S223603

IN THE SUPREME COURT OF CALIFORNIA

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

v.

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

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

Appeal from the San Diego County Superior Court,
Case No. 37-2011-00101593-CU-TT-CTL (Lead Case)
[Consolidated with Case No. 37-2011-00101660-CU-TT-CTL]
The Honorable Timothy B. Taylor, Judge Presiding

PLAINTIFFS' OPPOSITION TO SANDAG'S REQUEST FOR JUDICIAL NOTICE

*Rachel B. Hooper (SBN 98569)
Amy J. Bricker (SBN 227073)
Erin B. Chalmers (SBN 245907)
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816

Daniel P. Selmi (SBN 67481)
919 S. Albany Street
Los Angeles, CA 90015
Telephone: (213) 736-1098
Facsimile: (949) 675-9861

Marco Gonzalez (SBN 190832)
Coast Law Group LLP
1140 South Coast Highway 101
Encinitas, CA 92024
Telephone: (760) 942-8505
Facsimile: (760) 942-8515

Attorneys for Plaintiffs and Respondents Cleveland National Forest Foundation and Sierra Club

Kevin P. Bundy (SBN 231686)
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
Telephone: (510) 844-7100 x313
Facsimile: (510) 844-7150

Attorney for Plaintiff and Respondent Center for Biological Diversity

Cory J. Briggs (SBN 176284)
BRIGGS LAW CORPORATION
99 East "C" Street, Suite 111
Upland, CA 91786
Telephone: (909) 949-7115
Facsimile: (909) 949-7121

Attorneys for Plaintiffs and Respondents Creed-21 and Affordable Housing Coalition of San Diego County

Defendant and Appellant San Diego Association of Governments ("SANDAG") requests judicial notice of four documents in support of its Consolidated Answer to Amici's Briefs. These documents are not relevant to any issue before the Court and are not properly subject to judicial notice under subdivision (h) of Evidence Code section 452 in any event. SANDAG's request should be denied.

I. SANDAG's Extra-Record Materials Are Irrelevant to Any Issue Before the Court.

SANDAG concedes that each of the documents for which it requests judicial notice is outside the record and therefore irrelevant to determination of the claims before this Court. (Respondents' Request for Judicial Notice in Support of Answer to Amici's Briefs ("SANDAG RJN") at pp. 2-3 [citing *Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559, 571, 575].) "[J]udicial notice, which is a substitute for formal proof of a matter by evidence, cannot be taken of any matter that is irrelevant." (*People v. Young* (2005) 34 Cal.4th 1149, 1171, fn. 3 [quotation omitted].) SANDAG's request should be denied on this ground alone.

SANDAG claims it offers these extra-record materials solely in response to similar materials cited by *amici curiae*, but its Consolidated Answer to Amici's Briefs ("SANDAG Amici Answer") belies this claim. Rather, it appears SANDAG is seeking judicial notice of documents either

to support its arguments on the merits or to respond to arguments it concedes are not before the Court.

SANDAG cites Exhibits 1 and 2, for example, to support its argument that technological changes needed to attain California's 2050 climate stabilization goals have not yet been developed and are often outside individual agencies' control. (SANDAG Amici Answer at pp. 39-41.) SANDAG also relies on Exhibit 2 in support of its argument that Executive Order S-3-05 merely states a goal, but does not contain a detailed plan for implementation. (*Id.* at pp. 17-18, 39.) These are not arguments made solely in response to extra-record evidence offered by *amici curiae*. These are arguments SANDAG made on the merits. (SANDAG Opening Brief at pp. 24-25, 35-37; SANDAG Consolidated Reply Brief at pp. 44-45.) Because these documents are outside the record, they are irrelevant to whether SANDAG complied with CEQA and not subject to judicial notice. (See *Western States*, *supra*, 9 Cal.4th at p. 576.)

SANDAG's Exhibits 3 and 4 fare no better. In its response to *amici curiae*, SANDAG invents a dispute it acknowledges is not at issue in this case: whether the EIR should have attempted to predict the specific environmental effects attributable to the Plan's incremental emissions increase.[1] (SANDAG Amici Answer at pp. 22-25.) No party before the

[1] SANDAG either misunderstands or misstates the argument of *Amici Curiae* Dennis D. Baldocchi, Ph.D., and other climate scientists that the

Court has advanced any such argument. SANDAG's Exhibits 3 and 4, cited solely in response to an argument no party is making (SANDAG Amici Answer at p. 24), are thus concededly irrelevant and not subject to judicial notice.

II. SANDAG's Materials Are Not Judicially Noticeable Pursuant to Subdivision (h) of Evidence Code Section 452.

Even if SANDAG's materials were relevant, or were offered solely for the purpose of rebutting extra-record material cited by *amici curiae*, SANDAG has failed to show they are properly subject to judicial notice.

SANDAG predicates its request entirely on Evidence Code section 452, subdivision (h), which allows judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." These include, for example, "facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter." (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1145.) The mere fact that an assertion has appeared somewhere in print, however, does not establish that it is capable of accurate

---

EIR failed to provide a meaningful level of detail regarding the potential impact of global warming on California, and the relationship between increased emissions and warming effects, as a general matter. (See Brief of *Amici Curiae* Climate Scientists at pp. 30-34.)

determination and beyond reasonable dispute. (See, e.g., *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 171, fn. 3 [denying judicial notice of New York Times Index because appearance of an article in the Index did not mean "the truth of the article had been shown with 'reasonably indisputable accuracy'"]; *Huitt v. Southern California Gas Co.* (2010 188 Cal.App.4th 1586, 1605, fn. 10 ["Simply because information is on the Internet does not mean that it is not reasonably subject to dispute."].)

None of the documents SANDAG offers meets the statutory test. These are not treatises, encyclopedias, almanacs, or even published scientific studies. Exhibit 1 is a "draft white paper" prepared by certain individuals affiliated with a professional trade association. (SANDAG RJN at p. 6.) As the title page of the "draft white paper" explains, "[t]he views expressed in this paper are the personal opinions of the authors and do not represent the opinions or judgment of their respective firms or of AEP." (SANDAG RJN, Ex. 1.) Exhibit 2 appears to be a report prepared by a private consulting firm for an unknown client or purpose. The personal opinions of individuals and reports of consulting firms are a far cry from the published, scholarly scientific literature considered in the cases SANDAG cites. (SANDAG RJN at p. 2; see *In re Jordan R.* (2012) 205 Cal.App.4th 111, 125-26; *People v. Smith* (2003) 107 Cal.App.4th 646, 671-72.) Exhibits 3 and 4, in turn, appear to be "scientific," but they still consist solely of printouts from a website. Neither SANDAG's request nor

the accompanying declaration demonstrates that these printouts (a) contain only facts not reasonably subject to dispute, or (b) are "sources of reasonably indisputable accuracy." Indeed, the accompanying declaration does not even attempt to authenticate any of the documents, and claims only that the documents are "attributed to" their purported authors. SANDAG has failed to show that any of these materials are judicially noticeable pursuant to Evidence Code section 452, subdivision (h).

For all of the foregoing reasons, SANDAG's request for judicial notice should be denied.

DATED: November 30, 2015

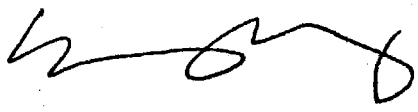
SHUTE, MIHALY & WEINBERGER LLP

By: 
RACHEL B. HOOPER

Attorneys for Plaintiffs and Respondents Cleveland National Forest Foundation and Sierra Club

DATED: November 30, 2015

CENTER FOR BIOLOGICAL DIVERSITY

By: 
KEVIN P. BUNDY

Attorney for Center for Biological Diversity

DATED: November 30, 2015

BRIGGS LAW CORPORATION

By: Cory J. Briggs (n#)
CORY J. BRIGGS

Attorney for CREED-21 and
Affordable Housing Coalition of
San Diego County

728649.1

PROOF OF SERVICE

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

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 396 Hayes Street, San Francisco, CA 94102.

On November 30, 2015, I served true copies of the following document(s) described as:

PLAINTIFFS' OPPOSITION TO SANDAG'S REQUEST FOR JUDICIAL NOTICE

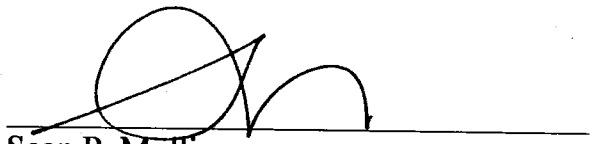
on the parties in this action as follows:

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. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. 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 November 30, 2015, at San Francisco, California.



Sean P. Mulligan

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

Julie D. Wiley, Special Counsel
San Diego Association of Governments
401 B Street, Suite 800
San Diego, CA 92101
Telephone: (619) 699-1995
Facsimile: (619) 595-8605
E-mail: jwi@sandag.org

Attorney for Defendants and Appellants San Diego Association of Governments, San Diego Association of Governments Board of Directors

Margaret M. Sohagi
Philip Seymour
The Sohagi Law Group, PLC
11999 San Vicente Boulevard, Suite 150
Los Angeles, CA 90049
Telephone: (310) 475-5700
Facsimile: (310) 475-5707
E-mail: msohagi@sohagi.com
pseymour@silcom.com

Attorney for Defendants and Appellants San Diego Association of Governments, San Diego Association of Governments Board of Directors

Michael H. Ziscke
Andrew B. Sabey
Linda C. Klein
Cox, Castle & Nicholson LLP
50 California Street, Suite 3200
San Francisco, CA 94111
Telephone: (415) 262-5100
Facsimile: (415) 262-5199
Email: mzischke@coxcastle.com
asabey@coxcastle.com
lklein@coxcastle.com

Attorney for Defendants and Appellants San Diego Association of Governments, San Diego Association of Governments Board of Directors

Timothy R. Patterson
Supervising Deputy Attorney General
Office of the Attorney General
P.O. Box 85266
San Diego, CA 92186-5266
600 West Broadway, Suite 1800
San Diego, CA 92101
Telephone: (619) 645-2013
Facsimile: (619) 645-2271
E-mail: tim.patterson@doj.ca.gov

Attorney for Intervenor and Respondent People of the State of California

Janill L. Richards
Office of the Attorney General
1515 Clay Street, 20th Floor
Oakland, CA 94612
Telephone: (510) 622-2130
Facsimile: (510) 622-2270
E-mail: janill.richards@doj.ca.gov

Attorney for Intervenor and Respondent People of the State of California

Marco Gonzalez
Coast Law Group LLP
1140 South Coast Highway 101
Encinitas, CA 92024
Telephone: (760) 942-8505
Facsimile: (760) 942-8515
E-mail: marco@coastlawgroup.com

Attorneys for Plaintiffs and Respondents Cleveland National Forest Foundation and Sierra Club

Kevin P. Bundy
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
Telephone: (510) 844-7113
Facsimile: (510) 844-7150
E-mail:
kbundy@biologicaldiversity.org

Attorney for Plaintiff and Respondent Center for Biological Diversity

Daniel P. Selmi
919 S. Albany Street
Los Angeles, CA 90015
Telephone: (213) 736-1098
Facsimile: (949) 675-9861
E-mail: dselmi@aol.com

Attorneys for Plaintiffs and Respondents Cleveland National Forest Foundation and Sierra Club

Cory J. Briggs
Mekaela M. Gladden
Briggs Law Corporation
99 East "C" Street, Suite 111
Upland, CA 91786
Telephone: (909) 949-7115
Facsimile: (909)-949-7121
E-mail: cory@briggslawcorp.com
mekaela@briggslawcorp.com

Attorneys for Plaintiffs and Respondents CREED-21 and Affordable Housing Coalition of San Diego County
In Consolidated Case No. 37-2011-00101660-CU-TT-CTL

M. Reed Hooper
Jonathan C. Wood
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: mrh@pacificlegal.org
E-mail: jw@pacificlegal.org

Attorneys for Amicus Curiae Pacific Legal Foundation

Michelle Wilde Anderson
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305
Telephone: (650) 498-1149
Facsimile: (650) 725-0253
Email: manderson@law.stanford.edu

Deborah Ann Sivas
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305
Telephone: (650) 723-0325
Facsimile: (650) 723-4426
Email: dsivas@stanford.edu

Attorneys for Amici Curiae League of Women Voters of California. et al.

Nancy C. Miller
Jennifer V. Gore
Miller & Owen
428 J Street, Suite 400
Sacramento, CA 95814
Telephone: (916) 447-7933
Email: miller@motlaw.com

Attorneys for Amici Curiae Building Industry Legal Defense Foundation, et al.

Whitman F. Manley
Laura M. Harris
Christopher L. Stiles
Remy Moose & Manley, LLP
555 Capitol Mall, Suite 800
Sacramento, CA 95814
Telephone: (916) 443-2745
Facsimile: (916) 443-9017
Email: wmanley@rmmenvirolaw.com
lhanis@rmmenvirolaw.com
cstiles@rmmenvirolaw.com

Attorneys for Amici Curiae California Association of Councils of Governments, et al.

Cara Ann Horowitz
Jesse Lueders
UCLA School of Law
405 Hilgard Avenue
Los Angeles, CA 90095
Telephone: (310) 206-4033
Facsimile: (310) 206-1234
Email: horowitz@law.ucla.edu

Attorneys for Amici Curiae Dennis D. Baldocchi, Ph.D., et al.

Tina A. Thomas
Thomas Law Group
455 Capitol Mall, Suite 801
Sacramento, CA 95814
Telephone: (916) 287-9292
Facsimile: (916) 737-5858

Attorneys for Amici Curiae California Infill Builders Federation and San Diego Housing Commission

Richard M. Frank
UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

Ethan N. Elkind
UC Berkeley School of Law
2850 Telegraph Avenue
Suite 500
Berkeley, CA 94705

Jayni Foley Hein
Policy Director
Institute for Policy Integrity
New York University
School of Law
Wilf Hall
139 MacDougal Street
Third Floor
New York, NY 10012

Attorneys for Amici Curiae Council of Infill Builders and Planning and Conservation League

Stephan C. Volker
Alexis E. Krieg
Daniel P. Garrett-Steinman
Law Offices of
Stephan C. Volker
436 14th Street, Suite. 1300
Oakland, CA 94612
Telephone: (510) 496-0600
Facsimile: (510) 496-1366

Attorney for Amicus Curiae Backcountry Against the Dump, Inc.

Clerk of the Court
San Diego Superior Court
330 West Broadway
San Diego, CA 92101

California Court of Appeal
4th District, Division 1
750 B Street, Suite 300
San Diego, CA 92101