

**SUPREME COURT COPY**

Case No. S223603

**In the Supreme Court of the State of California**

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

Appellants and Defendants,

vs.

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

**SUPREME COURT  
FILED**

SEP 14 2015

Frank A. McGuire Clerk  
Deputy

Respondents and Petitioners.

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

Appeal from the Judgment of the Los Angeles County Superior Court,  
Case No. 37-2011-00101593-CU-TT-CTL  
(Consolidated with Case No. 37- 2011-00101660-CU-TT-CTL)  
The Honorable Timothy B. Taylor, Judge Presiding

**APPLICATION TO FILE BRIEF AS AMICUS CURIAE AND  
BRIEF OF THE COUNCIL OF INFILL BUILDERS AND THE  
PLANNING AND CONSERVATION LEAGUE IN SUPPORT  
OF RESPONDENTS AND PETITIONERS**

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## **APPLICATION TO FILE**

Pursuant to Rule 8.200(c) of the California Rules of Court, the Council of Infill Builders and the Planning and Conservation League (hereafter, collectively, "Amici") respectfully request leave to file the accompanying brief in this proceeding in support of cross-appellants and respondents, 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.

This brief was entirely drafted by counsel for the Amici, and no party or counsel for a party in the pending case authored the proposed amicus brief in whole or in part, or made any monetary contribution intended to fund its preparation. (*See* Cal. Rules of Court, rule 8.200(c).)

### **STATEMENT OF INTEREST AS AMICI CURIAE**

#### **The Council of Infill Builders**

The Council of Infill Builders is a 501(c)(3) nonprofit corporation of real estate professionals committed to improving California through infill development. Infill development, which



increases density and utilizes available space in existing urban areas rather than building on the fringes and increasing urban sprawl, revitalizes neighborhoods and communities, provides transportation choices, creates viable close-knit mixed-use areas, reduces greenhouse gas emissions, and sustainably improves the overall economy. The Infill Builders seek to educate the public about these benefits through research and outreach.

### **The Planning and Conservation League (PCL)**

The Planning and Conservation League (PCL) was formed in 1965 by individuals who were concerned about the uncontrolled development taking place throughout California and the environmental destruction that accompanied it. PCL was thus created to remedy environmental impacts from the state's fast paced development. Today, PCL continues to work on the leading challenges facing our state, such as advocating for land-use planning focused on California's urban cores that will transform neighborhoods into thriving, livable and healthy communities. PCL also partners with hundreds of California organizations, to provide an

effective voice in Sacramento for sound planning and responsible environmental policy at the state level.

For more than 40 years, PCL has fought to develop a body of California environmental laws that is the strongest in the United States. One of its greatest early accomplishments was the enactment in 1970 of the California Environmental Quality Act (CEQA), the most powerful environmental law in the state. PCL helped draft this critically important measure, and continues to advocate for the integrity of CEQA and its effectiveness.

**Statement of leave to file:**

Amici are leading planning and transportation organizations and developers of successful infill real estate projects in California. They are very familiar with the economic feasibility of “smart growth” and “transit-oriented development,” and are acutely aware of the environmental dangers posed by climate change caused by greenhouse gas emissions. Amici frequently comply with CEQA in their development projects, as well as using CEQA as a tool to evaluate environmental impacts and feasible alternatives: an issue at

the heart of this case. Further, they seek economically and environmentally sound planning and policy at the state level and local levels, and support development that aligns with current science, including climate science.

As Amici will be directly affected by the decision of this Court and may assist the Court's decision through their unique perspectives, Amici respectfully request the permission of the Honorable Chief Justice Cantil-Sakauye to file this amici curiae brief.

DATED: September 8, 2015

Respectfully submitted,



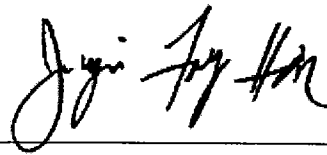
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## AMICUS CURIAE BRIEF

### STATEMENT OF THE 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.)?

#### I. INTRODUCTION

The Legislature intended CEQA to “[e]nsure that the long-term protection of the environment . . . shall be the guiding criterion in public decisions.” (Pub. Resources Code § 21001(d).<sup>1</sup>) The EIR, often called ‘the heart of CEQA’ (*Laurel Heights Improvement Ass’n v. Regents of the University of California* (1988) 47 Cal.3d 376, 392 (“*Laurel Heights*”), quoting *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810), has two core functions. It must provide the full and complete environmental disclosure that allows the decision

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<sup>1</sup> All statutory references herein are the Public Resources Code unless otherwise specified.

makers and the public to thoroughly understand and adequately assess the significant environmental effects of a proposed project, and must also propose, discuss, and adopt all feasible mitigation measures to lessen or avoid that harm.

Forty years ago, this Court wrote that;

It is, of course, too late to argue for a grudging, miserly reading of CEQA. . . . [T]he Legislature intended CEQA to be interpreted in such manner as to afford the *fullest possible protection* to the environment within the reasonable scope of the statutory language.” (*Bozung v. Local Agency Form. Com’n of Ventura County* (1975) 13 Cal.3 263, 274, internal quotation marks omitted, emphasis in original.)

Here, Appellant SANDAG does argue for a grudging, miserly, and overly narrow reading of CEQA and the CEQA Guidelines<sup>2</sup> in identifying the significant environmental impacts of its Regional Transportation Plan/Sustainable Communities Plan (“RTP/SCS” or “Plan”), and the agency deliberately avoids an accurate and forthright discussion of the Plan’s potential to impact the stability of the

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<sup>2</sup> This Court has held that the CEQA Guidelines, found at Cal. Code of Regs., tit. 14, § 15000, et seq., are entitled to great weight, unless unauthorized by the statute or clearly erroneous. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4<sup>th</sup> 412, 428, nt. 5. (“*Vineyard*”.)

climate. The RTP/SCS is a master plan for transportation in the San Diego area, directing transportation decisions over 40 years, with the potential to contribute significantly to California's greenhouse gas ("GHG") emissions. (AR002555, Table 4.8-2.) Transportation-related emissions accounted for 37 percent of statewide GHG emissions in 2008 – the highest contribution of any economic sector in California. The RTP/SCS plays a key role in determining transportation GHG emissions for decades to come, and can either position the region for sustainable growth, or exacerbate climate change effects. Unfortunately, the EIR for this Plan presents only limited facts without context or meaning, and masks, rather than discloses, the steady growth in climate-changing emissions that the RTP/SCS will cause over its 40-year lifespan. In so doing, SANDAG has abused its discretion.

SANDAG's narrowly drawn EIR discusses GHG emissions reduction targets that its RTP/SCS will briefly meet, but then drops any discussion of GHG reductions during the last 15 years of the Plan, when steadily growing GHG emissions will cause those prior reduction targets, and even the baseline, to be exceeded. Perhaps

most seriously, SANDAG refused to examine the impacts of the RTP/SCS in light of California's long-term goals for reducing emissions of climate-changing greenhouse gases (GHG) contained in the California Governor's Executive Order S-03-05, an official policy of the State of California setting rigorous statewide GHG reduction goals. (*Sierra Club v. County of San Diego* (2014) 231 Cal.App.4<sup>th</sup> 1152, 1168. ("*Sierra Club.*") Despite having chosen to develop an RTP/SCS that extends to 2050, a Plan that declares one of its environmental purposes to be significant, steady and lasting greenhouse gas reductions, SANDAG certified an EIR that leaves the last 15 years of the RTP, from 2035 to 2050, unmoored from California's long-term goals for greenhouse gas reductions, as embodied in the gubernatorial Executive Order. This failure was prejudicial in that it led to a failure to fully inform the public, and may have led to a failure to consider feasible alternatives that would avoid or lessen the Plan's significant environmental impacts on greenhouse gas emissions.



**II. SANDAG VIOLATED CEQA BY FAILING TO EVALUATE THE GHG EMISSIONS ATTRIBUTABLE TO THE RTP/SCS IN LIGHT OF THE SCIENCE-BASED GOALS OF EXECUTIVE ORDER S-03-5.**

**A. SANDAG's Narrow Framing of the RTP/SCS's Effects on the Climate Tended to Mask the Full Impact of Steadily Increasing GHG Emissions.**

Courts do not demand perfection from an EIR. (Guidelines, § 15003(i).) However, they do demand a good faith effort at full disclosure of the environmental harm a project may do. (*Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1046; Guidelines § 15151.)

The EIR begins its discussion of GHG emissions and potential to harm the climate with an extremely brief – only three pages - discussion of climate science and current GHG levels in the environment. (AR002553-54.) This discussion sets out the level of carbon dioxide (“CO<sub>2</sub>”) in the atmosphere that climate scientists believe would stabilize the climate in a mere two sentences. (*Id.*) However, the EIR does not provide the information that would be most relevant to a discussion of the RTP/SCS' impact: an estimate of

the degree of GHG emissions reductions that would be needed to get to that stabilizing level of CO<sub>2</sub> in the atmosphere.

The Governor's Executive Order, by contrast, shows the magnitude of the reductions that climate science indicates are needed to avert the most serious climate changes: 1) by 2010, reduce GHG emissions to 2000 levels; 2) by 2020, reduce GHG emissions levels to 1990 levels; and 3) by 2050, reduce GHG emissions levels to 80% below 1990 levels. The EIR, instead of using these emissions reduction goals, or making its own science-based estimate of the levels of GHG emissions reductions that will be needed by the 2050 end date of the RTP/SCS, primarily compares its overall GHG emissions reductions to regulatory targets set by the California Air Resources Board ("ARB") pursuant to the Scoping Plan adopted by the ARB pursuant to the Global Warming Solutions Act of 2006<sup>3</sup> (mandating a statewide reduction of 20% from 1990 levels). The EIR also compares per capita GHG emissions from passenger cars and light trucks to the per capita GHG target emissions reductions for

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<sup>3</sup> Health and Safety Code § 38501, et seq. (referred to hereafter as "AB32.")

these vehicles set by ARB for 2020 and 2035 pursuant to the Sustainable Communities Strategies Law<sup>4</sup> (7% reduction from 2005 levels for covered vehicles by 2020, and 13% reduction by 2035). However, despite the EIR's recognition that GHG emissions must be greatly reduced in order to stabilize the climate (AR002553-54), and despite the RTP/SCS's own environmental objectives to "[r]educe greenhouse gas emissions from vehicles," (AR013079), the EIR did *not* compare the RTP/SCS's GHG emissions reductions to the science-based goal for 2050 contained in Executive Order S-03-05, the most prominent statewide goal for such reductions.

Given that the targets for GHG emissions reductions set by the ARB will expire in 2020 and 2035, the EIR is left with no point of comparison for climate stabilization after 2035 – a full third of the Plan's lifespan – only a projection of GHG emissions increases over the 2010 baseline. The EIR drops all discussion of GHG emissions decreases after the 2035 target date passes, and confines itself to merely setting out the amount by which GHG emissions *increase*

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<sup>4</sup> Government Code § 65080, et seq. (referred to hereafter as "SB 375".)

over the baseline in the last third of the Plan's time span, finding the increases significant. It does not compare these increases with the huge *decreases* in GHG emissions needed to stabilize the climate, as decreed in the Executive Order.

The EIR's omission of an analysis and discussion of GHG emissions reductions for the years between 2035 and 2050 is glaring. The RTP/SCS itself sets out a "performance measure" by which to evaluate the success of the RTP/SCS in reducing per capita GHG emissions by 2050: the Plan will succeed if it reduces per capita transportation-related carbon dioxide emissions from the RTP/SCS from the 28.0 pounds per day that existed in 2008, to 18.8 pounds per day in 2050. (AR013081.) Critically, however, there is no mention of this objective, or of any GHG reduction objective, or of the environmental consequences of failing to achieve any such objective, for the post-2035 period in the EIR. Rather, the EIR states that total transportation-related GHG emissions from the RTP/SCS in 2050 will be 14.69 million metric tons (MMT) (AR002577), an *increase* over the 2010 baseline emissions of 14.31 MMT (AR002557.) The EIR also shows that per capita GHG emissions from all types of

vehicles in 2050 will be 27.8 pounds per day (AR003820), meaning that the RTP/SCS falls 32.7%, or about one-third, short of its own GHG reduction goal.

The statutes and regulations upon which SANDAG based its GHG reduction discussions explicitly envisioned GHG reductions past 2020 and 2035, and stated the need for them. The Scoping Plan adopted by the ARB pursuant to AB 32 recognizes that:

According to climate scientists, California . . . will have to cut [GHG] emissions by 80 percent from today's levels to stabilize the amount of carbon dioxide in the atmosphere and prevent the most severe effects of global climate change. This long range goal is reflected in California Executive Order S-3-05 that requires an 80 percent reduction of greenhouse gases from 1990 levels by 2050. (AR027848.)

Similarly, SB 375 looks towards the GHG emissions reductions needed past 2035, requiring the ARB to update the GHG reduction targets periodically, out to 2050. (Govt. Code § 65080(b)(1)(F)(2)(A)(iv).) The ARB emphasized the importance of continuing GHG emissions reductions past 2035 in a report on the SANDAG RTP/SCS that expressly noted the lack of GHG emissions reductions in the RTP/SCS after 2035. It stated that this "trend in per

capita GHG emissions is unexpected," since SB 375 and the RTP/SCS's prepared pursuant to it were intended to provide more, not less, GHG reductions over time. ("Informational Report on the San Diego Association of Governments' Draft SB 375 Sustainable Communities Strategy" (SAR, Tab 344:30143; see also *id.* at pp. 30144, 30188-89.))

1. The EIR Fails to Discuss or Analyze the RTP/SCS's Backsliding with Respect to GHG Emissions Reductions by 2050, by Which Date GHG Emissions Are Expected to Increase Over Baseline Levels.

As stated above, the EIR reports that 2050 GHG emissions will *increase* over the 2010 baseline, which it finds significant. The EIR does not compare these increases with GHG emissions *decreases* achieved earlier in the Plan, even though such decreases are a key goal of the RTP/SCS itself. In summary, the figures are these:

- The total 2050 GHG transportation emissions due to the RTP/SCS are 14.69 MMT (AR002577), as compared with 12.00 MMT in 2020 (AR002584), an *increase* of about 18% over the 2020 levels.

- The total 2050 transportation GHG emissions due to the RTP/SCS in 2050 are 14.69 MMT (AR002577), as compared with the 2035 total of 12.88 MMT (AR002575), an *increase* of 12.3% over the 2035 levels.
  
- The per capita GHG emissions from all vehicles due to the RTP/SCS in 2050 are 27.8 pounds per day, as compared with 25.8 pounds per day in 2020 (AR004435), an *increase* of 7.2%.
  
- The per capita emissions from all vehicles due to the RTP/SCS in 2035 are 26.7 pounds per day, as compared with 27.8 pounds per day in 2050 (AR004435), an *increase* of 3.95%.<sup>5</sup>

In other words, the 2050 GHG emissions reductions backslide substantially, and the reductions achieved in 2020 and 2035 are totally wiped out by 2050. In 2050, GHG emissions are not only *not*

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<sup>5</sup> The percentage increases in total GHG transportation emissions are greater than the per capita increases due in part to the fact that total vehicle miles traveled rises 51% over the life of the RTP/SCS. (AR003823.)

reduced from the baseline levels, they *increase* over that baseline.

The final result of the RTP/SCS is an utter failure to meet its own GHG reduction goals, or the GHG reduction goals of AB 32 and its Scoping Plan, of SB 375, and of the Executive Order.

The EIR points neither the decision makers nor the public to these comparisons, which would show a GHG emissions curve going dangerously in the wrong direction. The EIR fails to correlate the GHG emissions increases in 2050 with the substantial decreases that climate science indicates are needed to avert climate disruption, a correlation that would have been plain had the EIR compared the GHG emissions levels in 2050 with the Executive Order and its goals.<sup>6</sup> Instead, the EIR effectively downplays this environmental reversal.

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<sup>6</sup> SANDAG argues that a reader could have examined the EIR, located these figures, and done the arithmetic for him or herself. (SANDAG AOB, at 46-47.) However, the public is not obligated to hunt around in the EIR for relevant information or to perform the analysis for itself (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 659; it is the agency's responsibility to find out and disclose all it reasonably can. (Guidelines § 15144.)



2. SANDAG's Failure to Discuss the Goals of the Executive Order Prevented the EIR From Providing Full Environmental Disclosure of the Climate-Changing Impacts of the RTP/SCS.

SANDAG relies upon Guidelines section 15064.4, subd. (b)(3), as authority for its failure to compare the overall rise in GHG emissions to the science-based GHG emissions reduction goals of the Executive Order on grounds that “the EO does not constitute a ‘plan’ for GHG reduction, and no state plan has been adopted to achieve the 2050 goal.” (AR 002581-82.) While SANDAG may not consider it a “plan,” the Executive Order is an authoritative policy document that shows the magnitude of the reductions that climate science indicates are needed to avert the most serious climate changes, culminating in an 80% reduction over 1990 levels by 2050. The Executive Order and its goals are widely recognized as critically important benchmarks against which progress in reducing GHG emissions can be evaluated. The Legislature adopted its goal of reducing GHG emissions to 1990 levels by 2020 in AB 32. (Health and Saf. Code § 38501, et seq.; *Sierra Club, supra*, 231 Cal.App.4<sup>th</sup> at 1158; *see, also*, Health and Safety Code § 38501(i), endorsing use of Executive Order

S-3-05 in coordinating overall climate policy.”) The Scoping Plan adopted by the California Air Resources Board to carry out AB 32 recognized the validity of the Executive Order’s goal for 2050, and its scientific basis, stating that “[a]ccording to climate scientists, California and the rest of the developed world will have to cut emissions by 80 percent from today’s levels to stabilize” CO2 in the atmosphere “and prevent the most severe effects of global climate change. This long range goal is reflected in California Executive Order S-03-05. . . .” (AR027848.) The Legislature further recognized the soundness, and the urgency, of the Executive Order’s goals in enacting SB 375, the statute under which the Sustainable Communities Strategy was developed by SANDAG, and which echoes the goals of AB 32. (Govt. Code § 65080(b)(2)(A)(iii).) Additional legislative validation of the Executive Order is contained in SB 391, codified in part at Government Code section 14000.6, which reiterates the policy goals of the Executive Order, particularly the need for an 80% GHG reduction by 2050, a policy that it requires the Department of Transportation to adopt in its statewide California

Transportation Plan. (Govt. Code §§ 14000.6, subd. (b), 65072, subd. (a), 65072.2.)

The Executive Order is recognized as an authoritative benchmark for use in CEQA compliance by the California Air Pollution Control Officers Association (“CAPCOA”), a non-profit association of all 35 air quality agencies in California<sup>7</sup>, in its white paper *CEQA & Climate Change* (2008).<sup>8</sup> In that white paper, CAPCOA includes consistency with the Executive Order among potential thresholds that local air pollution control districts could use for determining the significance of GHG emissions under CEQA. (*Id.*, at pp. 32-33. *See, also, Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4<sup>th</sup> 70, 91. )

The Executive Order would have provided an important context for the decision makers and the public to evaluate and understand the climate-changing impacts of the RTP/SCS. The Plan

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<sup>7</sup> See [www.capcoa.org/about/](http://www.capcoa.org/about/).

<sup>8</sup> Available at [www.capcoa.org/documents](http://www.capcoa.org/documents).

attains, and then loses, the GHG emissions reductions required by the AB 32 and SB 375 targets set for 2020 and 2035, but the EIR does not examine or disclose the impacts of that loss. Guidelines section 15064(b) requires that the determination of the significance of an impact be “based to the extent possible on scientific and factual data;” Section 15064, subd. (d) requires the lead agency to evaluate both the direct and indirect physical changes in the environment due to the project. The EIR currently does not comply with either Guideline for the period after 2035. As to 2050, the EIR only advises the public that GHG emissions will rise slightly over the baseline level; it does not provide an evaluation of the indirect physical changes in the environment that this failure to *reduce* GHG emissions level may cause, “based to the extent possible on scientific and factual data.” It certainly does not advise the decision makers or the public that an 80% reduction from 1990 levels (not just from baseline levels) is necessary to avoid serious, if not dire, climate change. Failure to disclose the RTP/SCS’s consistency with the Executive Order’s goals, at least for the period after 2035, has produced a misleading EIR.

### 3. The EIR Failed to Correlate GHG Emissions with Their Environmental Consequences.

As this Court wrote in 1975, “[t]he purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind.” (*Bozung, supra*, 13 Cal.3d at 283.) In line with that fundamental statutory purpose, an EIR cannot simply provide figures and charts for the decision makers and the public to decipher as best they can, it must instead discuss the actual environmental consequences of the project, to the degree feasible. As *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4<sup>th</sup> 1184, 1219 -1220, correctly holds, merely acknowledging that emissions will increase over the baseline, or making a finding that such emissions are significant, is not adequate compliance with CEQA; some correlation to actual environmental effects from these significant adverse emissions increases is required. In *Bakersfield*, the Court of Appeal held that conventional pollutant emissions increases had to be correlated to human health effects in order for the data to be meaningful and useful to decision makers and the public. As the Court of Appeal there stated: “After reading the EIRs, the public

would have no idea of the health consequences that result when more pollutants are added to a nonattainment basin.” (*Bakersfield, supra* 124 Cal.App.4<sup>th</sup> at 1220.)

The same is true here; after reading the EIR, the public has no idea of the effect on California’s efforts to slow climate change that the RTP/SCS will have, particularly after 2035. While the EIR’s extremely brief discussion of climate science (AR002553-54) does set out the level of *C02* in the atmosphere that climate scientists believe would stabilize the climate, it contains no estimate of the amount of the *GHG emissions reductions* needed to get there. The EIR only compares GHG emissions triggered by the RTP/SCS with regulatory targets; it makes no attempt to correlate emissions levels with the kind of decreases that climate scientists say are needed. (See, e.g., AR 002572, 002577<sup>9</sup>, 002579, 002581, 002584.)

What the EIR presents is analogous to what the EIRs in *Bakersfield* presented: raw emissions increase data, with “no

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<sup>9</sup> On this page, the EIR admits that GHG emissions due to the RTP/SCS will be 48% higher than the baseline 2010 level, but does not compare that with the magnitude of the GHG emissions reductions required.

acknowledgement or analysis,” (*Id.*, 124 Cal.App.4<sup>th</sup> at 1220), of the connection between increased GHG emissions and climate disruption. (See also, *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4<sup>th</sup> 931, 955 (“An adequate EIR requires more than raw data: it requires also an analysis that will provide decision makers with sufficient information to make intelligent decisions[]”, citing Guidelines § 15151.)

4. The EIR Fails to Discuss or Analyze the RTP/SCS’s Backsliding by 2050 From GHG Emissions Reductions It Achieves in 2020 and 2035.

While the EIR compares the GHG emissions caused by the RTP/SCS to regulatory targets set for 2020 pursuant to AB 32, and for 2020 and 2035 pursuant to SB 375, once each target date passes, any reference to the GHG emissions reductions made to meet those targets vanishes from the EIR.

The EIR presents no substantial evidence, indeed, no evidence whatever, to support the omission. The EIR does not even try to argue that the climate science briefly discussed at AR002553-54, and in the Scoping Plan, becomes invalid after 2020 or 2035. The EIR

itself recognizes that, once emitted, GHGs stay active in the atmosphere for periods of time far exceeding the target deadlines, some for many decades. (AR002554.) Yet, once the EIR notes that the RTP/SCS will *meet* the Scoping Plan's 2020 target, it never discusses whether that 20% GHG reduction target is *maintained*. As noted, *supra* at pages 16-17, the Scoping Plan's 20% reduction is *not* maintained by the RTP/SCS, but is exceeded by 18% in 2050. Similarly, the 2020 and 2035 SB 375 targets are not maintained, but are exceeded in 2050 by 7.2% and 3.9%, respectively. Had the EIR compared 2050 GHG emissions due to the RTP/SCS to the goals of the Executive Order, the comparison would have shown a GHG emissions curve that was rising, not falling, until its initial gains were totally wiped out, and all of the Executive Order's science-based goals were exceeded.

The EIR neither discusses the environmental impacts of failing to maintain these GHG emissions reductions, nor presents any substantial evidence to support that omission. It simply drops any discussion of the 2020 and 2035 reduction targets without explanation once they are passed, and switches exclusively to a



comparison of GHG emissions with the baseline level. No authority supports the concept that backsliding from a previously attained level of GHG emissions reduction need not be disclosed or analyzed in an EIR. It may require less discussion that the original attainment of the threshold, but unless there is substantial evidence that the backsliding is of no environmental significance, it should be disclosed and analyzed. Failure to do so is a prejudicial abuse of discretion

That the RTP/SCS met the 2020 and 2035 targets initially does not excuse the EIR's failure to discuss subsequent backsliding.

CEQA's required inquiry is not limited to whether an agency has complied with other laws or regulations, like the ARB Scoping Plan and SB 375 targets, let alone compliance that is merely temporary. CEQA requires that the full environmental impact of the agency's project must be analyzed and disclosed, regardless of compliance with other statutes or regulations.

As an example, in *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, the coal-fired cogeneration plant at issue in that case fully complied with the air pollution control laws and regulations that applied to it. It had permits from the local

air pollution control district and the federal Environmental Protection Agency to emit the air pollution for which the CEQA analysis was found to be deficient. (*Id.*, 221 Cal.App.3d at 713.) The Court of Appeal held that compliance with regulatory air pollution control emissions limits “cannot properly be used to invoke the presumption that the project will have no significant impact on air quality.” (*Id.*, at 221 Cal.App.3d at 717.) In *Kings County*, compliance with regulatory levels did not immunize the project from a full CEQA analysis of its environmental impacts. *A fortiori*, the RTP/SCS’s compliance with the Scoping Plan and SB 375 targets at one point during the 40-year Plan cannot immunize it from performing a full CEQA analysis of the RTP/SCS’s failure to maintain those GHG emissions reductions past 2020 and 2035.

### **III. THE EIR’S FAILURE TO PROVIDE ADEQUATE INFORMATION WAS PREJUDICIAL, LEADING TO A FAILURE TO CONSIDER AND ADOPT ALL FEASIBLE MITIGATION**

CEQA’s two core purposes, full environmental disclosure, and adoption of all feasible mitigation measures, are intertwined. Where an EIR does not fully disclose all the environmental damage that a proposed project may do, that failure necessarily will color the

decision makers' consideration of what alternatives are feasible and are necessary to lessen or avoid that harm. (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4<sup>th</sup> 70, 91 (once agency recognizes an impact as significant, it must identify and adopt feasible mitigation for that impact.)) Full knowledge of possible environmental damage from a proposed project is essential to the design of, and choice among, project alternatives that could lessen or avoid that damage.

The Court of Appeal, in a portion of its opinion on which this Court did not grant review, found that substantial evidence did not support SANDAG's finding that the EIR adequately addressed mitigation for the RTP/SCS's GHG emissions impacts. (*Cleveland National Forest Foundation v. San Diego Association of Governments* (2014) 231 Cal.App.4<sup>th</sup> 1056, 180 Cal. Rptr.3d 548, 568.) Amici submit that the EIR's failure to fully disclose and explain the magnitude of the gap between the increased GHG emissions over the span of the RTP/SCS 2050 and the reduced GHG emissions over that time period set as state goals in the Executive

Order, deprived the decision makers of the proper lens through which to view and evaluate alternatives to the RTP/SCS as proposed.

**A. SANDAG Has the Authority to Reshape the RTP/SCS to Consider or Include Alternatives and Impose Mitigation That Could Reduce Driving and Resulting GHG Emissions.**

SANDAG is the gatekeeper for literally billions of dollars in transportation funding. No project in the region that requires federal, state, or TransNet funding may receive that funding unless it appears in the RTP/SCS. The RTP (now RTP/SCS) is a component part of the overall State Transportation Improvement Plan (STIP), which lists all transportation projects that California plans to build, and all transportation projects for which it will seek federal funds. (State RTP Guidelines (AR Tab 218:017703); *Edna Valley Ass'n v. San Luis Obispo County and Cities APCC* (1977) 67 Cal.App.3d 444, 448.)) State transportation funds are only available to projects in an approved RTP (State RTP Guidelines, AR Tab 218:017675, 017686-687, 017699), and Federal Highway Administration or Federal Transit Administration funds are only available to transportation projects that are listed in a federally approved STIP. This includes funding for projects that SANDAG does not build itself. (AR

8a:2065.) In addition, projects cannot be funded by the TransNet sales tax unless they are consistent with the RTP/SCS. SANDAG thus possesses substantial authority to lock or unlock the gates to funding eligibility in preparing its RTP/SCS.

The money is substantial, as well. Total revenues necessary to build the projects in the RTP/SCS are \$213.8 billion, of which local funds comprise 55 percent, or about \$118 billion. (TransNet Ordinance, § 5, AR Folder 320, Item 30:28700.) SANDAG's choices about which projects to include in the RTP/SCS and which not to include can lock or unlock the door to very large funding sources.

SANDAG also has considerable discretion in how it crafts the transportation project list for the RTP/SCS. As the state's Regional Transportation Plan Guidelines provide:

[Metropolitan Planning Organizations] and [Regional Transportation Planning Agencies (like SANDAG)] have the flexibility to be creative in selecting transportation planning options that best fit their regional needs. (AR Tab 218: 17687, 17685.)

SANDAG is responsible for the overall design and prioritization of the RTP/SCS and the projects in it. (Govt. Code § 65080; Public

Util. Code, § 120300; RTP Guidelines AR Tab 218: 17687-688.)

However, in order to wisely exercise its “flexibility to be creative in selecting transportation planning options that best fit [San Diego’s] regional needs” (State RTP Guidelines, see above), SANDAG needed full, adequate, and accurate information about the environmental impacts, including climate change impacts, that the EIR was supposed to provide, information noticeably absent from the EIR.

**B. Alternatives That Would Have Reduced Driving and GHG Emissions Got Short Shrift in the EIR.**

CEQA requires an EIR to set forth a reasonable range of feasible alternatives that will “offer substantial environmental advantages over the project proposal.” (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 566.) CEQA provides that public agencies “should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures which would substantially lessen the significant environmental effects of such projects . . . .” (Pub. Resources Code §21002; see also Pub. Resources Code § 21081.)

An EIR is required to consider alternatives that will attain most of the basic objectives, while avoiding or substantially reducing, the significant impacts of the proposed project. (Guidelines § 15126.6(b)); *Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4<sup>th</sup> 1059, 1087-1089 (“*Watsonville*”). In this case, one of the two descriptions of the “2050 RTP/SCS Vision” in the EIR states that the Plan:

Supports a prosperous economy; promotes a healthy and safe environment, *including climate change protection*, and provides a higher quality of life for all San Diego region residents. (AR002077, emphasis added.)

Thus, protection of the climate, and prevention of climate change, is one of the basic objectives of the RTP/SCS. The EIR was therefore obliged to present a range of alternatives that would forward this objective.

It did not. The six alternatives analyzed in the EIR vary only slightly from each other or the proposed project. All six would construct all, or a large portion of, the Plan’s highway project. (AR8a:2109-22, 3140-62.) Even the two “Transit Emphasis” alternatives (3a and 3b) would carry out the vast majority of highway

projects in the 2050 RTP/SCS in their early stages, and would defer at least half of the transit projects to the Plan's middle or later stages, thus locking in increased highway lane construction, driving and growth. Five of the six alternatives analyzed in the EIR would result in the same or *increased* impacts from the Plan's GHG emissions. (AR 8a:3323-24.) The EIR did not consider an alternative that would meaningfully increase public transit in the Plan's early years and would prioritize transit projects over highway lane development, thereby locking in GHG reductions over the life of the Plan.

Specifically, SANDAG refused to include in the EIR an analysis of two transit-oriented alternatives the 50-10 Transit Plan and the "FAST Plan" that were presented to SANDAG by public participants in the CEQA process. (AR 296:19690-91, 19749-68.) The 50-10 Plan in particular would have prioritized transit planning and development in the RTP/SCS's first ten years. Each of these alternatives would have significantly reduced the Plan's detrimental effects on GHG emissions, while still meeting its objectives, including the objective of climate protection. (*Id.*) Each of these publicly proposed alternatives would also better meet SANDAG's



task under SB 375 to use transportation funding to support sustainable communities, since they would prioritize infill development and public transit in the Plan's earliest years, leading to meaningful reductions in vehicle miles traveled and resulting GHG emissions. (AR 320:27735-39; 8b: 4296-97.)

**C. Transit-Oriented Development Promotes Economic Vitality, Reduces Environmental Harm, and Aligns With Public Demand.**

The EIR should have included the 50-10 Transit Plan, the FAST Plan, or another transit-focused alternative that would align with the goals of the Executive Order. Such an alternative would position the San Diego region to serve a growing population that desires smart growth.

1. There is Heightened Demand for Sustainable Development.

California is projected to grow by about twelve million residents by 2050<sup>10</sup>, and communities that facilitate transit-oriented

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<sup>10</sup> California Department of Finance, Report P-1 (County): State and County Total Population Projections, 2010-2060; available at [www.dof.ca.gov/research/demographic/reports/projections/P-1](http://www.dof.ca.gov/research/demographic/reports/projections/P-1).

development, as SB 375 intended the RTP/SCS's to do, will be best positioned to accommodate this growth.

The Journal of the American Planning Association reported in 2008 that approximately 50% of American households want sustainable development features in their neighborhoods, an increase from the roughly one-third of households that desired these features decades earlier.<sup>11</sup> Studies from the National Association of Homebuilders and high-production builders confirm that a high percentage of buyers now prefer “smart growth products,” with many homebuyers willing to trade lot or home size for shorter commute times.<sup>12</sup> Moreover, the region’s growing elderly population will require communities that can support a variety of services within walking distances, rather than requiring transport by automobile.<sup>13</sup>

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<sup>11</sup> S.J. Handy, F. Sallis, D. Weber, E. Maibach, and M. Hollander, “Is Support for Traditionally Designed Communities Growing? Evidence From Two National Surveys,” *Journal of the American Planning Association*, Vol. 74, no. 3, 2008, pp. 209-221.

<sup>12</sup> *Growing Cooler* 8 (AR 296: 19745).

<sup>13</sup> CCNF, 50-10 Transit Plan 18 (AR 296: 19767).

In addition, young “millennials” prefer living closer to city centers, in proximity to workplaces, restaurants, cultural attractions, and public spaces.<sup>14</sup> In one national survey, “walkability” was reported as the most important feature in Generation Y housing preferences. One-third of respondents born between 1980 and 2001 said they would pay more for a home with high walkability, diversity, and proximity to jobs.<sup>15</sup>

Only by prioritizing public transit and infill projects will the San Diego region be positioned to capitalize on this growing demand for higher density sustainable development.<sup>16</sup> And, importantly, demand alone is not enough to achieve effective smart growth; a

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<sup>14</sup> See, e.g., RCLCO, “The Impact of Gen Y on Housing – The Market and Demographic Perspective,” 2013 APA Virginia Annual Planning Conference, available at <http://rclco.com/article-wide-advisories?articleTitle=the-impact-of-gen-y-on-housing-the-market-and-demographic-perspective--1375469703--303-->

<sup>15</sup> *Id.*

<sup>16</sup> Council of Infill Builders, “A Home for Everyone; San Joaquin Valley Housing Preferences and Opportunities to 2050 (January 2013).

highly functioning transit system is also critical. In recognition of this fact, SB 375 directed SANDAG to lead the region toward transit-oriented development to meet this demand.<sup>17</sup> (See AR 190: 13251).

2. Transit-Oriented Development Supports Thriving Communities, in Furtherance of the RTP/SCS's Objectives.

One of the RTP/SCS's prime objectives is to "[s]upport[] a prosperous economy." (AR002077.) According to a recent report by Amicus Council of Infill Builders, investment in downtown development yields more property tax revenue per acre than building on the periphery outside downtowns.<sup>18</sup> Moreover, building on the periphery also contributes to urban sprawl, smog, GHG emissions, and other costly land use, health, and environmental impacts. In addition, the costs of catastrophic climate change are enormous,

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<sup>17</sup> San Diego residents, in particular, have shown themselves to strongly favor sustainable land use planning. See, Anderson, J, "Land Use Planning in San Diego", 8 Hastings W.-N.W.J. Env'tl. L.& Pol'y 261 (Spring 2002).

<sup>18</sup> Council of Infill Builders, *Valuing Downtowns: Upward Not Outward is a Smart Revenue Strategy For Local Governments*, January 2013, available at <http://www.councilofinfillbuilders.org/resources,PDFs/Valuing-Downtowns.pdf>.

including sea level rise, drought, heat waves, reduced rainfall and snowpack, and increased incidence of wildfires, many of which California is already experiencing.<sup>19</sup>

Transit-oriented development will also have specific benefits to San Diego's population and downtown businesses. Only an estimated 29% of jobs in San Diego County are accessible by transit,<sup>20</sup> and up-front investments in public transportation are critical to ameliorating this deficiency. Transit investments also provide immediate returns in the form of job generation in the construction and service sectors, with every \$1 billion invested yielding an estimated 19,299 job-months.<sup>21</sup>

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<sup>19</sup> See, e.g., S. Moser, J. Ekstrom, G Franco, *Our Changing Climate 2012, Vulnerability & Adaptation to the Increasing Risks from Climate Change in California; A Summary Report on the Third Assessment from the California Climate Change Center* (2012), available at <http://www.energy.ca.gov/2012publications/CEC-500-2012-007/>.

<sup>20</sup> San Diego and Imperial Counties Labor Council, letter on the 2050 RTP/SCS, July 8, 2011 (hereafter "Labor Council letter"). (AR 281: 19473.)

<sup>21</sup> Labor Council letter (AR 281: 19474.) Not that because transportation projects are of different durations, a "job-month" is a more accurate way of comparing quantities of employment created

### 3. Transit Access Yields Quality of Life Improvements that Support a Healthy Economy.

Developing and investing in alternatives to single-vehicle travel also improves a community's quality of life. Proximity to adequate transit is a key factor in making communities more livable,<sup>22</sup> as evidenced by studies showing that development near public transportation yields greater improvements in property values.<sup>23</sup>

Living in mixed-use communities where daily needs are within walking and biking distance also improves a variety of health outcomes by increasing physical activity levels.<sup>24</sup> This health improvement also benefits the region's employers by boosting the health of the local work force and reducing absenteeism. Further, there is a well-documented link between the growing obesity/Type 2

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than a "job-year."

<sup>22</sup> Labor Council letter (AR 281: 19473).

<sup>23</sup> Center for Transportation Excellence – Transit Benefits (AR 320(29): 28687).

<sup>24</sup> *Elevating Health & Equity into the Sustainable Communities Strategy Process* (AR 304: 19791).

diabetes epidemic and housing sprawl, as auto dependency, at least in part, reduces physical activity.<sup>25</sup>

4. Transit-Oriented Development Promotes Efficient Use of Scarce Public Resources.

Compact development also helps preserve dwindling resources such as open space<sup>26</sup> and water.<sup>27</sup> Focusing development around transit hubs rather than allowing sprawl into outlying areas will also help protect the region's working farmland, which is critical, given that agriculture in San Diego enjoys the highest per-acre value in the state.<sup>28</sup>

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<sup>25</sup> R. Lopez, *Urban sprawl and risk for being overweight or obese*. Am. J. Public Health, 2004; vol. 94: 1574-79; D. Berrigan, RP Troiano, *The Association between urban form and physical activity in U.S. adults*. Am. J. Prev. Med. 2002; Col. 23: 75-79.

<sup>26</sup> CNFF, 50-10 Transit Plan 17 (AR 296: 19766).

<sup>27</sup> CNFF, 50-10 Transit Plan 5 (AR 296: 19754).

<sup>28</sup> American Farmland Trust, letter on the 2050 RTP/SCS, July 8, 2011 (AR 279: 19462).

Sustainable development also allows cities and counties to accommodate population growth while avoiding undue strain on fiscal resources. Studies indicate, for example, that transit-oriented development saves municipalities money by reducing the cost of extending roads, water, and sewer infrastructure to new areas.<sup>29</sup> A report by Vision California quantified the infrastructure costs involved with different types of development, and found that shifting towards compact development and making corresponding investments in transit would result in a savings of \$4,000 per new household.<sup>30</sup> Applying such an analysis to the San Diego region, this shift would amount to over \$1 billion in infrastructure savings between now and 2050.<sup>31</sup>

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<sup>29</sup> *Growing Cooler* 9 (AR 296: 19746).

<sup>30</sup> SNFF, 50-10 Transit Plan 18 (AR 296: 19767).

<sup>31</sup> CNFF, 50-10 Transit Plan 18 (AR 296: 19767).



Finally, choices over transportation priorities affect another major source of municipal spending: subsidies for public parking.<sup>32</sup> Where commercial or entertainment centers are accessible almost exclusively by car, cities and towns are often forced to subsidize public parking in order to support their patronage. The fiscal impact of this obligation is hardly insignificant. As part of building a new home for the Los Angeles Philharmonic, for example, the City of Los Angeles subsidized construction of underground parking to the tune of \$50,000 per parking space, amounting to over one third of the project's total construction costs.<sup>33</sup> Sustainable development where residents can walk to businesses and entertainment helps space municipalities from the "high cost of free parking."<sup>34</sup>

Had SANDAG properly discussed climate change and the GHG reduction goals in the Executive Order, it might have seen the

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<sup>32</sup> CNFF, 50-10 Transit Plan 6 (AR 296: 19755).

<sup>33</sup> CNFF, 50-10 Transit Plan 6 (AR 296: 19755).

<sup>34</sup> CNFF, 50-10 Transit Plan 6 (AR 296: 19755).

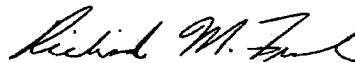
wisdom of including more transit-oriented alternatives in the EIR, and might have given the public more meaningful information about different possible approaches to planning transportation for the next 40 years in the San Diego region. The failure to do so was a prejudicial abuse of discretion, depriving the decision makers and the public of the information needed to support the analysis – and perhaps choice -- of the sustainable communities that SB 375 intended.

### CONCLUSION

For all the reasons set forth above, this Court should affirm the decision of the Court of Appeal.

Dated: September 8, 2015

Respectfully Submitted,



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RICHARD M. FRANK



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ETHAN N. ELKIND



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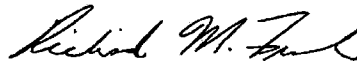
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## WORD COUNT CERTIFICATE

The undersigned states that the word count for this AMICUS CURIAE BRIEF, exclusive of tables, captions and this certificate, according to Microsoft Word is: 6,668.

DATED: Sept. 8, 2015



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**PROOF OF SERVICE**

***Cleveland National Forest Foundation, et al. v.  
San Diego Association of Governments, et al.  
California Supreme Court  
Case No. S223603***

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the City and County of San Francisco, State of California. My business address is 75 Columbia Square, San Francisco, CA 94103.

On September 8, 2015, I served true copies of the following document(s) described as:

**APPLICATION TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF  
THE COUNCIL OF INFILL BUILDERS AND THE PLANNING AND  
CONSERVATION LEAGUE IN SUPPORT OF RESPONDENTS AND  
PETITIONERS**

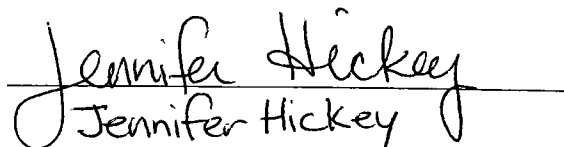
on the parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 8, 2015, at San Francisco, California.

  
Jennifer Hickey

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