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In the Supreme Court of the State of California

San Diego Association of Governments, San Diego Association of Governments Board of Directors
Appellants and Defendant,

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
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 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

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SAN DIEGO ASSOCIATION OF GOVERNMENTS' OPENING BRIEF

Cox, Castle & Nicholson LLP
Michael H. Zischke (SBN 105053)
*Andrew B. Sabey (SBN 160416)
Linda C. Klein (SBN 270016)
555 California Street, 10th Floor
San Francisco, CA 94104
Ph: 415.262.5100; Fax: 415.262.5199

The Sohagi Law Group, PLC
Margaret M. Sohagi (SBN 126336)
Philip A. Seymour (SBN 116606)
11999 San Vicente Blvd., Ste. 150
Los Angeles, CA 90049
Ph: 310.475.5700; Fax: 310.475.5707

San Diego Association of Governments
Julie D. Wiley (SBN 185699)
401 B Street, Ste. 800
San Diego, CA 92101
Ph: 619.699.1997; Fax: 619.699.1995

Attorneys for Defendants and Appellants
San Diego Association of Governments and
San Diego Association of Governments Board of Directors

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Los Angeles, CA 90049
Ph: 310.475.5700; Fax: 310.475.5707

San Diego Association of Governments
Julie D. Wiley (SBN 185699)
401 B Street, Ste. 800
San Diego, CA 92101
Ph: 619.699.1997; Fax: 619.699.1995

Attorneys for Defendants and Appellants
San Diego Association of Governments and
San Diego Association of Governments Board of Directors

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I. STATEMENT OF THE ISSUE

This Court has granted review on the following issue: "Must the environmental impact report for a regional transportation plan include an analysis of the plan's consistency with the greenhouse gas emission reduction goals reflected in Executive Order No. S-3-05 to comply with the California Environmental Quality Act (Pub. Resources Code, § 21000 *et seq.*)?"

II. INTRODUCTION

This Court is considering the environmental impact report ("EIR") prepared by the San Diego Association of Governments ("SANDAG") for its 2050 Regional Transportation Plan and Sustainable Communities Strategy (the "Plan"). The Plan serves both as a transportation plan under state and federal law, and as a Sustainable Communities Strategy under SB 375, one of California's ground-breaking laws seeking to address climate change. By law these plans must be updated every four years. The Plan was the latest in a series of transportation plans, and will soon be replaced by a new, updated plan.

As the Court's statement of the issue indicates, this case is not an argument about climate change. SANDAG takes climate change seriously, committing to do its fair share toward reducing greenhouse gas emissions that contribute to climate change; in fact SANDAG's Plan was the first sustainable communities strategy adopted.

Nor is this a case about disclosure of information. The record demonstrates that SANDAG went to great lengths to fully inform the public about the climate change implications of its Plan and provide the Board of Directors all the information it needed to take action on the Plan. SANDAG's EIR included an extensive analysis of greenhouse gas emissions with detailed and quantified disclosure of potential emissions through 2020, 2035, and 2050. The EIR compared emissions projected

under the Plan against the existing emission levels, as well as evaluating the projections against regional targets for emissions from vehicles established by the California Air Resources Board ("CARB"), and evaluated the Plan for consistency with the statewide greenhouse gas Scoping Plan established by CARB pursuant to AB 32 and with SANDAG's own Climate Action Strategy. SANDAG found that greenhouse gas impacts for 2035 and 2050 would be significant, as emissions would increase due to regional population, housing, and employment growth. SANDAG also found that the EIR's mitigation measures would reduce those emissions, but the measures could not guarantee that sufficient reductions would occur to reduce impacts to a less-than-significant level. Indeed, even though Governor Schwarzenegger's 2005 Executive Order S-03-05 (the "Executive Order" or "Order") is neither a law nor a recognized CEQA threshold of significance, SANDAG's EIR disclosed that the Plan and its mitigation measures could not guarantee that the region would meet the Order's statewide reduction goals.

Rather than disclosure, the crux of the question before the Court is whether SANDAG was required to analyze "consistency" with the Executive Order or use the Order as a threshold of significance to comply with CEQA. The answer is "no." The Order states a general objective of the governor, not a "plan" for greenhouse gas emission reduction and the state has not adopted a plan to implement the Order's 2050 goal. The Final EIR included a detailed, factual response to comments raising this issue, explaining why the EIR did not evaluate consistency with the Executive Order and instead used recognized thresholds to determine the significance of impacts. The EIR also explained that applying the Order as a threshold would not have altered the conclusion that impacts would be significant and unavoidable in 2035 and 2050.

The Court of Appeal majority found that the EIR's failure to analyze the Plan's consistency with the Executive Order was a prejudicial abuse of discretion. The dissenting opinion found the EIR's analysis consistent with CEQA and correctly observed there is no legal basis for requiring an EIR to analyze consistency with any executive order.

This Court has consistently held in California Environmental Quality Act ("CEQA")[1] cases that lead agencies have discretion to design EIRs, and that lead agency decisions regarding the scope and methodology of EIR analyses will be upheld if they are supported by substantial evidence. The Guidelines also reserve to lead agencies the discretion to determine which methodology to use to evaluate greenhouse gas emissions. (Guidelines, § 15064.4.) SANDAG's decision to use science-based thresholds rather than the Executive Order was explained and fully supported by substantial evidence. SANDAG complied with Guidelines section 15064.4 by basing its determination on scientific and factual data, using an accepted methodology to quantify emissions, and determining significance after considering and disclosing whether emissions would increase, whether emissions would be consistent with applicable thresholds, and whether emissions would be consistent with applicable plans.

No basis exists to set aside SANDAG's exercise of its discretion. If this Court applies the substantial evidence standard, as it should, there is ample evidence supporting SANDAG's determination that the Executive Order was neither an applicable greenhouse gas reduction plan nor a threshold of significance. If the Court treats this as a compliance with law issue, CEQA has express requirements for the analysis of greenhouse gas

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[1] CEQA is set forth at Public Resources Code sections 21100–21189.3. CEQA's implementing regulations, referred to in this brief as the "Guidelines" are set forth at California Code of Regulations, title 14, sections 15000–15387.

impact analysis, and SANDAG complied with all those requirements. Those requirements do not include analyzing the Executive Order in particular, or executive orders in general. Under the compliance with law standard, an EIR cannot be set aside for failure to meet a requirement that does not exist or does not apply. (Pub. Resources Code, § 21083.1.)

SANDAG's determinations regarding the Executive Order should be upheld for additional reasons as well. A long line of CEQA cases holds that lead agencies have discretion to design EIRs and determine EIR study methodology; rejecting that principle here would inject substantial uncertainty into the CEQA process. Further, executive orders are directives to the executive branch of state government. They are general policy statements, rather than rules or regulations. They are not laws adopted by the Legislature. Requiring local and regional agencies to comply with executive orders would violate separation of powers principles. As the dissent below noted, requiring the use of executive order consistency to determine greenhouse gas impacts is a "breathtaking" "insinuation of judicial power into the environmental planning process." (Dis. Opn. at p. 9.)

III. SUMMARY OF THE FACTS

A. Regional Transportation Planning

Regional transportation plans ("RTPs") are prepared by federally designated Metropolitan Planning Organizations ("MPOs") such as SANDAG or, in other areas, by Regional Transportation Planning Agencies created by state law. (AR 218:17688–17689.)

RTPs are governed by federal and state laws, including the California Transportation Commission's Regional Transportation Plan ("RTP Guidelines"). (See 23 U.S.C., § 134; 49 U.S.C., § 5303; 23 C.F.R., § 450.300 *et seq.*; Gov. Code, § 65080 *et seq.*; AR 218:17674–17927 [RTP Guidelines].) The RTP must address a time span extending twenty years

(or more) into the future. (Gov. Code, § 65080, subd. (b)(3).) The RTP must also remain flexible and is required by law to be comprehensively reviewed and updated every four years (or five years in federal air quality attainment areas) to address changing background conditions, such as population and economic changes, transportation funding realities, and transportation technologies. (Gov. Code, § 65080, subd. (d); AR 218:17712–17713.)

Fundamentally, the RTP is an investment plan for federal, state, and local transportation funds. (AR 218:17690–17692.) As the RTP Guidelines state, "[t]he purpose of the RTP is to establish regional goals, identify present and future needs, deficiencies and constraints, analyze potential solutions, estimate available funding, and propose investments." (AR 218:17690.) The RTP must be based on "a financial element that summarizes the cost of plan implementation constrained by a realistic projection of available revenues." (Gov. Code, § 65080, subds. (b)(1), (b)(4)(A); 23 C.F.R., § 450.322, subd. (f)(10); AR 218:17776–17785.) The RTP may not include projects that are not fully funded from current or anticipated revenue sources. (AR 218:17778–17780.) Short-term funding decisions are not governed directly by the RTP but by a Regional Transportation Improvement Program ("RTIP") and its state and federal counterparts which cover near-term (five year or four year) spending. (Gov. Code, §§ 14526, 14529 (state plan); § 65082; 23 C.F.R., §§ 450.324–450.330; AR 218:17703–17704.) While inclusion of a project in the RTP is a prerequisite for inclusion in the RTIP and eventual construction, inclusion in the RTP does not guarantee a project will be built.

Subject to these constraints, the RTP must provide for development and operation of an "integrated multimodal transportation system" that meets the current and long-term needs of all transportation sectors, from

commuters, pedestrians, and disadvantaged populations to private freight carriers. (23 C.F.R., § 450.322(b); Gov. Code, § 65080, subd. (b)(1); AR 218:17702.) The RTP must address all major types of transportation systems, including highways, local streets and roads, public transit, aviation, bicycle, and pedestrian facilities. (Gov. Code, § 65080, subd. (a); AR 218:17786–17794.) Factors considered when preparing RTPs include economic productivity, transportation efficiency, interconnectivity, safety and security, and environmental protection. (23 U.S.C., § 134, subd. (h); Gov. Code, § 65080, subd. (a); AR 218:17702.)

Because RTPs coordinate federal, state and local transportation planning and investment, RTP planning is inherently collaborative and requires extensive consultation and cooperation among affected federal and state planning and regulatory agencies, local governments and stakeholders such as environmental organizations, business representatives, Native American tribes, community organizations and the general public. (40 C.F.R., § 93.105; AR 218:17743–17757.) RTPs must consider and strive for consistency with adopted federal and state plans, city and county general plans, local coastal programs and other local plans, and must comply with federal and state Clean Air Act requirements. (Gov. Code, § 65080, subd. (a); AR 218:17703–17709; 218:17769–17772.)

B. California's Response to Climate Change

1. Early Actions

California's first action to address climate change occurred in 1988 with the enactment of AB 4420, directing the California Energy Commission to study potential global warming impacts and develop an inventory of greenhouse gas emissions. (Stats. 1988, ch. 1506; AR 319:26142.) In 2000 the Legislature established the California Climate Action Registry to allow public and private agencies to record greenhouse gas emissions in anticipation of a possible cap-and-trade program. (Stats.

2000, ch. 1018.) In 2002 the Legislature adopted AB 1493, generally known as the Pavley legislation, directing CARB to develop and adopt regulations to achieve "the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles." (Health & Saf. Code § 43018.5, subd. (a).)

2. Executive Order S-03-05

In June 2005, then-Governor Schwarzenegger issued the Executive Order. After declaring California's "leadership role in reducing greenhouse gas emissions," the Order states: "That the following greenhouse gas reduction targets are hereby established in 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." (AR 319:27049–27050.) The Order directs various state agencies to form what is now known as the Climate Action Team under the direction of the Cal-EPA Secretary. (AR 319:26144–26146, 27050.) Leading members of the Climate Action Team include CARB and the California Natural Resources Agency ("Resources Agency"). (*Id.*)

The Executive Order does not state a technical basis for its reduction targets, but they appear to be based on studies estimating that stabilization of atmospheric CO_2 levels at approximately 450 parts per million (ppm) would stabilize global temperature levels at approximately 2 degrees centigrade above pre-industrial levels. (AR 319:25810, 320:27791, 27805.) Pre-industrial CO_2 levels are estimated to have been 280 ppm; CO_2 levels in 2008 were approximately 385 ppm. (AR 311:25640; 319:27806.) Achievement of the targets would not avoid significant climate change effects, but could avoid more extreme climate change scenarios. (AR 320:27791.)

3. The Global Warming Solutions Act (AB 32) And SB 97

In 2006 the Legislature enacted the California Global Warming Solutions Act of 2006, known as "AB 32." (Health & Saf. Code, § 38500 *et seq.*) AB 32 directs CARB to prepare a scoping plan (the "Scoping Plan") to identify feasible and cost effective measures to reduce statewide greenhouse gas emissions to 1990 levels by 2020. (Health & Saf. Code, §§ 38550, 38561.)

In 2007 the Legislature addressed the role of CEQA in statewide climate planning by directing the Office of Planning and Research (OPR) to draft, and the Resources Agency to adopt, revisions to the state CEQA Guidelines specifically addressing analysis and mitigation of greenhouse gas emissions. (Stats. 2007, ch. 185, § 1 ("SB 97"); Pub. Resources Code, § 21083.05.) One result was Guidelines section 15064.4. (See AR 319:25846–25854 [Resources Agency Final Statement of Reasons for Regulatory Action].)

4. CARB Adopts The Scoping Plan Pursuant to AB 32

In 2008 CARB adopted the Scoping Plan required by AB 32. (AR 319:26120–26260.) The Scoping Plan constitutes the state's official strategy for combatting greenhouse gas emissions. To develop its reduction strategy, the Scoping Plan forecast "business as usual" greenhouse gas emissions for 2020, i.e., emissions expected to occur without major legislative or technological changes. (AR 319:26149–26152.) The Scoping Plan then assigns reduction goals, measured in millions of metric tons (MMT) of CO_2 equivalent (CO_2e) emissions below business-as-usual levels, to be achieved through various measures or programs.[2]

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[2] Greenhouse gases are comprised of a number of different gases, each of which contributes differently to climate change. (AR 8a:2554.) The units CO_2e (carbon dioxide equivalency) represent a quantity that describes, for a given mixture of greenhouse gases, the amount of CO_2 that would have the same global warming potential. (See *id.*)

(AR 319:26153–26209.) The Scoping Plan estimated that business-as-usual statewide emissions would reach 596 MMT CO_2e by 2020, and that an approximately 30 percent reduction in this amount would be necessary to return to 1990 levels. (AR 319:26149–26152.)

The Scoping Plan reduction targets will be accomplished primarily through state legislative and administrative measures. (AR 319:26154–26164.) Energy efficiency measures, such as green building and utility efficiency standards, are expected to account for 26.3 MMT in reductions. (AR 319:26179–26182.) Conversion to 33 percent renewable electrical energy sources will account for 21.3 MMT. (AR 319:26182–26184.) New vehicle fuel standards (Pavley legislation) and low-carbon fuel standards are expected to account for, respectively, 31.7 MMT and 15.0 MMT in reductions. (AR 319:26155, 26176–26179, 26184–26185, 26189–26190.) Regional transportation planning measures, the focus of the Sustainable Communities and Climate Protection Act of 2008 discussed below, are expected to account for 5 MMT, or slightly less than 3 percent of the total statewide reduction target. (AR 319:26185–26189.)

5. SB 375, Sustainable Communities Planning, And Development Of Regional Emissions Reduction Targets

In 2008 the Legislature enacted the Sustainable Communities and Climate Protection Act of 2008, known as "SB 375." SB 375 focuses on the role of regional transportation planning in reducing greenhouse gas emissions. SB 375 directed CARB to develop, by September 2010, specific numerical targets for emissions reduction from automobiles and light trucks for each regional transportation planning area. (Gov. Code, § 65080(b)(2)(A).) Recognizing that population growth rates, travel patterns and other relevant variables differ widely throughout the state, CARB adopted a system of per capita targets for reductions in emissions from automobile and light trucks expressed in percent change in average

pounds per person per day from 2005 emissions. (See AR 8a:2076.) The San Diego region was assigned targets of 7 percent reductions by 2020 and 13 percent reductions by 2035. (*Id.*) Targets assigned to other regions differ, accounting for regional variations. (CARB, Approved Regional Greenhouse Gas Emission Reduction Targets, available at http://www.arb.ca.gov/cc/sb375/final_targets.pdf.)

Each regional transportation planning agency must then, in its next regional transportation plan update, include a "sustainable communities strategy" ("SCS") that focuses on achieving the targets set by CARB for reducing greenhouse gas emissions from automobiles and light trucks. (Gov. Code, § 65080, subds. (b)(2)(B)–(N); AR 218:17807–17823; 319:26185–26186.) The SCS must be developed through an intensive public consultation process. (Gov. Code § 65080, subds. (b)(2)(E), (b)(2)(F).) The strategy must address, among other things, regional distribution of land uses and population, housing needs and protection of resource areas. (*Id.*, § 65080, subd. (b)(2)(B); AR 218:17808–17816.) And if possible, the strategy must match forecasted development in the region to transportation plans in a manner that will reduce greenhouse gas emissions to meet SB 375 targets. (Gov. Code § 65080, subds. (b)(2)(A), (b)(2)(B); AR 218:17807.)

The core means of achieving the reductions mandated by SB 375 is to use transportation investments to support "smart growth" planning, which strives to maximize building densities at locations served by public transit and locate residences near needed services and shopping to reduce automobile dependency. (AR 218:17819–17820, 17912–17914.) Other means to reduce automobile trips include transportation pricing and demand management measures, such as promoting carpooling. (AR 218:17820, 17911, 17913.) If the reduction targets set by CARB cannot be met, the MPO must prepare an advisory alternative planning strategy

("APS") that illustrates how the targets could be achieved with further changes to forecasted development patterns or transportation measures. (Gov. Code, § 65080, subd. (b)(2)(I); AR 218:17821.)[3]

Despite its goal of better integrating land use and transportation planning, SB 375 did not confer any new or different authority over land use planning and regulation on MPOs (or otherwise affect the local control traditionally vested in cities and counties under California law). (Gov. Code, § 65080, subd. (b)(2)(K); see *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782–783 [state planning law does not alter local control over zoning].) Instead, in preparing the SCS, an MPO must "utilize the most recent planning assumptions considering local general plans and other factors," i.e., must accept the existing land use plans and zoning of the area's local governments, or rely on reasonably expected changes to these plans, as the basis for transportation planning. (Gov. Code, § 65080, subd. (b)(2)(B); AR 218:17809–17810.) Government Code section 65080, subdivision (b)(2)(K)) provides:

> Neither a sustainable communities strategy nor an alternative planning strategy regulates the use of land. . . . Nothing in a sustainable communities strategy shall be interpreted as superseding the exercise of the land use authority of cities and counties within the region. . . . Nothing in this section shall require a city's or county's land use policies and regulations, including its general plan, to be consistent with the regional transportation plan or an alternative planning strategy.

Once adopted, a SCS must be reviewed by CARB. If CARB determines that the strategy will not meet its mandated reduction targets, it may reject

[3] An APS shows how the greenhouse gas reduction targets could be achieved unlinked from planning realities such as the constraints imposed by transportation revenue limitations and existing and forecasted local land use plans. The APS must be a separate document from the RTP, and has no legal effect on land use plans or regulations. (Gov. Code, § 65080, subds. (b)(2)(I)(v), (b)(2)(K).

the strategy and require the MPO to prepare a revised SCS or an alternative planning strategy. (Gov. Code, § 65080, subd. (b)(2)(J)(ii).)

C. SANDAG Prepares The 2050 Regional Transportation Plan And Sustainable Communities Strategy

1. SANDAG Prepares The Draft Plan

SANDAG began preparing the Plan in 2008. In lieu of the twenty-year planning period required by law, SANDAG chose to have the Plan address a forty-year period ending in 2050, so the Plan's expiration date would extend through the 2048 expiration of the *TransNet* Extension Ordinance and Expenditure Plan, a sales tax and spending measure approved by San Diego county voters in 2004. (AR 190:13237–13238; 320:28689–28738.)

The first planning step was to update the Regional Growth Forecast analyzing the population growth and development expected to occur in the San Diego region, based (as required by law) on planning assumptions reflected in the land use plans and policies of the region's local governments. (AR 8a:2075, 2835; 65:6181–6182.) This information was used to identify a range of planning options that would satisfy the fiscal and other legal requirements governing the Plan, including the objective of meeting the emission reduction targets of SB 375. (AR 8a:2075, 3331–3335; 8b:3788; 136:9279–9302.) After review of the available alternatives, the SANDAG Board directed SANDAG staff to commence preparation of the Draft Plan.

Preparation and subsequent review of the Draft Plan involved intensive consultation with and participation by local, state, and federal government agencies, stakeholder groups, and the general public, organized through a multi-year public involvement program consisting of meetings, public workshops, a dedicated website, community outreach activities, newsletters, surveys and questionnaires, and a formal comment process on

the Draft Plan released in April 2011. (See AR 3:013–014; 8a:2067–2068, 2076–2077, 2080; 159:10245–10282; 190a:13372–13382.) SANDAG received over 4,000 comments from more than 1,500 contributors on the Draft Plan. (AR 8a:2080.)

2. SANDAG Prepares The EIR For The Plan

"Scoping" for CEQA review of the Draft Plan began in April 2010. (AR 8a:2067–2068; 8b:3407–3411; see Guidelines, § 15083.) Following public workshops and receipt of comments, SANDAG began drafting the Draft Program EIR ("Draft EIR") in June 2010. (AR 8a:2067; 8b:3413–3617.) The 1,355-page Draft EIR (AR 7:225-1580) was released for a 55-day public review period on June 7, 2011. (AR 3:14; 8a:2068.) The Draft EIR analyzed greenhouse gas (GHG) impacts through the horizon year 2050 in 42 pages of text using three different significance criteria drawn from Guidelines section 15064.4. (AR 7:755–791, 1281–1286.) The Draft EIR noted the Order "sets a goal that statewide GHG emissions be reduced to 80 percent below 1990 levels by 2050." (AR 7:784–785.) Since "the EO does not constitute a 'plan' for GHG reduction, and no state plan has been adopted to achieve the 2050 goal," however, SANDAG chose not to use the Order as a significance threshold, consistent with the guidance of Guidelines section 15064.4. (*Id.*) Because greenhouse gas emissions were nevertheless found to be significant, directly and cumulatively, for the horizon years 2035 and 2050, the Draft EIR identified an array of mitigation measures. (AR 7:777–780, 789–790, 1284–1286.)

Beginning in June 2011, SANDAG conducted seven informational workshops and hearings on the Draft Plan and EIR. (AR 3:14; 8a:2068; 190a:13376–13377.) SANDAG received 22 comment letters on the Draft EIR, and provided 600 pages of detailed responses in the Final EIR. (AR 8a:2068; AR 8b:3762–4447.)

SANDAG's Final EIR spanned 2,481 pages, consisting of the revised Draft EIR text, public comments and responses, and technical appendices. (AR 3:14; 8a:1969–3400; 8b:3762–4448, 3405–3761.) The Final EIR contains some 45-pages of text analyzing direct and cumulative greenhouse gas impacts, including an expanded discussion of mitigation measures. (AR 8a:2553–2591, 3091–3096.) In response to public comments, the Final EIR also contains an extensive explanation of why the Executive Order was not used as a significance threshold, as well as elaboration on other aspects of the greenhouse gas impact analysis and mitigation issues. (AR 8b:3766–3770, 3817–3831, 4430–4440.) In addition, the Final EIR fully evaluated seven alternatives to the proposed Plan in over 200 pages of text (AR 8a:3131–3336), concluding no feasible alternative would achieve significantly greater reductions in greenhouse gas emissions (AR 8a:3317–3318).

3. SANDAG Certifies The EIR And Adopts The Plan

Following a public hearing on October 28, 2011, the SANDAG Board certified the EIR, adopted CEQA findings, a Statement of Overriding Considerations, and a Mitigation Monitoring and Reporting Program, and adopted the Plan. (AR 3:7–216; 190a:13043–190b:16835 [Plan].) The Board concurrently adopted a Clean Air Act conformity determination and found, based on the extensive technical analysis in the record, that the Plan met SB 375's greenhouse gas reduction targets. (AR 4:217–220; 8a:2578–2581; 8b:3717–3722; 190b:15978–15987.) The Plan will achieve a 14 percent per capita reduction in greenhouse gas emissions in 2020, which is double the state mandated target of 7 percent per capita reductions. The Plan also will achieve the state mandated 13 percent per capita reductions in 2035. (AR 8a:2578–2581.) If further emission reductions anticipated from pending state vehicle efficiency and fuel standards are factored in, per capita reductions will be 36 percent in 2020 and 44 percent in 2035, far in

excess of the mandated targets. (AR 8a:2579, 2581.) In November 2011, CARB reviewed the SCS and confirmed SANDAG's determination that the Plan would meet the SB 375 targets. (AR 329:29360–29361.)

The per capita greenhouse gas reductions resulting from the Plan will be achieved despite a Regional Growth Forecast that projects a 36 percent population increase from 3.2 million in 2010 to 4.4 million in 2050. (AR 8a:3043; 190b:13668–13673). To achieve the reductions, the Plan promotes compact, higher-density development located near public transit systems, and in already urbanized areas of the region, as envisioned by SB 375. (AR 190a:13064–13065, 13089–13113.) If the Plan is implemented by the region's many local authorities, more than 80 percent of new housing would be high density. (AR 190a:13094.) About 80 percent of all housing and 86 percent of all jobs would be located within the Urban Area Transit Strategy Study Area, where the greatest investments in public transit are being made. (AR 190a:13094; 190b:14220–14221.) The Plan also includes transportation system management and transportation demand strategies to increase efficiencies and reduce vehicle usage through incentive programs such as carpooling or free transit support services. (AR 190a:13334–13355, 13357–13370; see AR 8a:2102–2103; 190a:13166–13168.)

The Plan envisions total expenditures of $214 billion for transportation improvements and operations through 2050. (AR 190a:13246–13248.) As required by law, funding is allocated in accordance the legal constraints that govern various types of federal, state, and local transportation funds. (AR 8a:2101; 145:9906–9913 190a:13237–13246.) Approximately half of all funds ($106.6 billion) are programmed for public transit projects(AR 190a:13247), including expanded bus and commuter rail service, trolley lines, and streetcars/shuttles, and increased frequencies on trolleys and most bus routes (AR 8b:3786; 190a:13066–

13068, 13255–13272, 13284–13285). The bulk of highway expenditures—$31 billion or 62.5 percent of the total highway expenditures—are not designated for conventional highway improvements, but for new "managed lanes" to improve bus rapid transit service, promote carpools and vanpools, and generate revenue for transit improvements from fee-paying single-occupant vehicles. (AR 8a:2115–2118; 8b:3778; 190a:13247, 13262, 13273, 13280–13283, 13289.) Alternatives providing for increased or faster phasing of transit expenditures were considered, but found to be infeasible for various reasons, including failure to be based on reasonable revenue availability as required by 23 C.F.R. section 450.322, subdivision (b)(11). (AR 8a:3331–3336; 8b:3778, 3805–3811; 136:9279–9302.)

As the above description of the RTP process demonstrates, preparing an RTP is a complex process, made more complex in California by this state's requirements under SB 375 and CEQA. These multiple legal requirements cause SANDAG to have to invest years of planning into each four-year RTP cycle. SANDAG thus began planning for the next update to its plan only one year after adopting the Plan and EIR because public outreach, forecasts, modeling, and development of the Plan documents take three years and CEQA review takes minimally one more year. SANDAG intends to adopt its next RTP/SCS and EIR in fall 2015. Based on the four-year cycle, the Plan will be updated and reworked nine times between now and 2050, and with each revision it will be based on more advanced data and models, and incorporate new greenhouse gas reduction policies and technology.

D. Petitioners File Two Mandate Petitions

Two petitions for writs of mandate challenging certification of the EIR were filed on November 28, 2011, by CREED-21 and the Affordable Housing Association of San Diego County, and by the Cleveland National Forest Foundation ("CNFF"), Center for Biological Diversity and the Sierra

Club (collectively, "Petitioners"). (Joint Appendix ("JA") (1)1–13, (2)14–42.) The Attorney General was granted leave to intervene in the CNFF case on January 25, 2012. (JA (30)200–201.) The two cases were consolidated on April 9, 2012. (JA (34)251, (38)264–274.)

Briefing in the superior court, comprising seven briefs totaling some 225 pages, was completed in October 2012. (JA (46)342–(48)449, (51)457–(52)573, (64)773–(65)843.) After release of a tentative decision on November 16, 2012 (JA (70)985–995) and oral argument on November 30, 2012, the superior court issued a Ruling on Petitions for Writ of Mandate on December 3, 2012. (JA (75)1046–1057.) The superior court found the EIR inadequate because it was "impermissibly dismissive of Executive Order S-0305" and did not use the Order as a basis for its assessment of the significance of greenhouse gas impacts. (JA (75)1056–1057.) The superior court also concluded the EIR failed to adequately analyze mitigation measures for greenhouse gas impacts, and declined to rule on the other issues raised by Petitioners. (JA (75)1057.)

E. SANDAG Appeals The Superior Court Decision

SANDAG timely appealed the superior court's judgment on December 26, 2012. (JA (92)1140.) Notices of cross-appeals were subsequently filed by the CNFF and CREED-21 petitioners and by the Attorney General on January 23, 2013. (JA (95)1161, (96)1164.)

A divided court of appeal affirmed the superior court.[4] The majority concluded "SANDAG's decision to omit an analysis of the transportation plan's consistency with [the Order] did not reflect a reasonable, good faith effort at full disclosure and is not supported by substantial evidence

[4] The majority affirmed the superior court ruling concerning the adequacy of the EIR's discussion of greenhouse gas mitigation measures, and ruled in favor of Petitioners on various issues raised in their cross-appeal that had not been addressed below. (Opn. at pp. 20–27, 27–47.) These issues are not within the scope of review granted by this Court.

because SANDAG's decision ignored the Executive Order's role in shaping state climate policy." (Slip Opinion ("Opn.") at p. 14.)

Justice Benke disagreed with the majority on all points, finding the EIR's analysis complied with CEQA. (Dis. Opn. at pp. 1–30.) Justice Benke characterized the Executive Order as a broad gubernatorial policy statement that, if interpreted as law, lacks "an identifiable foundation" in the constitution or statute. (*Id.* at p. 3). Justice Benke also noted the majority did "profound harm" to Guidelines section 15064.4 and the discretion it affords lead agencies. (*Id.* at p. 8.) She concluded the majority's "insinuation of judicial power into the environmental planning process and usurping of legislative prerogative is breathtaking." (*Id.* at p. 9.)

The appellate court subsequently denied SANDAG's petition for rehearing. (Order Modifying Opinion and Denying Rehearing (Dec. 14, 2014).) This Court granted SANDAG's petition for review, with briefing limited as stated in Section I, above.

IV. STANDARD OF REVIEW

A. SANDAG'S EIR Should Be Evaluated Under The Longstanding Standards That Apply To All EIRs

This Court has set forth the legal standards for evaluating the adequacy of an EIR, and those standards should be applied here. The lead agency has discretion to design the EIR, and a court's role is not to "'pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document.'" (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1161 [citation omitted], quoting *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392.) The court may not set aside an agency's approval of an EIR on the ground "'that an opposite conclusion would have been equally or more

reasonable.'" (*In re Bay-Delta, supra*, 43 Cal.4th at p. 1162, quoting *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564.)

The court's inquiry in a CEQA case "'shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law or if the determination or decision is not supported by substantial evidence.'" (*Laurel Heights, supra*, 47 Cal.3d at p. 392, quoting Pub. Resources Code § 21168.5.) A court's review under these two "prongs" of the abuse of discretion standards differs significantly; the court determines "de novo whether the agency has employed the correct procedures" but accords "greater deference to the agency's substantive factual conclusions." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 ("*Vineyard*").) Thus, in evaluating an EIR for compliance with CEQA, "a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." (*Id.*)

B. The Substantial Evidence Standard of Review Applies In Determining Whether The SANDAG EIR Was Required To Evaluate Consistency With The Executive Order

This is not a case about *whether* an EIR must evaluate greenhouse gas emissions and climate change; this is a case about *how* the lead agency chooses to perform that analysis. Questions regarding the scope and methodology of an EIR's analysis of a required topic are substantial evidence questions. (E.g., *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 457 [determination of baseline for EIR impact analysis is primarily a factual assessment reviewed for substantial evidence]; *In re Bay-Delta, supra*, 43 Cal.4th at p. 1167 [determination whether proffered project alternatives meet project objectives reviewed under substantial evidence standard]; *Vineyard, supra*,

40 Cal.4th at p. 437 [analysis of near term availability of water upheld as supported by substantial evidence].)

Based on this Court's CEQA rulings, appellate courts have consistently held that questions of EIR methodology and significance criteria are substantial evidence questions. In *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, for example, the court noted that "where the agency includes the relevant information, but the *adequacy* of the information is disputed, the question is one of substantial evidence." (*Id.* at p. 12, citing *Vineyard, supra*, 40 Cal.4th at p. 435 and *Laurel Heights, supra*, 47 Cal.3d at p. 393.) Other appellate decisions confirm the substantial evidence standard applies to all issues concerning the scope of analysis, methodologies employed, and other discretionary determinations of the lead agency, as these are ultimately fact-based determinations. (E.g., *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 898–899; *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 898; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198.)

Notably, every court of appeal that has considered the standard of review for evaluating the scope or methodology of climate change or greenhouse gas analysis in an EIR has applied the substantial evidence test. (*Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 839–844 [applying the substantial evidence test to find significance conclusion not supported]; *North Coast Rivers Alliance v. Marin Mun. Water District Bd. of Directors* (2013) 216 Cal.App.4th 614, 653 [applying substantial evidence test and upholding EIR analysis]; *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 475–476 [applying substantial evidence and upholding analysis of sea level rise]; *Santa Clarita Org. for Planning the Environment v. City of Santa Clarita* (2011) 197

Cal.App.4th 1042, 1057–1059 [substantial evidence supported findings on greenhouse gas emission impacts]; see also *Citizens for Responsible Equitable Environmental Dev. v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 335–336 ("*CREED*") [upholding negative declaration against challenge to the threshold used to analyze greenhouse gas emissions, finding the "City properly exercised its discretion"].)[5]

These cases, as well as the Guidelines, make it clear that selecting analytical criteria for assessing greenhouse gas emission impacts involves agency discretion, informed by relevant technical and scientific understanding. (E.g., Guidelines, § 15064, subd. (b); *id.*, § 15064.4, subd. (a).)

C. If The Compliance With Law Standard Is Applied, The EIR Is Upheld Unless It Fails To Comply With An Express, Applicable Legal Requirement

The "compliance with law" prong of the abuse of discretion standard has traditionally been applied to questions of CEQA procedure, such as when an EIR must be prepared, whether an action is a "project" subject to CEQA, or whether analysis may be deferred. (See, e.g., *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 128 [timing]; *Muzzy Ranch Co. v. Solano County Airport Land Use Comm'n* (2007) 41 Cal.4th 372, 381–382 [whether an activity is a "project"]; *Vineyard, supra*, 40 Cal.4th at p. 447 [whether water analysis could tier from a future document].) The question here concerns *how* SANDAG should have analyzed climate change impacts, not *whether* or *when* that analysis was required.

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[5] The only appellate decision to apply the "compliance with law" test to an EIR's greenhouse gas emissions analysis is *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 95, which concerned an EIR that deferred the formulation of mitigation measures rather than the scope of the analysis or the methodology used in the analysis.

If this Court nevertheless determines that the "compliance with law" standard applies, then, under that standard, this Court's task is to enforce "'all legislatively mandated CEQA requirements.'" (*Vineyard*, *supra*, 40 Cal.4th at p. 435, quoting *Citizens of Goleta Valley*, *supra*, 52 Cal.3d at p. 564.) The task is not to consider whether additional requirements might be desirable. The Legislature intends for courts to not interpret CEQA or the Guidelines "in a manner which imposes procedural or substantive requirements beyond those explicitly stated" in CEQA or the Guidelines. (Pub. Resources Code, § 21083.1.) As this Court recently noted, the purpose of that provision is to limit judicial expansion of CEQA requirements and provide a "safe harbor" to agencies that comply with the explicit requirements of the law. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1107, petn. for rehearing pending, petn. filed March 18, 2015, time for decision on rehearing extended to May 29, 2015.) Under this standard, the Court could find that SANDAG abused its discretion by foregoing analysis of consistency with the Executive Order only if there were an "explicitly stated" requirement for such analysis in CEQA or the Guidelines. There is none.

V. ARGUMENT

Neither CEQA nor another law requires EIRs to analyze a project's consistency with the Executive Order. Nevertheless, the Court of Appeal majority held that notwithstanding the EIR's thorough analysis of greenhouse gas emission impacts under criteria consistent with Guidelines section 15064.4, the omission of analysis of "consistency" with the Executive Order "did not reflect a reasonable, good faith effort at full disclosure and is not supported by substantial evidence." (Opn. at p. 14.) According to the majority, the Executive Order "underpins all the state's current efforts to reduce greenhouse gas emissions," and has led to legislative enactments such as AB 32, which "validated and ratified the

Executive Order's overarching goal of ongoing emissions reductions," and SB 375. (*Id.* at p. 14.)

The majority reached its misguided conclusion based on a misunderstanding of CEQA and the role of executive orders. As the dissent noted, the record offers no grounds for questioning SANDAG's exercise of discretion or for questioning SANDAG's reliance on criteria consistent with Guidelines section 15064.4 for its impact analysis. (Dis. Opn. at pp. 8–10, 19–30.) Moreover, it is unclear how any regional agency could conduct a meaningful analysis of long term "consistency" with the Executive Order, as the Order specifies only a statewide target, and no branch of the state government has yet devised any actual plan for achieving these goals. (Dis. Opn. at pp. 6–8.) Further, the Executive Order cannot create binding standards on local or regional agencies and the Legislature has not passed any law either delegating authority to establish greenhouse gas emission reduction targets to the Governor or adopting the Order's 2050 targets. (*Id.* at pp. 2–5, 11–17.) Because SANDAG "properly exercised its discretion" under CEQA, its EIR fulfilled its function as an informational document and should be upheld. (*Id.* at pp. 24–30.)

A. CEQA And The Guidelines Do Not Require Analysis Of The Plan's Consistency With The Executive Order

Neither CEQA nor the Guidelines requires an EIR to address consistency with the Executive Order. Instead, under the Guidelines, agencies have discretion to choose how to analyze the significance of impacts and that discretion should be upheld if supported by substantial evidence. (Guidelines, § 15064, subd. (b); *id.*, § 15064.4, subd. (a).) In interpreting CEQA, courts give "the Guidelines great weight except where they are clearly unauthorized or erroneous." (*Neighbors for Smart Rail,*

supra, 57 Cal.4th at p. 448, fn. 4, citing *Vineyard*, *supra*, 40 Cal.4th at p. 428, fn. 5.)

1. Guidelines Section 15064.4 Sets Forth The Requirements For Analysis Of Greenhouse Gas Emissions Under CEQA And Excludes The Executive Order

Guidelines section 15064.4 sets forth specific requirements for analyzing the significance of greenhouse gas emissions and confirms agencies have discretion to choose significance criteria. These requirements were adopted pursuant to Public Resources Code section 21083.05, which was enacted in 2007 through SB 97 and requires OPR and the Resources Agency to "incorporate new information or criteria *established by the State Air Resources Board* pursuant to Division 25.5 (commencing with Section 38500) of the Health and Safety Code." (Pub. Resources Code § 21083.05 [emphasis added].) Although enacted and amended after the Order, section 21083.05 does not require the Guidelines to include information or criteria from the Order specifically or from the Governor generally. (*Id.*, § 21083.05 (2007) [original version]; *id.*, § 21083.05 (2012) [amended version].)

Guidelines section 15064.4 confirms lead agencies retain discretion to determine significance thresholds, as stated in Guidelines section 15064, adding that "[a] lead agency should make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project" using "a model or methodology" or relying "on a qualitative analysis or performance based standards," at its discretion. (Guidelines, § 15064.4, subd. (a).) To assess significance, Guidelines section 15064.4 advises lead agencies to consider several factors, including (1) "[t]he extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing setting," (2) "[w]hether the project emissions exceed a

threshold of significance that the *lead agency* determines applies to the project," and (3) "[t]he extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions" where those requirements "reduce or mitigate the project's incremental contribution of greenhouse gas emissions" and were "*adopted by the* relevant *public agency through a public review process*." (*Id.*, § 15064.4, subd. (b) [emphasis added].)

Guidelines section 15064.4 does not mention consistency with standards or policies adopted by the Governor. Guidelines section 15064.4, subdivision (b)(3), suggests agencies should use plans adopted by a "public agency" as thresholds; the Governor is not a "public agency" within the meaning of CEQA. (*Picayune Rancheria of Chukchansi Indians v. Brown* (2014) 229 Cal.App.4th 1416, 1422.) Nor do the Guidelines mention consistency with requirements set forth without a public review process, and that is a critical point. Guidelines section 15064.4, subdivision (b)(3), states that the relevant requirements to be considered "must be" adopted through a public review process, which would subject those requirements to public comment and appropriate administrative process, assuring the agency's decision had the appropriate checks and balances. The thresholds adopted by the Resources Agency under SB 97, and the Scoping Plan and SB 375 reduction targets adopted by CARB were subject to extensive public review and input. (AR 319:25837–25839 [summarizing public review process for the CEQA thresholds]; see *Ass'n of Irritated Residents v. Cal. Air Resources Bd.* (2012) 206 Cal.App.4th 1487, 1491–1491 [noting CARB's "extensive and rigorous" process for developing Scoping Plan].) In contrast, the adoption of an executive order by the Governor is not subject to any procedural safeguards.

2. SANDAG's EIR Fully Complied With Guidelines Section 15064.4, And Therefore SANDAG Is Entitled To "Safe Harbor" Under CEQA

SANDAG's analysis of the Plan's impact on greenhouse gas emissions complied with Guidelines section 15064.4. As required by that guideline, SANDAG made a good-faith effort, based to the extent possible on scientific and factual data, to estimate the amount of the Plan's greenhouse gas emissions. (AR 8a:2567–2578, 8b:3717–3722 [describing model assumptions and output], 8b:3818–3823 [explaining modeling for emission projections].)

SANDAG also properly exercised its discretion to choose three significance thresholds, each of which matches criteria set forth in Guidelines section 15064.4.

The first criterion follows the guidance of Guidelines section 15064.4, subdivision (b)(1) and is the traditional baseline analysis used in most CEQA evaluations, i.e., whether the Plan would increase greenhouse gas emissions from existing conditions. (See *Neighbors for Smart Rail*, *supra*, 57 Cal.4th at p. 447 [noting this is the typical method for an agency to make an assessment of a project's environmental impacts].) Significance was measured for three horizon years: 2020, 2035, and 2050. (AR 8a:2568–2578.) The analysis found that population growth and development under the Plan "would lead to an overall increase in GHG emissions" compared to 2010 (baseline) levels in 2035 (AR 8a:2575) and 2050 (AR 8a:2578). Specifically, in 2035, emissions with the Plan would be 30.18 MMT, or 1.33 MMT CO_2e greater than 2010 emissions (AR 8a:2575), and in 2050 emissions would be 33.65 MMT, or 4.8 MMT CO_2e greater than in 2010 (AR 8a:2578). The EIR evaluated mitigation measures and concluded that even with mitigation, the Plan's impact and contribution

to cumulative impacts would be significant and unavoidable.[6] (AR 8a:2588–2591, 3091–3096.)

The second significance threshold, "[c]onflict with SB 375 GHG emission reduction targets" (AR 8a:2567), follows the guidance of Guidelines section 15064.4, subdivision (b)(3), for lead agencies to analyze significance against applicable greenhouse gas reduction plans, and subdivision (b)(2), which suggests agencies analyze a project's emissions against thresholds they find apply to that project. Since the Plan includes the SCS for the San Diego metropolitan area, SANDAG's use of the thresholds established by CARB to apply to the SCS is reasonable. (See AR 8a:2563 [explaining the relationship between SB 375, the SCS, and the emission reductions required by CARB].) The analysis showed that the Plan would meet its SB 375 emission reduction goals from CARB. (AR 8a:2578–2581; see AR 329:29360–29361 [CARB's acceptance of the "determination that the SCS will, if implemented, achieve the 2020 and 2035 greenhouse gas emission reduction targets"].)

The third EIR significance criterion, "[c]onflict with applicable GHG reduction plans" (AR 8a:2567), addresses additional performance standard criteria recommended by Guidelines section 15064.4, subdivision (b)(3). Under this criterion, SANDAG addressed two greenhouse gas reduction plans that were applicable to the Plan: SANDAG's Climate Action Strategy and CARB's Scoping Plan. (AR 8a:2581–2588.) SANDAG found the Plan would be consistent with the Scoping Plan. (AR 8a:2581–2584.) Specifically, the EIR quantifies estimated 1990

[6] SANDAG exercised its discretion to approve the Plan despite its significant and unavoidable impacts. (AR 3:7–10, 87–92; cf. *San Diego Citizenry Group*, *supra*, 219 Cal.App.4th at p. 13 ["decision to approve the Project despite its significant environmental impacts is a discretionary policy decision . . . which will be upheld as long as it is based on findings of overriding considerations that are supported by substantial evidence"].)

emissions for the region for both land use and transportation sectors (11.59 MMT for land use, 13.52 MMT for transportation, for a total of 25.11 MMT), and compares them to projected emissions under the Plan. (*Id.*) Emissions would be above the 1990 target for land use and below the 1990 target for transportation, but with additional statewide reduction measures whose regional effects could not be quantified, the EIR concludes that the Plan will not impede implementation of the Scoping Plan. (AR 8a:2584–2585.)

SANDAG also found the Plan would be consist with SANDAG's Climate Action Strategy in 2020, 2035, and 2050. (AR 8a:2582–2588). The Climate Action Strategy does not contain quantitative targets, but was prepared to "provide[] a 'toolkit' for local governments to consider using when updating general plans," as well as provided "the basis for many of the policies listed in the [Plan]." (AR 8a:2566; see 216:17616–17672 [Climate Action Strategy].) The Plan "aligned with the policies outlined in the [Climate Action Strategy]," including focusing "on transit and compact development near transit centers." (AR 8a:2588.)

In short, consistent with the requirements of Guidelines section 15064.4 (as well as all other CEQA requirements), the EIR provides an informative and quantitative picture of the Plan's reasonably foreseeable greenhouse gas emissions in 2020, 2035, and 2050, and the Plan's consistency with applicable regulations and plans, i.e., CARB's targets under SB 375, the Scoping Plan, and SANDAG's Climate Action Strategy.

Because the EIR meets all of CEQA's and the Guidelines' explicit requirements, SANDAG is entitled to the "safe harbor" provided by Public Resources Code section 21083.1. (*Berkeley Hillside*, *supra*, 60 Cal.4th at p. 1107 [internal quotation marks omitted].) CEQA specifically advises "courts, consistent with generally accepted rules of statutory interpretation, [to] not interpret this division or the state guidelines adopted pursuant to

Section 21083 in a manner which imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines." (Pub. Resources Code, § 21083.1.) The Legislature enacted section 21083.1 to "'limit judicial expansion of CEQA requirements' and to 'reduce the uncertainty and litigation risks facing local governments and project applicants by providing a safe harbor to local entities and developers who comply with the explicit requirements of the law.'" (*Berkeley Hillside*, *supra*, 60 Cal.4th at p. 1107 [internal quotation marks omitted].) Thus imputing a requirement that EIRs analyze consistency with the Order would itself violate CEQA.

B. SANDAG's Determinations Regarding Which Thresholds To Use Are Supported By Substantial Evidence

There is no basis for concluding, as the majority below did, that no substantial evidence supports SANDAG's analysis of greenhouse gas impacts. (Opn. at p. 27.) SANDAG's analysis specifically follows criteria set forth in Guidelines section 15064.4 and is supported by substantial evidence in the record. "Substantial evidence" is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines, § 15384, subd. (a).)

In adopting Guidelines section 15064.4, the Resources Agency employed its scientific and technical expertise concerning appropriate methodologies for evaluating environmental impacts under CEQA, which is substantial evidence of the appropriateness of the guidance. (319:25846–25855 [Resources Agency Final Statement of Reasons for Regulatory Action].) SANDAG's choice of significance criteria also included the targets adopted by CARB under AB 32 and SB 375, which are likewise supported by substantial evidence. (See AR 319:26142–26232 [Scoping Plan], 26272–26281; see *Recommendations of the Regional Targets*

Advisory Committee Pursuant to Senate Bill 375, a Report to CARB (Sept. 29, 2009), available at http://www.arb.ca.gov/cc/sb375/rtac/report/092909/finalreport.pdf; see also 328:29359–29361 [CARB's acceptance of the Plan].) Similarly, the Climate Action Strategy is supported by substantial evidence. (AR 76:6562–6630.)

SANDAG employed its scientific and technical expertise when estimating the Plan's emissions and choosing to rely on the traditional baseline analysis, as well as targets established by CARB and its Climate Action Strategy, as significance criteria. (See, e.g., AR 8b:3717–3722 [technical basis for the greenhouse gas emissions reported in the EIR], 87:7192–7195 [staff's report regarding scenario testing under SB 375]; 225:17976–18049 [SANDAG's 2050 regional growth forecast and model projections].) Lead agencies are normally permitted to rely on the opinions of their qualified professional staff, retained experts on technical matters, and the opinions of the qualified staff of an agency with expertise in the subject area, such as CARB. (*Porterville Citizens for Responsible Hillside Dev. v. City of Porterville* (2007) 157 Cal.App.4th 885, 907; *National Parks & Conservation Ass'n v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1361–1363.) These opinions constitute substantial evidence. (*Porterville Citizens for Responsible Hillside Dev., supra*, 157 Cal.App.4th at p. 901.) There is no reason to create a different rule for the analysis of greenhouse gas emissions.

No one claims SANDAG misapplied the Guidelines or made significant factual errors in analyzing impacts in terms of existing baseline conditions or significance criteria derived from CARB's Scoping Plan, SANDAG's own Climate Action Strategy, and targets calculated by CARB pursuant to SB 375 for SANDAG's Sustainable Communities Strategy. (See 8b:3766–3770.) Because SANDAG scrupulously followed Guidelines section 15064.4 in selecting thresholds supported by substantial evidence,

its choice of thresholds should be upheld. (See *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1072 [upholding agency's threshold because it was supported by substantial evidence].)

SANDAG's decision to not rely on the Executive Order as a threshold of significance is equally supported by substantial evidence, including the almost unanimous weight of expert opinion from other sources, including the Resources Agency and CARB. Through Guidelines section 15064.4, subdivision (b)(3), the Resources Agency implicitly rejected use of the Executive Order's broad, statewide targets as being technically sound for CEQA analysis. Instead, the Resources Agency advised lead agencies to use consistency criteria drawn from "regulations or requirements" found in state, regional, or local plans for greenhouse gas emissions reductions that have been vetted through a public review process and contain identifiable standards for reducing "the project's incremental contribution of greenhouse gas emissions." (Guidelines, § 15064.4, subd. (b)(3); see AR 319:25846–25854.) Indeed, the Resources Agency suggested the use of greenhouse gas reduction plans or goals, such as the broad state-wide targets of the Order, "that are purely aspirational (i.e., those that include only unenforceable goals without mandatory reduction measures)," as CEQA significance criterion would be inappropriate. (AR 319:25842–25843.)

Other agencies with expertise in greenhouse gas emissions and analytical methodologies also have rejected use of the Executive Order as a CEQA threshold. CARB, in its draft guidelines for CEQA review, has not recommended use of the Order as a standard. (AR 320:27783–27804.) While CARB has not formally adopted CEQA guidelines, the expert opinion of CARB staff reflected in the draft guidelines provides substantial evidence supporting SANDAG's decision to not rely on the Order. Notably, the Resources Agency and CARB are not only agencies with

relevant technical expertise, but also members of the Climate Action Team. Had they considered consistency analysis based on the Executive Order a technically or legally sound method of measuring CEQA impacts, or believed that the Order was intended for such use, they would have recommended this type of analysis. They chose not to do so.

One respected technical association, the California Air Pollution Control Officers Association ("CAPCOA"), issued an advisory report discussing the possibility of using the Executive Order's reduction targets as CEQA significance criteria. (AR 319:26320–26326.) CAPCOA ultimately concluded, however, that such an approach would likely be problematic due to the substantial uncertainties involved in forecasting long-term future emissions and the effects of future reduction strategies. (AR 319:26324–26325.) CAPCOA also noted that the Order sets "emission goals at milestone years" and is "unclear how California will progress to these goals in non-milestone years." (AR 319:26322.) These comments correctly anticipate the practical problems discussed below that would arise from any attempt to use the Executive Order as a significance standard for CEQA analysis.

In sum, ample substantial evidence supports SANDAG's choice of significance criteria and decision to forego analysis of "consistency" with the Order in its EIR. Because SANDAG's decisions are supported by substantial evidence, they should be upheld.

C. Mandating Analysis Of The Executive Order Would Conflict With The Wide Discretion CEQA Gives Agencies To Determine How To Evaluate Environmental Impacts

As discussed above, neither CEQA nor the Guidelines requires agencies to analyze whether a project's greenhouse gas emissions are consistent with the Order. If such a consistency analysis were required, however, it would be functionally equivalent to a threshold of significance.

(Cf. Guidelines, § 15064.4, subd. (b)(3) [an example of a threshold of significance is determining consistency with plan adopted by an agency].)[7] Yet the Guidelines explicitly state that agencies have discretion to choose their own thresholds. (*Id.*, § 15064, subds. (b), (d); *id.*, § 15064.4, subd. (a).)

Several courts have upheld the discretion afforded to lead agencies by Guidelines section 15064. (See, e.g., *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 716–717 [upholding county's discretion to use its own standard of significance to evaluate impacts to agricultural land]; *Save Cuyama Valley, supra,* 213 Cal.App.4th at p. 1068 [upholding the county's choice to use a project specific threshold to determine the significance of hydrology impacts].)

Importantly, courts also have upheld agencies' discretion to choose significance criteria to evaluate greenhouse gas emissions. For example, *CREED, supra,* 197 Cal.App.4th 327, found under Guidelines section 15064.4, "lead agencies are allowed to decide what threshold of significance [they] will apply to a project" and held that the city "properly exercised its discretion to utilize compliance with AB 32 as the threshold." (*Id.* at p. 336.) *CREED* rejected the petitioner's argument that the city should have used thresholds found in a document titled "On-Road Transportation Report" published by San Diego County because the city "had the discretion to not adopt this different threshold." (*Id.* at p. 337.)

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[7] Although the majority opinion calls the analysis it requires an analysis of "consistency" with the Executive Order, Petitioners have always argued that the Executive Order's 2050 target should be treated as a significance criterion. As the dissent notes, the practical effect of requiring analysis of "consistency" with the Executive Order as the majority interprets it is to make the Order's targets a mandatory significance criterion. (Dis. Opn. at pp. 1–5.)

North Coast Rivers Alliance, *supra*, also upheld an agency's discretion to choose its thresholds to measure the significance of greenhouse gas emissions. (216 Cal.App.4th at pp. 650–652.) There, the court found the water district's decision to use the greenhouse gas emissions reduction goal of the county where the project was located "more than satisfied the requirements of CEQA." (*Id.* at pp. 651–652.)

Other courts have likewise upheld agencies' discretion to choose how to analyze the significance of greenhouse gas emissions. (See, e.g., *Citizens Against Airport Pollution v. City of San Jose* (2014) 227 Cal.App.4th 788, 807 ["lead agencies retain the discretion to determine the significance of greenhouse gas 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 greenhouse gas emissions resulting from a project'"]; *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 841 [use of Assembly Bill 32's reduction targets proper]; *Utility Consumers' Action Network v. Public Utilities Comm'n* (2010) 187 Cal.App.4th 688, 702 [upholding the CPUC's reliance on estimates from CARB for its greenhouse gas emission analysis].)

Tellingly, the analysis *North Coast Rivers Alliance* found to "more than satisfy CEQA" is strikingly similar to that performed by SANDAG. Each agency explained the connection between climate change and greenhouse gas emissions, listed the prominent greenhouse gasses, and explained the sources of human-made greenhouse gasses that are of the greatest concern. (Compare *North Coast Rivers Alliance*, *supra*, 216 Cal.App.4th at p. 650 to AR 8a:2553–2556.) Each agency also explained AB 32 and noted other applicable or draft plans setting greenhouse gas thresholds of significance. (Compare *North Coast Rivers Alliance*, *supra*, 216 Cal.App.4th at p. 651 to AR 8a:2561–2562, 2563, 2566.) Then each agency estimated the project's emissions and compared these emissions to

existing conditions, as well as examining if the project would interfere with reduction targets established by various plans. (Compare *North Coast Rivers Alliance*, *supra*, 216 Cal.App.4th at p. 652 to AR 8a:2567–2591.)

Like the analysis in *North Coast Rivers Alliance*, SANDAG's analysis, based on its significance criteria, more than satisfied CEQA. A different holding would conflict with existing case law confirming that agencies have discretion to choose significance criteria.

D. Requiring Analysis Of Consistency With The Executive Order Would Inject Excessive Speculation And Uncertainty Into The CEQA Process

Agencies and courts need a standard for judging the adequacy of EIRs. As discussed above, these standards are set forth in CEQA and the Guidelines, neither of which require analysis of the Order. Introducing a new requirement to analyze the Order would inject unnecessary uncertainty into the CEQA process without the benefit of better information of a project's environmental impacts.

As the dissent recognized, the first problem with requiring analysis of consistency with the Executive Order is that there is no plan with ascertainable regional reductions for 2050 stemming from the Order with which to be consistent. (Dis. Opn. at pp. 6–8.) Unlike the Scoping Plan or the thresholds established by CARB under SB 375, the Order includes no implementation plan or procedures. The Governor did not break the 2050 target down by sector, for example, by requiring a three percent reduction from local transportation planning measures, or set forth another way to account for emission reductions. (Cf. AR 319:26154–26155 [Scoping Plan's detailed accounting].) This contrasts with CARB's targets under AB 32, which specifies reduction targets expected from each sector that emits greenhouse gases, and under SB 375, which accounts for regional variability.

It would be practically impossible for agencies to be accountable for accomplishing the Order's statewide goal for 2050 when the state has not figured out how to allocate that responsibility among its regions and the various emitters in those regions. Calculating any locality or region's appropriate share of statewide emission reductions depends on a host of variables and technical considerations, including the regulating authority of the local or regional agency. (Dis. Opn. at pp. 6–8.) For example, in determining the SB 375 regional targets, CARB, after much analysis, adopted a range from 0 percent for some regions through 16 percent in 2035 for the Sacramento region. (See CARB, Approved Regional Greenhouse Gas Emission Reduction Targets, *supra*, at p. 10.) Because the Order omits information on how its goals should be accomplished, each agency would struggle to figure it out, producing conflicting conclusions regarding the appropriate analysis. (See Dis. Opn. at p. 9 [discussing the inevitable chaos that would result if each of the six appellate districts, and multiple divisions within many of them, instructed the 18 MPOs "regarding whether a 'consistency analysis' is required based on, for example, the Executive Order, and, if so, what it should contain"].)

Moreover, even for long-range plans such as the Plan, the result of any near-term analysis of consistency with the Order's 2050 target would be speculative and potentially misleading for several reasons. First, state mandates could change as additional scientific information on climate change and technical information on feasible means of reducing greenhouse gas emissions become available. (Dis. Opn. at p. 5; see also *In re Bay-Delta*, *supra*, 43 Cal. 4th at pp. 1172–1173 [long range plans need to remain "flexible as they are subject to changing conditions, such as . . . new or revised environmental restrictions"].) Second, there is an inherent

incompatibility between measuring local or regional impacts against broad statewide standards.[8]

Perhaps most important, there are presently no reliable means of forecasting how future technological developments or state legislative actions to reduce greenhouse gas emissions may affect future emissions in any one planning jurisdiction. As this Court has recognized, long-range forecasting is always problematic: "However sophisticated and well-designed a model is, its product carries the inherent uncertainty of every long-term prediction, uncertainty that tends to increase with the period of projection." (*Neighbors for Smart Rail, supra,* 57 Cal.4th at p. 455.) Such uncertainty increases geometrically when the subject matter is as complex as greenhouse gas emissions and reduction strategies. Lead agencies can only guess how future technical developments or state (or federal or international) actions may affect emissions from the myriad of sources beyond their control. CEQA does not require this kind of speculation. (Guidelines, § 15145; see *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 940–941 [holding that prior to adoption of the Scoping Plan, "there were no legal or regulatory standards for determining whether a given project's greenhouse gas emissions should be considered cumulatively significant" and in their absence, "the City reasonably concluded that the impact was too speculative to determine"].)

A lead agency can, as SANDAG did, forecast emission trends based on current trends and legislation. (AR 8b:4436; see AR 8b:3821–3823

[8] Unlike the Order, SB 375 recognizes that RTPs address only transportation—no other emitting sectors such as electricity, natural gas, and industry. Although MPOs can work toward reducing greenhouse gas emissions through various means, they cannot control the fact that even if GHG levels are falling on a per capita basis, levels for the state overall could continue to rise due to population growth and actions of other GHG-producing sectors.

[discussing SANDAG's "three sets of conservative modeling assumptions" taken to avoid overstating the benefits of the Plan in light of future uncertainties].) Such projections, however, are not likely to remain accurate. While such projections may result in a crude worst case analysis, CEQA does not require speculative analysis that will almost certainly overstate future emissions levels any more than it permits understating future emissions. (See *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1060–1061 [EIRs are not required to speculate, and lead agencies are not required to foresee the unforeseeable or quantify the unquantifiable].)

Accordingly, adding a requirement that SANDAG analyze the Plan's consistency with the Order would not benefit the public's understanding of the Plan's potential to increase greenhouse gas emissions. Such a requirement is far more likely to lead to guesswork and speculative predictions that are themselves misleading.

E. No Other Law Or Regulation Requires EIRs To Consider Consistency With The Executive Order

Holding that an EIR must analyze consistency with an executive order would break new ground. CEQA does not require an examination of consistency with executive orders. The Guidelines indicate the consideration of consistency with applicable *regulations* or with relevant *regional* or *local plans* may be relevant in assessing the significance of a project's environmental effects. (See, e.g., Guidelines, § 15125, subd. (d); *id.*, § 15064.4, subd. (b)(3).) But the Executive Order does not fall within these categories. Instead, it is a statement of the Governor's aspirations, which can spur the Legislature to adopt laws that effectuate them to the extent the Legislature deems appropriate. The Order is undoubtedly a strong policy statement by the Governor, but its long-range goals for reducing greenhouse gas emissions have never been enacted into law or

adopted as a CEQA measuring standard by the Legislature or state agencies (including members of the Climate Action Team) charged with addressing climate change.

Because no law requires EIRs to analyze consistency with the Order, introducing such a requirement contravenes CEQA, and, as discussed above, would be particularly inconsistent with the discretion that CEQA grants agencies to choose thresholds under Guidelines sections 15064 and 15064.4, and the warning against judicial enlargement in Public Resources Code section 21083.1. Further, as discussed below, imposing such a requirement subverts the traditional separation of the executive, judicial, and legislative branches recognized in this Court's CEQA jurisprudence. (See *Western States Petroleum Ass'n v. Superior Court* (1995) 9 Cal.4th 559, 572 ["[B]ecause the Legislature has delegated quasi-legislative authority to [C]ARB, excessive judicial interference with [C]ARB's quasi-legislative actions would conflict with the well-settled principle that the legislative branch is entitled to deference from the courts because of the constitutional separation of powers" (internal citations omitted).].)

1. The Order Is Not Law Binding On Regional Agencies

The California Constitution provides "[t]he powers of state government are legislative, executive, and judicial. The persons charged with the exercise of one power may not exercise either of the others except as permitted by the Constitution." (Cal. Const., art. III, § 3.) This constitutional section encapsulates the principle of separation of powers between each branch of government.

The power to make law is vested generally in the Legislature, with the people reserving to themselves the power of initiative and referendum. (Cal. Const., art. IV, § 1.) The Governor does not have the authority to legislate. (75 Ops.Cal.Atty.Gen. 263 (1992).) Instead, the executive power of the Governor is to "see to it that the law is faithfully executed." (*Id.*;

Cal. Const., art. V, § 1.) The Governor's only authority over legislation is to approve it. When a bill is presented to the Governor after passing through the Legislature, he may approve it by signing or "may veto it by returning it with any objections to the house of origin." (Cal. Const., art. IV, § 10.) Because the Governor "is not empowered, by executive order or otherwise," to legislate, executive orders are not law and cannot alter or modify laws. (75 Ops.Cal.Atty.Gen. 263 (1992); see *Lukens v. Nye* (1909) 156 Cal. 498, 501 ["As an executive officer, [the Governor] is forbidden to exercise any legislative power or function except as in the Constitution expressly provided."]; Center for California Studies, et al., and Governor's Office of Planning and Research, *Guide to the California State Executive Branch* (Dec. 1998, rev. Oct. 2004) at p. 8, available at www.csus.edu/ calst/government_affairs/reports/guide_to_the_ca_state_executive_branch. pdf ["The Governor is limited in his or her use of executive orders, as they may not interfere or conflict with the legislative domain. Consequently, the Governor may not execute an executive order that amends the effect of existing legislation."].)

Executive Orders are "directives, communicated verbally or by formal written order, to subordinate executive officers concerning the enforcement of law." (63 Ops.Cal.Atty.Gen. 583 (1980).) These directives are binding on only executive officers and agencies. (*Id.*; *Lukens*, *supra*, 156 Cal. at p. 504; see 75 Ops.Cal.Atty.Gen. 263 (1992).) As such, even as a directive, the Order is not binding as to SANDAG, a regional transportation planning agency. Finding otherwise ignores the constitutionally derived principle of separation of powers and authorizes the Governor to invade the Legislature's domain by making law through executive orders.

Finding that the Executive Order is binding as to SANDAG also ignores this Court's prior holding that only the Legislature can legislate.

(See *Prof'l Engineers in Cal. Gov't v. Schwarzenegger* (2010) 50 Cal.4th 989, 1015 ("*Professional Engineers*").) *Professional Engineers* evaluated an executive order that purported to implement a mandatory furlough program during the state's fiscal crisis. (*Id.*) The Governor argued that his order had the force of law, but "fail[ed] to cite any judicial decision or other supporting authority holding or suggesting that the power under the California Constitution to establish or revise the terms" of a legislative enactment resides in the Governor. (*Id.*) The reason the Governor could not cite such authority is because it is "well established [that] . . . it is *the Legislature*, rather than the Governor, that generally possesses the ultimate authority to establish or revise" legislative enactments. (*Id.*)

According to this Court, the only authority that the Governor or an executive branch entity would be entitled to exercise must "emanate[] from the Legislature's delegation of a portion of its legislative authority to such executive officials or entities through statutory enactments." (*Id.*; see *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80; *Santa Ana Hospital Medical Center v. Belshe* (1997) 56 Cal.App.4th 819, 836.) But the Legislature had not delegated its power over state employee compensation to the Governor. (*Prof'l Engineers, supra*, 50 Cal.4th at pp. 1034–1035.) Because the relevant statutory provisions made clear the Legislature's "special interest in retaining . . . [the] ultimate control over the salary and wages of such employees," the Governor's executive order could not create law pertaining to that topic. (*Id.* at p. 1024.)

Like the statutes concerning state employee compensation, the statutes concerning greenhouse gas emissions do not delegate authority to the Governor to legislate in that realm. Through its enactment of AB 32 and SB 375 (as well as other laws related to greenhouse gas emissions) the Legislature has instead demonstrated a "special interest in retaining" control over greenhouse gas reduction and climate change policy by placing

authority in CARB to enact greenhouse gas emission reduction goals and targets. (Dis. Opn. at pp. 3–4, 12–17.)

2. AB 32 Did Not Ratify The Executive Order

Shortly after the Executive Order was issued, the Legislature began the process that resulted in AB 32. (Health & Saf. Code, § 38501 et seq.; see Assem. Bill No. 32 (2005–2006 Reg. Sess.).) AB 32 did not ratify the Executive Order, but instead continued the Legislature's policy to have an expert agency, CARB, determine appropriate emission reduction goals and targets. (E.g., Health & Saf. Code, § 43018.5, subd. (a) [AB 1493, enacted in 2002, directs CARB to establish regulation to reduce greenhouse gas emissions]; *Ass'n of Irritated Residents v. California Air Resources Bd.* (2012) 206 Cal.App.4th 1487, 1490 [noting AB 32 designated CARB as the agency in charge of "monitoring and regulating sources of emissions of greenhouse gases"]; see Dis. Opn. at p. 12 [citing the Legislatures pre-AB 32 legislation of greenhouse gases and directives to CARB].)

AB 32 directed CARB to develop a "scoping plan . . . for achieving the maximum technologically feasible and cost-effective reductions in greenhouse gas emissions from sources . . . of greenhouse gases." (Health & Saf. Code, § 38561, subd. (a).) As part of that plan, CARB needed to "coordinate with state agencies" as well as other stakeholders to "design emissions reduction measures." (*Id.*, § 38501, subds. (f), (g).) The Legislature gave CARB until January 1, 2008, to "determine what the statewide greenhouse gas emissions level was in 1990, and approve in a public hearing, a statewide greenhouse gas emissions limit that is equivalent to that level, to be achieved by 2020." (*Id.*, § 38550; see AR 319:26120–26280 [Scoping Plan adopted by CARB pursuant to AB 32].)

AB 32 did not direct CARB to adopt targets for 2050 or otherwise ratify the Executive Order's 2050 targets. (See *Gikas v. Zolin* (1993) 6

Cal.4th 841, 852 [To the extent a statute addresses one subject but not another, courts assume that choice was deliberate. "The expression of some things in a statute necessarily means the exclusion of other things not expressed."].) While the Legislature required state agencies other than CARB to "consider and implement strategies to reduce their greenhouse gas emissions" in addition to complying with "other applicable federal, state, or local laws or regulations, including state air and water quality requirements, and other requirements for protecting public health or the environment" (Health & Saf. Code, § 38592), it did not direct those agencies to consider and implement the Executive Order.

Although not mentioned in the list of applicable environmental requirements for state agencies, the Legislature was well aware of the Order when drafting AB 32, as indicated by AB 32's reference to it. Specifically, AB 32 requires that "the Climate Action Team established by the Governor to coordinate the efforts set forth under Executive Order S-3-05 continue its role in coordinating overall climate policy." (Health & Saf. Code, § 38501, subd. (i).) But rather than adopt the Governor's reduction targets, the Legislature directed CARB to establish targets for 2020 (*id.*, § 38562) and then to "make recommendations to the Governor and the Legislature on how to continue reductions of greenhouse gas emissions beyond 2020" (*id.*, § 38551, subd. (c)). If the Legislature had intended to adopt the Order's 2050 target as law, it would not have needed to direct CARB to make recommendations regarding appropriate targets beyond 2020. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1118 [refusing to interpret one subsection of a statute in a way that made other subsections surplusage].)

Moreover, if AB 32 had adopted the Order's 2050 target, then the Legislature would not have needed to draft additional legislation to require the California Department Transportation of to assess how the state will

achieve the Order's 2050 goal. (See Gov. Code, § 65072.2 [directing the agency to address AB 32's target "*and* 80 percent below 1990 levels by 2050" (emphasis added)].) That the Legislature felt compelled to do so indicates that the Executive Order's 2050 target was not made binding on agencies by AB 32.

3. SB 375 Did Not Ratify The Executive Order

In 2008, the Legislature adopted SB 375 to build on AB 32. (JA (56)653.)[9] SB 375 also did not ratify the Executive Order's 2050 target or delegate to the Governor the authority to set that target.

Under SB 375, CARB had to develop, by September 2010, specific numerical targets for the reduction of greenhouse gas emissions from automobiles and light trucks for each regional transportation planning area in 2020 and 2035. (Gov. Code, § 65080, subd. (b)(2)(A).) Each regional transportation planning agency must then, in its next regional transportation plan update, include an SCS that meets numerous requirements, including the emission reduction targets set by CARB. (*Id.*, § 65080, subds. (b)(2)(B)–(N).) In general, CARB is required to update the regional greenhouse gas emission reduction targets every eight years, consistent with each MPO's timeframe for updating its regional transportation plan under federal law, until 2050. (*Id.*, § 65080, subd. (b)(2)(A)(iv).) When creating these future targets, the Legislature directed CARB to consider greenhouse gas emission reductions "that will be achieved by improved vehicle emission standards, changes in fuel composition, and other

[9] In the legislative history of SB 375, the Legislature described AB 32 as requiring CARB "to establish a statewide greenhouse gas emissions limit such that by 2020 California reduces its greenhouse gas emissions to the level they were in 1990." (JA (56)653.) This description highlights the Legislature's choice not to enact Governor Schwarzenegger's 2050 GHG emission reduction targets, but instead leave it to CARB to adopt future targets. (*Id.*)

measures *it* has approved that will reduce greenhouse gas emissions in the affected regions." (*Id.*, § 65080, subd. (b)(2)(A)(iii) [emphasis added].)

Notably, SB 375 does not mention the Executive Order even once. And the only mention of 2050 in SB 375 is in a section that discusses CARB, not the Governor, setting future emission targets, indicating CARB's targets are the ones binding on metropolitan planning organizations such as SANDAG. (Gov. Code, § 65080, subd. (b)(2)(A)(iv).) Presumably, if the Legislature intended to tie SB 375 compliance with the Governor's 2050 target or the Order's goal of a decreasing emission trajectory, it would have included language to that effect. The absence of such language is telling. (Cf. *Gikas*, *supra*, 6 Cal.4th at p. 852; see Dis. Opn. at pp. 3–4, 11–17.)

Not only did AB 32 and AB 375 not ratify the Order, no other Legislative act has done so. As Justice Benke noted, "the Legislature is currently considering a comprehensive and complex plan for 2050 that tasks *CARB* to establish regional targets," indicating that the Legislature did not delegate that task to the Governor and does not plan to do so. (Dis. Opn. at pp. 5, 16 & fn. 7, citing Sen. Appropriations. Com., analysis of Assem. Bill No. 2050 (2013–2014 Reg. Sess.), p. 1 ("AB 2050") [emphasis added]; see Sen. Bill No. 32 (2014–2015 Reg. Sess.) ("SB 32").) The Legislature intends to amend AB 32 by requiring "'the California Air Resources Board (CARB) to develop greenhouse gas emissions reductions goals for 2050, including intermediate goals, and to perform a number of analyses of the strategies that would be required to reach those goals'" for purposes of the next scoping plan update. (Dis. Opn. at p. 16, fn. 7, quoting AB 2050.) The Legislature's present action underscores the fact no existing law ratified the Order's 2050 target or delegated the authority to set the 2050 target to the Governor. Instead, the Legislature has "fully occupied this enormously complex field by delegating the 'target-setting

responsibility' of such reductions to the CARB through a series of comprehensive legislative enactments." (*Id.* at p. 16.)

F. The EIR Disclosed The Plan With Mitigation Would Not Comply With The Executive Order's Goal, So Even If This Court Finds The EIR Should Have Evaluated Consistency With The Order, The EIR Is Sufficient As An Informational Document

The majority below concluded that the omission of some sort of analysis of consistency with the Executive Order "precluded informed public participation and decisionmaking," and thus constituted prejudicial error. (Opn. at p. 32.) As discussed above, there is no basis for concluding that such a consistency analysis was legally required, and thus no basis for finding a legally cognizable error of omission. (Pub. Resources Code, § 21083.1.) Beyond this, there is no basis for finding that the EIR failed to provide adequate substantive information to the public and agency decisionmakers on greenhouse gas emissions, much less any basis for concluding that failure to provide such information in the particular form demanded by the majority was prejudicial.

As further discussed above, the EIR quantified the Plan's predicted emissions in detail for horizon years 2020, 2035, and 2050. (AR 8a:2567–2578.) Because the effects were found significant in 2035 and 2050, the EIR discussed mitigation measures for greenhouse gas impacts, as well as additional mitigation measures which were considered but found infeasible. (AR 8a:2588–2591.) The EIR also estimates emissions for 1990, the baseline year for the Executive Order's targets, and measures these against the Scoping Plan reduction goals, which are the same as those of the Executive Order for 2020. The Plan's projected emissions for 2050 also could be compared with the Executive Order's broad, statewide year 2050 goal for an 80 percent reduction using nothing more than arithmetic. (AR 14:4514; cf. *Pfeiffer v. City of Sunnyvale* (2011) 200 Cal.App.4th 1552,

1572 [upholding EIR where information sought by petitioners was available using basic calculations].) The EIR thus informed SANDAG's Board of Directors and the public of the Plan's reasonably foreseeable greenhouse gas trajectory from 2020 to 2050. (AR 8b:3768–3770, 8b:4436; see Dis. Opn. at pp. 7, 20–23, 30.) It also explained how the model forecasting emissions would continue to be updated as the Plan was reworked every four years to account for changing conditions. (AR 8b:3831; see AR 348:30145 ["The long-term elements of the plan will continue to evolve as the RTP is updated every four years."].)

The EIR did not neglect discussion of the Executive Order or its role in state climate strategy. (AR 8a:2561, 2581–2582; 8b:3766–3768.) Indeed, the Order is discussed at length in the EIR and elsewhere in the administrative record. (*Id.*; AR 8b:3768–3770, 4436; see AR 14:4514 [comparing the Plan's greenhouse gas emissions to the Order's 2050 target].) The record also includes, among other reasons, the primary reason for not using the Order as a significance threshold: due to the lack of specificity in the Order regarding how the 80 percent reduction in greenhouse gas emissions was to be achieved by 2050, an analysis of the Plan's consistency with the Order would not be any more informative of the Plan's contribution to the state's greenhouse gas emissions than the existing analysis. (AR 8b:3768–3770, 4436; see AR 14:4514.)

Even if the EIR's failure to include a more detailed "consistency" analysis is deemed error—and it was not—the "error" is not prejudicial because the public and the Board were fully informed of the Plan's inability to singlehandedly meet the Executive Order's long-term greenhouse gas reduction goals. (See *Neighbors for Smart Rail*, *supra*, 57 Cal.4th at pp. 463–465 [failure to analyze the project's impact on existing traffic congestion and air quality conditions was harmless because failure "did not deprive agency decision makers or the public of substantial information

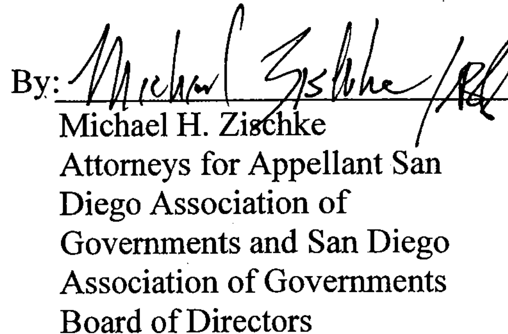
relevant to approving the project"]; *Save Cuyama Valley, supra*, 213 Cal.App.4th at pp. 1073–1074 [mislabeling of impact as less than significant not prejudicial where impact was fully discussed in EIR].) There is thus no basis for finding the EIR did not comply with CEQA by failing to analyze the Plan's consistency with the Executive Order as the absence of that analysis is not prejudicial.

VI. CONCLUSION

For the foregoing reasons, SANDAG respectfully requests that the Court find the EIR is not legally required to analyze the Plan's consistency with the Order.

Dated: May 8, 2015

Cox, Castle & Nicholson LLP

By: 

Michael H. Zischke
Attorneys for Appellant San Diego Association of Governments and San Diego Association of Governments Board of Directors

CERTIFICATE OF WORD COUNT
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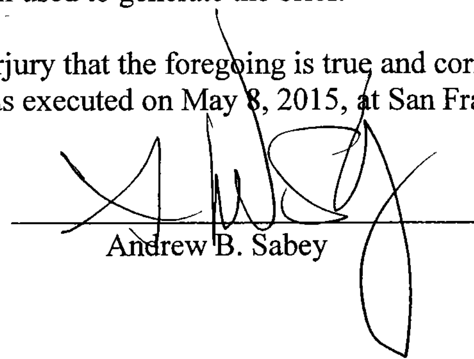

Andrew B. Sabey

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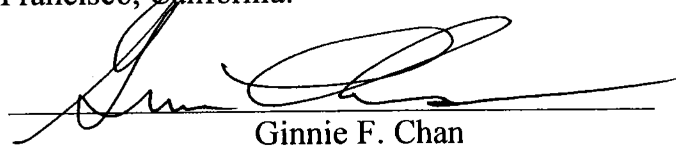
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Ginnie F. Chan
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Cleveland National Forest Foundation: Plaintiff and Appellant; Sierra Club: Plaintiff and Appellant	Rachel B. Hooper Shute, Mihaly & Weinberger 396 Hayes Street San Francisco, CA 94102
	Daniel Patrick Selmi 919 S Albany Street Los Angeles, CA 90015
Center for Biological Diversity: Plaintiff and Appellant	Kevin Patrick Bundy Center for Biological Diversity 351 California Street, Suite 600 San Francisco, CA 94104
Creed-21: Plaintiff and Appellant; Affordable Housing Coalition of San Diego County: Plaintiff and Appellant	Cory Jay Briggs Briggs Law Corp 99 "C" Street, Suite 111 Upland, CA 91786
The People: Intervener and Appellant	Timothy Raymond Patterson Office of the Attorney General P.O. Box 85266 San Diego, CA 92186
	Janill Loreen Richards Office of the Attorney General 1515 Clay Street, 20th Floor Oakland, CA 94612
	California Court of Appeal Fourth Appellate District, Division 1 750 B Street, Ste. 300 San Diego, CA 92101
	Hon. Timothy B. Taylor Superior Court for the County of San Diego 220 W. Broadway San Diego, CA 92101