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No. S223603

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SAN DIEGO ASSOCIATION OF GOVERNMENTS, SAN DIEGO ASSOCIATION OF GOVERNMENTS BOARD OF DIRECTORS
Defendants and Appellants,

vs.

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
Petitioners and Respondents.

After a Decision by the Court of Appeal of the State of California Fourth Appellate District, Division One, Case No. D063288

Appeal from Superior Court of the State of California for the County of San Diego, Case Nos. 37-2011-00101593-CU-TT-CTL (Consolidated with Case No. 37-2011-00101660-CU-TT-CTL) The Honorable Timothy B. Taylor Presiding

CALIFORNIA INFILL BUILDERS FEDERATION AND SAN DIEGO HOUSING COMMISSION'S APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND APPELLANTS SAN DIEGO ASSOCIATION OF GOVERNMENTS AND SAN DIEGO ASSOCIATION OF GOVERNMENTS BOARD OF DIRECTORS

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APPLICATION TO FILE AMICI CURIAE BRIEF

I. INTRODUCTION

Pursuant to California Rules of Court rule 8.520, subd. (f), the California Infill Builders Federation ("Infill Builders") and San Diego Housing Commission ("SDHC") respectfully request leave from the Chief Justice to file an amici curiae brief in support of Defendants and Appellants San Diego Association of Governments and San Diego Association of Governments Board of Directors ("SANDAG"). The proposed amici curiae brief is submitted herewith pursuant to Rule 8.520, subd. (f)(5). This Application is timely made pursuant to Rule 8.520, subd. (f)(2).

II. INTEREST OF AMICI CURIAE

Infill Builders is a statewide organization of builders, developers, and affiliated businesses and professionals that build homes, schools, and retail space in California's urban areas. Its core belief is that quality infill development results in environmentally and economically sound investments in California's urban communities.

Infill Builders joins this amici brief on behalf of all its members. However, Infill Builders notes that its members include a number of affordable housing builders and advocates including Bridge Housing and the California Council for Affordable Housing.

SDHC is a public agency dedicated to preserving and increasing affordable housing within the City of San Diego (City). Since 1981, SDHC has contributed more than $1 billion in loans and bond financing to projects that have produced 14,531 affordable rental units within the City.

Within California, more than 34 percent of working renters pay more than 50 percent of their income toward housing. The affordable housing crisis in California is not only a significant economic issue, but because it has resulted in an increasing number of Californians living farther away from their places of employment it is also a critical environmental issue. While Infill Builders and SDHC strongly support infill, transit-oriented, and other environmentally sound development practices, Infill Builders and SDHC believe CEQA mandates that are not developed through an open public process before the Legislature or a state or local agency with jurisdiction over a natural resource may result in unintended economic and environmental consequences, including the continued escalation of housing costs in urban centers and associated traffic and air quality impacts.

Infill Builders and SDHC are interested in developing case law under the California Environmental Quality Act ("CEQA"), California Public Resources Code, sections 21000 et seq., and particularly clarifying methods for infill projects to comply with CEQA, while reducing unnecessary project delays and costs. The continued development of CEQA streamlining options for infill development will promote much needed infill projects. Direction from this Court clarifying the obligations of lead agencies and metropolitan planning organizations ("MPOs") in determining greenhouse gas ("GHG") impacts will assist agencies and the development community. Specifically, it will assist agencies and the development community when they seek to comply with the CEQA streamlining provisions enacted by The Sustainable Communities and Climate Protection Act of 2008 (Cal. Stats. 2008, ch. 728) ("SB 375") for projects consistent with an adopted Regional Transportation Plan ("RTP") and Sustainable

Communities Strategy ("SCS"). (Pub. Resources Code, §§ 21155.1, 21155.2, 21159.28.)

III. ASSISTANCE IN DECIDING MATTER

Counsel for Infill Builders and SDHC, the proposed amici curiae, have reviewed the briefs filed in this action and believe that this Court would benefit from additional briefing on the importance of agency discretion, in particular within the context of balancing environmental and other competing considerations under CEQA. The proposed amici curiae brief complements SANDAG's brief in analyzing how the Court of Appeal erred in its decision.

IV. RULE 8.520 DISCLOSURE

Pursuant to Rule 8.520, subd. (f)(4), of the California Rules of Court, neither Petitioners, Defendants, nor their respective counsels made any monetary contributions to fund the preparation or submission of this brief. Infill Builders and SDHC authored this brief in whole.

V. CONCLUSION

Infill Builders and SDHC respectfully request that this Court accept the filing of the attached brief.

Dated: September 3, 2015

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for By:

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INTRODUCTION

Appellant San Diego Association of Governments ("SANDAG") certified an Environmental Impact Report ("EIR") for its 2050 Regional Transportation Plan ("RTP") and Sustainable Communities Strategy ("SCS") (collectively, "Plan") on October 28, 2011. (Answer Brief, at p. 14.) The court of appeal affirmed the trial court's decertification of SANDAG's EIR in *Cleveland Nat. Forest Foundation et al. v. Sand Diego Assn. of Governments et al.* (2014) 231 Cal.App.4th 1056 ["Opinion" or "Slip Op."]; review granted on March 11, 2015. This Court should hold that SANDAG properly exercised its discretion in selecting thresholds for determining the significance of the Plan's greenhouse gas ("GHG") impacts, and analyzing impacts in consideration of the selected thresholds.

The Opinion sets a precedent that affects compliance with the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000, et. seq.) and the Sustainable Communities and Climate Protection Act of 2008 (Cal. Stats. 2008, ch. 728) ("SB 375") on a statewide basis. The Opinion improperly holds that SANDAG abused its discretion by failing to analyze the Plan's impacts against Executive Order S-3-05, which establishes GHG reduction goals for the year 2050 ("Executive Order"). The Opinion requires lead agencies to use the Executive Order as a significance threshold, stripping them of the discretion CEQA provides, and essentially handing that discretion to the Governor's office. Justice Benke's dissent properly recognizes there is no authority supporting the view that the Governor has power to establish reduction targets. (Slip Op., Dissent, at pp. 2-3, 12.)

SANDAG exercised its discretion, and made a good faith and reasonable effort to analyze the Plan's GHG impacts as required by CEQA Guidelines section 15065.4, subdivision (a). SANDAG's EIR certification was done in accordance with the law, and its analysis is supported by substantial evidence. Infill Builders and SDHC respectfully request this Court find that SANDAG properly exercised its discretion in establishing thresholds to analyze GHG impacts.

DISCUSSION

I. The Legislature Delegated the California Air Resources Control Board (CARB) Authority to Define GHG Reduction Targets for 2020 and 2035, and Legislative Action is Required to Effectuate Additional Goals.

The California Global Warming Solutions Act of 2006 (Cal. Stats. 2006, ch. 488) ("AB 32") defines "statewide emissions limit" as "the maximum allowable level of statewide [GHG] emissions in 2020, *as determined by the [California Air Resources Control Board ("CARB")]*." (Health & Saf., Code, § 38505, subd. (n), italics added.) Under SB 375, CARB is required to set regional targets for GHG emissions reductions from passenger vehicle use for 2020 and 2035. (Gov. Code, § 65080, subd. (b).) But, neither AB 32 nor SB 375 requires CARB to develop regional reduction targets for 2050. Indeed, recently proposed legislation, Senate Bill 32, 2015-2016 Regular Session ("SB 32"), makes clear that doing so requires additional legislative action.

A. AB 32 delegates authority to CARB to establish Statewide targets for 2020.

CARB is "the state agency charged with monitoring and regulating sources of emissions of [GHGs] that cause global warming in

order to reduce emissions of [GHGs]." (Health & Saf. Code, § 38510; *POET, LLC v. Cal. Air Resources Bd.* (2013) 218 Cal.App.4th 681, 697 (*POET*); *Assn. of Irritated Residents v. State Air Resources Bd.* (2012) 206 Cal.App.4th 1487, 1490 (*AIR*).) CARB has broad authority to adopt regulations to reduce air pollution, subject to cost-effectiveness and feasibility limitations. (*Engine Manufacturers Assn. v. State Air Resources Board* (2014) 231 Cal.App.4th 1022, 1025 (*Engine Manufacturers*).)

AB 32 requires CARB to "prepare and approve a scoping plan, as that term is understood by [CARB], for achieving the maximum technologically feasible and cost-effective reductions" in sources or categories of sources of GHG by 2020. (Heath & Saf. Code, § 38561, subd. (a).) In preparing the 2008 Climate Change Scoping Plan, CARB consulted with every state agency with jurisdiction over GHG sources, considered relevant GHG reduction program information from other jurisdictions, and considered public input. (*Id.*, subds. (b)-(d).) Additionally, CARB evaluated the Scoping Plan's potential costs, potential economic benefits, and potential noneconomic benefits, including benefits to the environment and public health. (*Id.*, subd. (d).)

AB 32 also requires CARB to "identify and make recommendations on direct emission reduction measures, alternative compliance mechanisms, market-based compliance mechanisms, and potential monetary and nonmonetary incentives for sources and categories of sources that [CARB] finds are necessary or desirable to facilitate the achievement of the maximum feasible and cost-effective reductions of [GHG] emissions by 2020." (Health & Saf. Code, § 38561, subd. (b).) CARB did exactly this in its 2008 Scoping Plan.

In *Association of Irritated Residents*, *supra*, the court of appeal upheld the 2008 Scoping Plan, including its 2020 emissions targets. (206 Cal.App.4th at p. 1487.) In that case, the petitioners contended that CARB acted arbitrarily and capriciously by limiting the 2008 Scoping Plan's GHG reduction goals to 2020. (*AIR*, *supra*, 206 Cal.App.4th at p. 1496.) CARB noted that the 2008 Scoping Plan was designed to achieve the 2020 GHG emissions limit established by the Legislature. (*Ibid.*) The court upheld this approach and noted "[t]he goal that the plan sets for 2020 is but a step towards achieving a longer-term climate goal." (*Id.* at p. 1496.)

The Legislature did not dictate any project-specific or site-specific basis for CARB to achieve its AB 32 directives. (See Health & Saf. Code, § 38501 [Declarations of Legislative Intent].) AB 32 states that the Legislature's intent is to "continue reductions in emissions of [GHGs] beyond 2020," but, it does not include a 2050 target or direct CARB to establish one. (Health & Saf. Code, § 38551, subd. (b).) CARB was obligated under AB 32 to prepare the 2008 Scoping Plan and set emissions limits and targets through 2020. CARB complied with its obligations; CARB was not required to, nor has it, established 2050 targets.

The Opinion holds that AB 32 is the Legislature's "unqualified endorsement" of the Executive Order, and thus required SANDAG to consider GHG emissions through 2050. (Slip Op., at p. 14.) However, AB 32's directives leave GHG regulatory decisions to CARB. AB 32 does require CARB to update the State's Scoping Plan for achieving the maximum technology feasible and cost-effective reductions of GHG emissions at least once every five years. (Health & Saf. Code, § 38561,

subd. (h).) This is the only provision in AB 32 that originally reached beyond 2020, but it does not require any particular standard be achieved within a specific timeframe.

B. SB 375 delegates authority to CARB to establish regional targets for 2020 and 2035.

SB 375 was passed two years after AB 32 to reduce GHG emissions from passenger vehicles through better integration of regional transportation, land use, and housing planning. (Scoping Plan (2014), p. 49-50.) SB 375 established a detailed program to further reduce GHG emissions from regional transportation and land use decisions, while also satisfying state housing requirements. (Gov. Code, § 65080, subd. (b).) SB 375 also directs CARB to consult with the MPOs and regional air districts to exchange technical information and receive recommendations on the appropriate targets. (Gov. Code, § 65080, subd. (b)(2)(A)(ii).) SB 375 requires that CARB update these targets once every four years following a "consultative process with public and private stakeholders." (Gov. Code, § 65080, subd. (b)(2)(A)(iv).)

SB 375 explicitly requires CARB to set regional targets for 2020 and 2035, but makes no mention of such a requirement through 2050.

C. Establishing statewide targets for 2050 requires new legislation, as evidenced by currently pending SB 32.

While CARB has not been tasked with setting targets for 2050 to date, pending legislation would direct CARB to establish 2050 emissions reduction goals. Specifically, SB 32 would amend AB 32 and require CARB to develop statewide GHG emissions limits that are the equivalent to 40% below the 1990 level by 2030 and 80% below the 1990 level by 2050. (See Slip Op., Dissent, at p. 16, fn. 7.) SB 32 would

also authorize CARB to adopt interim GHG emissions level targets to be achieved by 2040. (SB 32, § 2.)

SB 32 demonstrates that statutory action is needed to effectuate the goals set forth in the Executive Order on a statewide basis. Petitioners Cleveland National Forest Foundation, et al. ("Petitioners") argue that SANDAG was required to include regional emissions targets for 2050, regardless of SB 32. (See Answer Brief at pp. 27-28.) Petitioners' position fails to honor the Legislature's intent for CARB to take on the role of target setting. CARB was delegated the authority to set GHG reduction targets for 2020 and 2035. And action by the Legislature is required before CARB can set targets beyond then.

II. CARB Undertook an Exhaustive Rulemaking Process in Establishing Regional Greenhouse Gas (GHG) Reduction Targets, None of Which Include a 2050 Goal.

To develop statewide targets under AB 32, CARB had to, with public notice and an opportunity for public comment, "determine what the statewide [GHG] emissions level was in 1990, and approve in a public hearing, a statewide [GHG] emissions limit that is equivalent to that level, to be achieved by 2020." (Health & Saf. Code, § 38550.) In reaching its decision, CARB had to use the best available scientific, technological, and economic information on GHG emissions to determine the 1990 level of GHG emissions. (*Ibid.*)

To develop regional reduction targets under SB 375, CARB had to: (1) appoint a Regional Targets Advisory Committee (RTAC) to recommend factors to be considered and methodologies to be used for setting GHG emission reduction targets for the region; (2) exchange technical information with the metropolitan planning organization and

air district; (3) take into account targets that will be reached by improved vehicle emissions standards; and (4) update the plan every eight years. (Gov. Code, § 65080 (b)(2)(A)(i-iv).)

AB 32 does not require the 2008 Scoping Plan or any updates to include a 2050 target. (See Health & Saf. Code, § 38561.) Likewise, the regional GHG targets established pursuant to SB 375 do not include a 2050 target. (Gov. Code, § 65080, subd. (b)(2)(A)(iv).)

A. CARB adopted the 2008 Scoping Plan in accordance with the requirements of AB 32, and was not required to include a 2050 target.

AB 32 mandated that CARB "adopt regulations to require the reporting and verification of statewide [GHG] emissions and to monitor and enforce compliance." (Health & Saf. Code, § 38530, subd. (a).) AB 32 also required CARB to "determine what the statewide [GHG] emissions level was in 1990, and approve . . . a statewide [GHG] emissions limit that is equivalent to that level, to be achieved by 2020" after receiving public input. (Health & Saf. Code, § 38550.) AB 32 then required CARB to develop a Scoping Plan to achieve those goals. (Health & Saf. Code, § 38561, subd. (a).)

The Scoping Plan was required to: "identify and make recommendations on direct emission reduction measures, alternative compliance mechanisms, market-based compliance mechanisms, and potential monetary and nonmonetary incentives for sources and categories of sources that the state board finds are necessary or desirable to facilitate the achievement of the maximum feasible and cost-effective reductions of [GHG] emissions by 2020." (*Ibid.*)

In the Scoping Plan, CARB determined that a 30 percent reduction in GHG would reduce GHG emissions in California to the statutorily required 1990 levels by 2020. (Administrative Record (AR) 26125.) In developing the 2008 Scoping Plan, CARB evaluated different sectors of the economy, including: transportation, electricity, commercial and residential, industry, recycling and waste, and agriculture and forestry. (AR 26151, 26153.) Developing the 2008 Scoping Plan took over 250 public workshops, 350 community meetings, and meetings by specialized committees, including an environmental justice advisory committee, and a market advisory committee. (*AIR*, *supra*, 206 Cal.App.4th at p. 1491.)

Furthermore, the 2008 Scoping Plan was challenged and upheld by the court of appeal. The court of appeal held that the 2008 Scoping Plan complied with all the requirements of AB 32, and CARB had not acted arbitrarily or capriciously.[1] (*AIR*, *supra*, 206 Cal.App.4th at p. 1493.) CARB adopted the 2008 Scoping Plan in accordance with the law. CARB was not required to consider emissions through 2050.

B. CARB followed its statutory obligations in developing the 2014 Scoping Plan Update, and the Plan does not include a 2050 target.

The 2014 Scoping Plan Update builds on the 2008 Scoping Plan with new strategies and recommendations. (Scoping Plan (2014), pp. ES-7, 4.) The 2014 Scoping Plan was adopted through a process very similar to the 2008 Scoping Plan, which included collecting input from

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[1] The court did note that the 2008 Scoping Plan was not properly reviewed under CEQA, but, following supplemental CEQA review, the plan was readopted in 2011 without any changes. (*AIR*, *supra*, 206 Cal.App.4th at p. 1494.)

outside organizations and individuals, workshops, two public comment periods, and presented for public comment in CARB meetings. (Scoping Plan (2014), pp. 5-6.) CARB staff released the final 2014 Scoping Plan Update with a final Environmental Analysis in May 2014.

The 2014 Scoping Plan builds on the successes of the 2008 Scoping Plan by outlining priorities and recommendations for the State to meet its climate objectives. (Scoping Plan (2014), p.1.) The 2014 Scoping Plan aims to set a broad framework for California's continued emissions reductions beyond 2020. (Scoping Plan (2014), p. 4-5.) The 2014 Scoping Plan stresses the importance of establishing a mid-term statewide emissions target between 2020 and 2050 to continue reaching California's emissions goals. (Scoping Plan (2014), p. 33-34.) But, at the same time, the 2014 Scoping Plan acknowledges that no such goal yet exists. (*Id.*, at p. 34.)

C. CARB's regional targets established under SB 375 do not include a 2050 target.

SB 375 required CARB to appoint an RTAC to "recommend factors to be considered and methodologies to be used for setting [GHG] emission reduction targets for affected regions." (Gov. Code, § 65080, subd. (b)(2)(A)(i).) The legislature directed that RTAC be composed of: "members of the public, including homebuilders, environmental organizations, planning organizations, environmental justice organizations, affordable housing organizations, and others." (*Ibid.*)

RTAC is required to work with local metropolitan planning organizations and affected air districts when setting targets for a region. (Gov. Code, § 65080, subd. (b)(2)(A)(ii).) Notably, RTAC is

required to "update the regional [GHG] emission reduction targets every eight years consistent with *each metropolitan planning organization's* timeframe for updating its regional transportation plan until 2050." (Gov. Code, § 65080, subd. (b)(2)(A)(iv), italics added.) This provision is the only time the year 2050 is mentioned in SB 375. SB 375 does not include any obligation to create regional targets for 2050. It only requires RTAC to *update* the targets once every eight years *until* 2050.

In June 2010, CARB staff prepared and circulated "Draft Regional GHG Emission Reduction Targets for Automobiles and Light Trucks Pursuant to SB 375" for public review in accordance with the requirements set forth in Government Code section 65080, subdivision (b). Following public review, the regional targets were adopted in September 2010. (CARB Resolution 10-31, pp. 6-7.)[2]

The approved regional targets for SANDAG require reduction of CO_2 emissions 7 percent below 2005 levels by 2020, and 13 percent below 2005 levels by 2035. (Slip Op., Dissent, p. 21; see also CARB Resolution 10-31, p. 6.) CARB has not yet set long-term 2050 GHG emission reduction targets for SANDAG or any of the eight other MPOs.

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[2] California Air Resources Board (September 23, 2010), Resolution 10-31, available at <http://www.arb.ca.gov/cc/sb375/eo_attachment.pdf> [as of Sept. 3, 2015].

III. The 2050 Target Identified in the Executive Order Cannot be Interpreted as a Requirement for Lead Agency Analysis.

In 2005, then Governor Schwarzenegger issued an Executive Order setting goals that California "by 2010, reduce [GHG] emissions to 2000 levels; by 2020, reduce [GHG] emissions to 1990 levels; by 2050, reduce [GHG] emissions to 80 percent below 1990 levels . . ." (Office of Governor Edmund G. Brown, Exec. Order. No. S-3-05 <http://gov.ca.gov/news.php?id=1861> [as of Sept. 3, 2015].) The Executive Order was unilaterally enacted by the Governor and not subject to an open and transparent public review process. (See CEQA Guidelines, § 15064.4, subd. (b)(3).)

The Dissent properly recognized the Executive Order as merely a broad policy statement of goals issued by the Governor. (Slip Op., Dissent, p. 3.) An executive order is a "formal written directive of the Governor which by interpretation or the specification of detail, directs and guides subordinate officers in the enforcement of a *particular law*." (75 Ops.Cal.Atty.Gen 263, 266 (1992), italics added.) Without the express authority from the Legislature, an executive order is only binding on executive officers and agencies under the Governor's control, consistent with applicable laws. (63 Ops.Cal.Atty.Gen. 583 (1980).) The Governor cannot use executive orders to amend the effect of, or to qualify the operation of, existing legislation. (*Lukens v. Nye* (1909) 156 Cal. 498, 503-504; and *cf. Contractor's Assn. of Eastern Pa. v. Secretary of Labor* (1971) 442 F.2d 159, 168; 75 Ops.Cal.Atty.Gen. 263, 267 (1992).)

The Opinion improperly treats the Executive Order as "state policy" that must be considered in a lead agency's analysis under CEQA. There are two problems with this approach. First, the Executive Order was issued before AB 32 was enacted. Second, the Executive Order did not undergo any public review.

A. The Executive Order could not have directed agencies on implementing AB 32 before AB 32 existed.

The Executive Order was issued before the Legislature passed AB 32 and therefore cannot be viewed as implementing any statute. (See Slip Op., Dissent, p. 5, 13.)

The Opinion holds that CARB was required to consider GHG emissions through 2050 due to the Executive Order and its relationship with AB 32. (Slip Op., p. 14.) However, AB 32 had not been passed when the Executive Order was issued. (See Assem. Bill No. 32 (2005-2006 Reg. Sess.); see also Slip. Op., pp. 9-10; Slip Op., Dissent, p. 5, 13.)[3] The Opinion requires SANDAG to have assumed a requirement to analyze GHG emissions through 2050, by interpreting a legislative finding provision in AB 32 that refers to the Executive Order. To comply with such a convoluted requirement, SANDAG would have had to interpret AB 32's legislative findings and assume a 2050 requirement existed where none is explicitly mentioned anywhere in AB 32, because the Executive Order mentioned a goal for 2050. (See

[3] Notably, AB 32 was introduced six months before Governor Schwarzenegger signed the Executive Order. (Assem. Bill No. 32 (2005-2006 Reg. Sess.); see also Slip Op., Dissent, p. 11.) Furthermore, the state policy of reducing GHG emissions did not originate with the Executive Order. As recognized by Justice Benke's dissent, the first law regulating GHG vehicle emissions was passed in 2002, well before the Executive Order was issued. (See Stats. 2002, ch. 200, enacting Assem. Bill No. 1493 (2001-2002 Reg. Sess.) (AB 1493); Slip Op., pp. 12-13.)

Slip Op., Dissent at p. 7, 16-17, fn. 8, 26; Health & Saf. Code, § 38501, subd. (h).) Such a requirement is neither supported in law nor reasonable.

Moreover, the Opinion's approach to interpreting AB 32 cannot be reconciled with the statutory construction canon that "[e]xpression of one thing is the exclusion of another." (*County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 923, fn. 15.) Here, no one disputes that the Legislature was aware of the 2050 target included in the Executive Order. (See also Health & Safety Code, § 38501, subd. (i) [AB 32 expressly references the Executive Order].) Yet, despite the Legislature's knowledge of the Executive Order and the goals set forth therein, the Legislature only required CARB to adopt and implement a 2020 limit. The Legislature's express direction to adopt and implement a 2020 limit and corresponding silence with respect to adopting and implementing a 2050 limit should, contrary to the Opinion's holding, evince the Legislative intent that AB 32 not impose a mandatory 2050 limit.

B. The 2050 target identified in the Executive Order did not undergo any public review.

Because the Executive Order was not subject to the same rigorous public review that CARB undertook in adopting the Scoping Plan, the Scoping Plan Update, or the SB 375 targets, and was not based on the same requirements for extensive technical analyses, the Executive Order should not be elevated to the level of a threshold of significance to be analyzed by SANDAG. (See CEQA Guidelines, § 15064.4, subd. (b)(3); Slip Op., Dissent, p. 27.) As Justice Benke's dissent recognized, the Executive Order "was not a 'plan' adopted

through a public review process as required in subdivision (b)(3) of [CEQA] Guidelines section 15064.4." (Slip Op., Dissent, p. 22.)

Notably, unlike existing legislation, the Executive Order does not guarantee that mechanisms to reduce GHG emissions will be economically and technologically feasible, consistent with state law. Health & Safety Code, section 38560 requires that CARB "adopt rules and regulations in an open public process to achieve the maximum technologically feasible and cost-effective [GHG] emission reductions from sources or categories of sources, subject to the criteria and schedules set forth . . . [therein]."

Specifically, in enacting AB 32, the Legislature understood that while imposing aggressive GHG limits within the state has myriad of benefits, it could also result in unintended economic and environmental consequences. Therefore, AB 32 directed CARB to identify measures that could achieve the 2020 limit while "maximiz[ing] additional environmental and economic co-benefits for California..." (Health & Safety Code, § 38501, subd. (h).) CARB's 2008 Scoping Plan further recognizes potential unintended procedural and environmental impacts that may be caused by plans and programs implemented to achieve the 2020 limit. (See, e.g., AR 26249 ["The State recognizes the potential for conflicts between various federal, state and local permitting requirements, which may cross various media – air, water, etc."].) In consideration of these issues, the 2008 Scoping Plan explains that a "[p]articular focus on the potential permitting impacts and cross-media consequences of a proposed rule will take place during the rulemaking process." (AR 26249.) Unlike the 2020 and 2035 limits, and the emission reduction measures proposed by CARB in its Scoping Plan to

achieve those limits, neither the Executive Order's 2050 limit nor potential measures that could be used to achieve that limit have undergone a detailed rulemaking process or been subject to its own environmental review pursuant to CEQA.

CARB's 2014 Scoping Plan Update reiterates that programs designed to achieve the state's 2020 and 2035 limits, such as Cap-and-Trade, could have "unintended consequences..." (Scoping Plan (2014), p. 87.) CARB, therefore, has implemented a plan to "track and respond" to such unintended consequences. (*Ibid.*) Unless and until a 2050 limit and programs to achieve it undergo a similar rulemaking, CEQA review, and/or an ongoing CARB monitoring process, imposing a 2050 limit as a CEQA threshold throughout the state could have significant unintended consequences. Therefore, a judicially imposed 2050 limit is neither required by law nor sound public policy.

IV. Substantial Evidence in the Record Demonstrates that SANDAG Made a Good Faith and Reasonable Effort to Analyze GHG Impacts of the RTP/SCS Consistent with CEQA.

CEQA Guidelines section 15064.4, subdivision (a), requires that a lead agency "make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of [GHG] emissions resulting from a project." In light of this requirement, CEQA Guidelines, section 15064.4 also provides a lead agency with discretion to determine the amount of GHG emissions from a project and whether such emissions are significant. Substantial evidence in the record demonstrates that SANDAG made a good faith and reasonable effort to analyze the RTP/SCS GHG impacts.

SANDAG appropriately exercised its discretion in using the 2020 and 2035 emission reduction targets set forth in AB 32 and SB 375. (Slip Op., Dissent, p. 21-22.) SANDAG's use of these targets is consistent with previous interpretations of GHG impact analysis. In *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614 (*North Coast*), the court of appeal upheld a lead agency's use of AB 32 as a GHG threshold of significance. In *North Coast*, the petitioners challenged a local water district's approval of a desalination plant. The EIR in *North Coast* noted that no GHG thresholds of significance had been established by CEQA. (*Id.* at p. 651.) Since CEQA provided no threshold, the EIR considered whether the project would interfere with the AB 32's emission reduction goals by 2020. (*Ibid.*) The court of appeal agreed that this was an acceptable threshold of significance, the project would not interfere with the 2020 GHG emission reduction goal, and that this "more than satisfied the requirements of CEQA." (*Id.* at p. 652.)

Likewise, in *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 336 (*Chula Vista*), the petitioners challenged the City of Chula Vista's decision to use AB 32 as a significant threshold for GHG emissions. However, the court of appeal recognized that the CEQA Guidelines confirm that "lead agencies retain the discretion to determine the significance of [GHG] emissions."

In light of the above decisions, Justice Benke recognized in her dissent that SANDAG's lack of a discussion of the project's consistency with the Executive Order does not constitute a lack of "good faith." (Slip Op., Dissent, pp. 10, 17, 30.) In her dissent, Justice Benke wrote that,

"SANDAG considered in its EIR the important public policy of GHG emissions reduction in implementing its project." (Slip Op., Dissent, pp. 5-6.) CEQA Guidelines section 15064.4, subdivision (b)(1), requires a lead agency to compare a project's existing environmental conditions to the "existing environmental setting." SANDAG's EIR included an "existing conditions" baseline analysis. (Slip Op., Dissent, p. 20.) Also, SANDAG's EIR went further, and used the GHG reduction targets set forth in SB 375, as well as CARB's 2008 Scoping Plan, and SANDAG's Climate Action Strategy to determine whether GHG emissions would be significant. (Slip Op., Dissent, pp. 21-22.)

SANDAG acknowledged the Executive Order and its goals, but appropriately concluded that the 2050 goal was not an applicable standard at the time, since CARB had not developed a GHG emissions target for 2050 or a scoping plan to achieve reductions through 2050. (See Slip Op., Dissent, pp. 22.)

Thus, abundant evidence in the record demonstrates that SANDAG made a "good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of [GHG] emissions [in the SANDAG MPO region] resulting from [the] project" (CEQA Guidelines, § 15064.4, subd. (a)); and that SANDAG appropriately analyzed the significance of GHG emissions under applicable thresholds (*id.*, subd. (b)), including those adopted by CARB (through enabling legislation) for 2020 and 2035. (See *Chula Vista, supra,* 197 Cal.App.4th at pp. 335-337.) Moreover, consistent with *North Coast* and *Chula Vista*, there is substantial evidence in the record to demonstrate that SANDAG properly exercised its discretion when it chose not to use the Executive Order's 2050 statewide emission

target as a threshold for its regional plan, and instead used AB 32's goals.

V. The Opinion Improperly Applied CEQA Guidelines, Section 15064.4.

CEQA Guidelines section 15064.4 directs lead agencies to consider several factors relative to GHG emissions analysis, but it does not mandate any particular method of analysis or require adoption of any particular threshold of significance. Furthermore, lead agencies have discretion in choosing what particular methodology they want to employ in making their determination. (CEQA Guidelines, § 15064.4, subd. (a)(1)-(2).) Agencies are provided with a list of factors that they "should consider . . ., among others, when assessing the significance of impact from [GHG] emissions on the environment." (CEQA Guidelines, § 15064.4 subd. (b).) CEQA Guidelines section 15064.4 "confirms that lead agencies retain the discretion to determine the significance of [GHG] emissions and should 'make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of [GHG] emissions resulting from a project. [Citation.]' [Citations.]" (*Citizens Against Airport Pollution v. City of San Jose* (2014) 227 Cal.App.4th 788, 807.)

Furthermore, both the Legislature and this Court have given lead agencies discretion in conducting environmental review. Public Resources Code section 21083.1 directs the courts in interpreting CEQA's requirements and its implementing guidelines. Section 21083.1 states that courts "shall not interpret this division or the state guidelines... in a manner which imposes procedural or substantive requirements beyond those explicitly stated in [CEQA] or in the state

guidelines." (Pub. Resources Code, § 21083.1.) This Court has also recognized that "courts should afford great weight to the [CEQA] Guidelines except when a provision is clearly unauthorized or erroneous." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, fn. 2.) Justice Benke's dissent recognized the court's departure from this longstanding precedent. "Perhaps the most profound harm arising from the majority's finesse of CEQA is the lasting damage it does to Guidelines section 15064.4." (Slip Op., Dissent, p. 8.) The Opinion "destroys the integrity" of CEQA Guidelines section 15064.4, by stripping lead agencies of the discretion vested in them by the Legislature to conduct environmental review. (Slip Op., Dissent, p. 9.)

Justice Benke's dissent echoes the EIR, which concluded that the Executive Order was not a "plan" adopted through a public review process as required in subdivision (b)(3) of CEQA Guidelines section 15064.4. (See Slip Op., Dissent, p. 22.) As noted above, the EIR used three separate GHG analyses relying on two of the specific significance criteria authorized by CEQA Guidelines section 15064.4.

In their Answer Brief, Petitioners argue that the EIR should have considered whether the Plan would be consistent with the goals set forth in the Executive Order. (Answer Brief, pp. 34-35.) However, Petitioners fail to distinguish between a goal, as identified in the Executive Order, and a plan to achieve that goal, as developed in CARB's Scoping Plans, the SB 375 regional target setting, and SANDAG's Climate Action Strategy, all of which the EIR considered.

The Opinion relies on language in CEQA Guidelines section 15064.4, subdivision (b) stating that the lead agency should consider

the three listed factors "among others." (Slip Op., pp. 17-18.) The Opinion reads "among others" as suggesting that the means of determining whether GHG emissions impacts are significant are by no means exclusive. (Slip Op., p. 18.) This is correct, but the Legislature has clearly vested lead agencies, not the Governor or courts, with the discretion to determine the means of analysis. Only the lead agency may determine what additional thresholds of significance, if any, may be applied. As recognized by Justice Benke in her dissent, "[t]o the extent thresholds of significance *other* than the three expressly provided in [CEQA Guidelines section 15064.4] subdivision (b) apply, that should be a determination made by an agency in the proper exercise of its discretion." (Slip Op., Dissent, p. 8, original italics.) It is not for the Governor or the courts to unilaterally determine identifiable standards, as the Opinion suggests.

CONCLUSION

The Legislature delegated CARB the authority to define GHG reduction targets for 2020 and 2035 as evidenced by: (1) AB 32, which delegates authority to CARB to establish statewide targets for 2020; (2) SB 375, which delegates authority to CARB to establish regional targets for 2020 and 2035; and (3) CARB's regional targets established under SB 375, which do not include a 2050 target. An Executive Order does not undergo any public review, and does not carry the same authority as a legislative directive.

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Substantial evidence in the record demonstrates that SANDAG made a good faith and reasonable effort to analyze GHG impacts of the Plan consistent with the requirements of AB 32, SB 375, and CEQA.

Dated: September 3, 2015

THOMAS LAW GROUP

For By: ____________________

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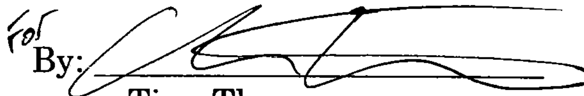
Certificate of Word Count

The undersigned counsel certifies that, pursuant to rule 8.204(c) of the California Rules of Court, the text of this brief was produced using 13 point Roman type and contains 5,246 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: September 3, 2015

THOMAS LAW GROUP



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Cleveland National Forest Foundation v. San Diego Association of Governments, Supreme Court of the State Of California Case No. S223603

PROOF OF SERVICE

I am a resident of the United States, employed in the City and County of Sacramento. My business address is 455 Capitol Mall, Suite 801, Sacramento, California 95814. I am over the age of 18 years and not a party to the above-entitled action.

On September 3, 2015, I served the following:

CALIFORNIA INFILL BUILDERS FEDERATION AND SAN DIEGO HOUSING COMMISSION'S APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND APPELLANTS SAN DIEGO ASSOCIATION OF GOVERNMENTS AND SAN DIEGO ASSOCIATION OF GOVERNMENTS BOARD OF DIRECTORS

and

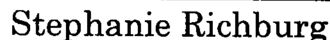
CALIFORNIA INFILL BUILDERS FEDERATION AND SAN DIEGO HOUSING COMMISSION'S AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND APPELLANTS SAN DIEGO ASSOCIATION OF GOVERNMENTS AND SAN DIEGO ASSOCIATION OF GOVERNMENTS BOARD OF DIRECTORS

On the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 3rd day of September 2015, at Sacramento, California

/s/



Stephanie Richburg

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