can reasonably be expected to be available to carry out the plan, and recommend any additional financing strategies for needed projects and programs. Total dollar amounts for projects must take into account a projected rate of inflation. The MPO, transit operators, and state shall cooperatively develop estimates of funds that will be available to support plan implementation. (23 C.F.R. § 450.322(f)(10).)

As the above summary makes clear, an RTP/SCS is a complex document with numerous, and often competing, policy considerations. The preparation of an RTP/SCS involves striking a balance between a wide range of concerns. Many of these concerns focus on environmental considerations: air quality, GHG emissions, transportation levels of service, identifying areas sufficient to house population growth, energy efficiency, and the like. Still other concerns are not purely environmental in character, but are no less important: financial feasibility, efficiency, economic vitality, accessibility, reliability, and so forth.

Suffice to say, SANDAG prepared the RTP/SCS and associated EIR against a regulatory and policy landscape of unusual sweep and complexity. This is not to suggest that SANDAG or other MPOs should be subject to different standards for CEQA compliance in adopting RTPs or SCSs. Rather, the complexities involved in the RTP and SCS development process highlight

why MPOs are best suited to develop EIRs for such plans using their unique expertise and why CEQA affords MPOs substantial discretion in doing so. The briefs filed by CNFF and the AG appear to reflect an effort to second guess the manner in which SANDAG exercised its discretion. Such policy differences, however sincere, do not constitute a violation of CEQA.

III.
CONCLUSION

Amici Curiae respectfully request that the Court consider these arguments in ruling on this matter.

Dated: September 4, 2015 REMY MOOSE MANLEY, LLP

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CERTIFICATE OF WORD COUNT

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Whitman F. Manley

Cleveland National Forest Foundation, et al. v. San Diego Association of Governments, et al.
Supreme Court of the State of California, Case No. S223603
(Fourth Appellate District Case No. D063288)

PROOF OF SERVICE

I, Michele Nickell, am a citizen of the United States, employed in the City and County of Sacramento. My business address is 555 Capitol Mall, Suite 800, Sacramento, California. My email address is mnickell@rmmenvirolaw.com. I am over the age of 18 years and not a party to the above-entitled action.

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