Appellate Court Case No. D063288

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT

DIVISION ONE

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

Cross-Appellants and Respondents,

v.

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

Appellants and Cross-Respondents,

APPELLANT SAN DIEGO ASSOCIATION OF GOVERNMENTS' OPENING BRIEF

From the Judgment of the Superior Court of the State of California,
County of San Diego, Honorable Timothy B. Taylor
San Diego Superior Court,
Superior Court Case No. 37-2011-00101593-CU-TT-CTL (Lead Case)
[Consolidated with Case No. 37-2011-00101660-CU-TT-CTL]

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Fourth **APPELLATE DISTRICT, DIVISION** One	Court of Appeal Case Number: D063288
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Margaret M. Sohagi (SBN 126336) and Philip A. Seymour (SBN 116606) The Sohagi Law Group, PLC 11999 San Vicente Boulevard, Suite 150 Los Angeles, CA 90049-5136 TELEPHONE NO.: (310) 475-5700 FAX NO. *(Optional):* (310) 475-5707 E-MAIL ADDRESS *(Optional):* msohagi@sohagi.com and pseymour@sohagi.com ATTORNEY FOR *(Name):* San Diego Association of Governments, et al.	Superior Court Case Number: 37-2011-00101593-CU-TT-CTL ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: Cleveland National Forest Foundation, et al. RESPONDENT/REAL PARTY IN INTEREST: San Diego Association of Governments	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
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(4)	
(5)	

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Date: July 11, 2013

Margaret M. Sohagi
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I. INTRODUCTION

This case concerns the 2050 Regional Transportation Plan and included Sustainable Communities Strategy (the "RTP/SCS") adopted by appellant (and cross-respondent) San Diego Association of Governments ("SANDAG"). By law, the RTP must realistically address the expected long-term needs and demands of all transportation sectors, ranging from heavy trucks to public transit users, private automobile commuters and bicyclists. It must do so in light of the fiscal realities and many constraints that govern allocation and expenditure of available federal, state and local funds. A RTP may not be based, as petitioners' appear to believe, on wishful thinking.

The task of preparing a rational and legally viable RTP became more complex in 2008, when the Legislature enacted SB 375, which requires that every RTP include a Sustainable Communities Strategy ("SCS"). The purpose of the SCS is to provide for reductions of emissions of greenhouse gases – the cause of global climate change – through better transportation planning and land use coordination. SB 375 is an important part, if ultimately a small part, of California's present strategy for reducing statewide greenhouse gas emissions ("GHG"). Although most planned GHG reductions will come from statewide measures such as fuel efficiency standards, alternative energy sources and a cap-and-trade program, about 3% are expected to come from local and regional planning actions such as those required by SB 375. (Administrative Record ("AR"), 320:26155, 26185-26189.)

As confirmed by the California Air Resources Board and SANDAG's own exhaustive modeling studies, SANDAG's 2050 RTP/SCS will meet its state mandated target for GHG reductions. It does so by utilizing and facilitating "smart-growth" planning techniques to increase transportation system efficiencies, by greatly expanding public transit opportunities, and by reducing future automobile travel demands to the extent possible given the realities of current development patterns and the

existing and expected land use plans and policies of the 19 local city and county governments that regulate land use in San Diego County. The RTP/SCS also includes a host of individual action items, programs and policies intended to further reduce GHG emissions, ranging from further local and regional planning initiatives such as "Transit-Oriented Development" ("TOD") programs through support for car-pools and van-pools, and electric car recharging and alternative fuel stations. The RTP/SCS thus does more than meet minimum legal standards. It reflects SANDAG's longstanding leadership role in planning for climate change within the legal and fiscal constraints that govern its existence.

SANDAG's 2050 RTP/SCS was the first RTP/SCS to be approved in the state. Consequently it has become a test case for the petitioners and cross-appellants in this case. The petitioners are certainly a veteran array. They include the Sierra Club, Center for Biological Diversity ("CBD") and Cleveland National Forest Foundation ("CNFF"); CREED-21 and the Affordable Housing Association of San Diego County (collectively, "CREED-21"); and intervener the People of the State of California, represented by the Attorney General ("AG"). The petitioners admit that the RTP/SCS meets its statutory goals for GHG reductions and all other requirements for a legally valid RTP/SCS. Nevertheless they are clearly disappointed that the RTP/SCS has proven not to be quite the knock-out punch against global climate change that they had hoped for, and has fallen short of undertaking the kind of utopian planning and social engineering that would be necessary to eliminate private automobile transportation as a major source of GHG and other air pollution emissions. Their solution has been to attack the messenger, i.e., the Environmental Impact Report ("EIR") prepared for the 2050 RTP/SCS.

The trial court ruled in petitioners' favor on two issues.[1] It

[1] The petitioners may wish to pursue issues they did not prevail on in their cross-appeal.

concluded that that the EIR's 39 page analysis of GHG impacts was deficient because it did not include a comparison of projected regional GHG emissions through the year 2050 against statewide reduction targets established in a 2005 Executive Order issued by then-governor Arnold Schwarzenegger. The EIR instead analyzed GHG impacts under three other significance criteria, i.e., an existing baseline analysis, consistency with SB 375 emission reduction goals, and consistency with the state's adopted Climate Change Scoping Plan and SANDAG's own adopted Climate Action Strategy. Petitioners and the trial court appear to concede that the EIR analysis of GHG emissions was fully consistent with CEQA Guidelines § 15064.4, which was specifically adopted by the state Resources Agency – a member of Governor Schwarzenegger's own designated executive branch "climate action team" – to guide analysis of GHG impacts. Petitioners and the trial court appear to believe that compliance with Guidelines § 15064.4 is not enough.

The trial court also found that the EIR failed to adequately address mitigation measures for GHG emissions. Both the EIR and the RTP/SCS itself include a vast range of measures to reduce GHG emissions. Petitioners' and the trial court's criticisms are that these measures do not go far enough, are insufficiently detailed, and that many are not "legally enforceable," but instead rely on voluntary action by the region's 19 local municipal governments or by other agencies such as Caltrans for implementation. The EIR at issue, however, is a program EIR. Most of the future transportation projects planned in the RTP/SCS, and all of the future land use decisions that will affect future regional development, will be made or carried out by independent public agencies over which SANDAG has no legal control. In this situation a Program EIR is not required to do the impossible, i.e., identify feasible, specific project-level mitigation measures for every individual future project or type of project that will occur during the 40-year planning period anticipated in the RTP/SCS.

Neither is a lead agency preparing an EIR required to claim legal powers to enforce or impose mitigation requirements that it does not actually have.

II. STATEMENT OF THE CASE

A. Appealability

Appellant and Cross-Respondent SANDAG is appealing from an adverse final judgment entered on December 20, 2012, in a consolidated action for writs of mandate. (Joint Appendix ("JA") {88}1132-1134.) The notice of appeal was timely filed on December 26, 2012. (JA {92}1140.) SANDAG seeks reversal of the trial court judgment, with directions to vacate the trial court's decision and enter a new decision denying the petitions for writs of mandate with prejudice.

B. Statement of Facts

1. *Regional Transportation Planning and the RTP/SCS*

The "Project" at issue in this case is SANDAG's 2050 RTP/SCS, approved on October 28, 2011. (8a:2071-2139, 190a:13043-16835.) Even before 2008, preparation of a RTP that complied with applicable federal and state laws was no mean feat. (See 23 U.S.C. § 134; 49 U.S.C. § 5303, 23 CFR § 450.300 et seq.; Gov. Code § 65080 et seq.) The RTP must provide for development and operation of "integrated multimodal transportation system" that meets the current and long-term needs of all transportation sectors, from commuters, pedestrians and disadvantaged populations through commercial movers of goods. (23 CFR § 450.322(b); Gov. Code § 65080(b)(1).) The RTP establishes the basis for programming virtually all local, state, and federal funds for transportation within a region. (AR 218:17692.) A RTP therefore must be "fiscally constrained," meaning that it must be based on realistic forecasts of the funding that will be available from all sources for transportation improvements and operations. (AR 218:17776; 23 CFR § 450.322(f)(10); Gov. Code § 65080(b)(1).)

In 2008 the Legislature amended Government Code § 65080 to require the addition of a Sustainable Communities Strategy ("SCS") to the RTP. (Stats 2008, ch. 728, § 14 (SB 375); Gov. Code § 65080(b)(2).) The

purpose of the SCS is to marry regional transportation planning with state efforts to combat climate change by reducing GHG emissions. (AR 319:26185-26186.) This is accomplished by mandating that transportation plans be designed to achieve GHG reduction targets, measured in terms of per capita emissions from automobiles and light trucks, assigned to each region by the state Air Resources Board ("ARB"). (Gov. Code § 65080(b)(2)(A), (B).)

In preparing a RTP/SCS, regional planners typically do not write on a clean slate. RTPs have been required for many years and are updated every four years. (Gov. Code § 65080(d); 23 CFR § 450.322(c).) Updating a RTP entails a comprehensive review of past plans and conscientious revisions where changing fiscal, environmental, technical or policy mandates warrant them. In updating a RTP, however, a regional agency cannot lightly disregard longstanding plans and funding commitments made in previous RTPs that have been relied on by local governments, funding agencies and transportation providers in conducting their own long-term land-use, environmental, fiscal and operations planning. Neither can a RTP/SCS ignore the realities on the ground, i.e., existing development patterns and the existing transportation network and infrastructure, nor transportation demands generated by existing and foreseeable new development and population growth. By law, the RTP/SCS must be based on "the most recent planning assumptions considering general plans and other factors," whether these "planning assumptions" represent the most environmentally sensitive options possible or not. (Gov. Code § 65080(b)(2)(B); 40 CFR § 93.110.)

2. *The 2050 RTP/SCS Public Process*

a. Draft RTP/SCS

Preparation of the 2050 RTP/SCS began in 2008 with the development of a 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 established local governments. (AR 8a:2075, 2835, 65:6181-6182.) This information was then used to identify a range of planning options that would satisfy the fiscal and other legal requirements governing the RTP/SCS, including particularly the objective of meeting GHG emission reduction targets of SB 375. (AR 8a:2075, 3331-3334; 8b:3788, 136:9279-9302.) After review of the available alternatives, the SANDAG Board directed SANDAG staff to commence preparation of a draft RTP/SCS.

Preparation and subsequent review of the draft RTP/SCS was accomplished with intensive consultation and participation by local, state and federal government agencies, stakeholder groups and the general public, secured through a multi-year Public Involvement Plan involving innumerable meetings, public workshops, community outreach activities, newsletters, surveys and questionnaires, and a formal comment process on the Draft RTP/SCS 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 individual comments on the Draft RTP/SCS from more than 1,500 different contributors. (AR 8a:2080.)

b. CEQA Review Process

"Scoping" for CEQA review of the final Draft RTP/SCS was commenced in April 2010. (AR 8a:2067-2068; 8b:3407-3411; see Guidelines § 15084(d)(2).) Following public workshops and receipt of written comments, preparation of a Draft Program EIR ("DEIR") was commenced in June 2010. (AR 8a:2067; 8b:3413-3618.) The 1,355-page DEIR (AR 7:225-1580) was released for a 55-day public review period on June 7, 2011. (AR 3:14; 8a:2068.) Beginning in June, 2011, SANDAG conducted seven informational workshops and public hearings on the Draft RTP/SCS and DEIR. (AR 3:14; 8a:2068; 190a:13376-13377.) SANDAG received 22 letters and e-mails commenting on the DEIR. (AR 8a:2068.) Detailed responses, extending over some 600 pages, were prepared for inclusion in the Final EIR ("FEIR"). (AR 8b: 3762-4449.) On October 18,

2011 SANDAG released the 2,481 page FEIR, consisting of the revised DEIR text, public comments and responses, and technical appendices. (AR 3:14, 8a:1969-3401; 8b:3762-4449, 3405-3761.)

3. *The Adopted 2050 RTP/SCS*

Following a public hearing on October 28, 2011, the SANDAG Board formally certified the Final EIR, adopted CEQA findings, a Statement of Overriding Considerations, and a Mitigation Monitoring and Reporting Program ("MMRP"), and adopted the 2050 RTP. (AR 3:7-10, 11-178, 179-181, 182-216; 190a:13043-16835.) The Board concurrently adopted a Clean Air Act conformity determination and found, based on the extensive technical analysis in the record, that the RTP met the GHG reduction targets mandated by SB 375 and Government Code § 65080(b)(2)(A.) (AR 4:217-220; 8a:2578-2581; 8b:3717-3722; 190b:15978-15987.) The ARB formally confirmed SANDAG's determination that the RTP/SCS would meet the SB 375 targets in November, 2011. (AR 329:29360-29361.)

The GHG reductions planned in the RTP/SCS will be achieved in the face of a Regional Growth Forecast that projects a regional population of 4.4 million people by 2050, a 36 percent increase from the 2010 population of 3.2 million. (AR 8a:3043; 190b:13668-13673). To achieve these reductions, the RTP/SCS promotes compact, higher density development located near public transit systems, and within the already urbanized areas of the region, as envisioned by SB 375. (AR 190a:13064-13065; 13089-13090.) If the plan is fully implemented by the region's many local authorities, more than 80 percent of new housing would be higher 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.) Meanwhile, more than 50 percent of the region's land area would remain open space and parkland. (AR 190a:13094, 13102.)

The RTP/SCS will also achieve these goals in the face of the many financial constraints that govern allocation of state, federal and local transportation funds. (AR 8a:2101; 190a:13253-13254.) Notwithstanding these constraints, almost one half of all transportation fund expenditures planned in the RTP/SCS's are for public transit projects, while the other half is divided up between multi-purpose highway lanes, local streets and roads, and projects for bicycles, pedestrians, seniors and disabled persons. (AR 8a:2104-2129; 8b:3786; 190a:13245-13248, 13253-13292, 13302-13314.) Improvements include increased frequencies on trolleys and most buses, and expansions of bus services, trolley services, commuter rail services, and streetcars/shuttles in key areas. (AR 8b:3786; 190a:13066-13068, 13255-13272.) Of the remainder, 24 percent is allocated for highway improvements, most of which will go for congestion relief projects or new "managed lanes" intended to improve bus rapid transit (BRT) service, promote carpools and vanpools, and generate revenue for further transit improvements from fee-paying single-occupant vehicles. (AR 8a:2115-2118; 8b:3778; 190a:13245-13429, 13262, 13273-13283, 13289.) Another 17 percent is allocated for local streets and roads, and 9 percent for other programs and services, such as pedestrian and bicycle projects and services for seniors and disabled persons. (AR 190a:13245-13248, 13302 13314.)

It is important to note that this expenditure breakdown for transit projects does not include the managed lanes to be constructed for a BRT network. The BRT managed lanes network included in the 2050 RTP/SCS has been much maligned by Petitioners as just being a way to add more highway lanes. Although SANDAG can count the managed lanes as a highway expense and still show a majority of the expenditures will be on transit, the lanes are in fact an integral component of the transit system. Petitioners' negative characterization of the managed lanes network does not account for the options, flexibility and savings it will provide. Using managed lanes on highways accomplishes many goals: buses are given a

priority lane for travel making transit more efficient and attracting more riders; single occupant vehicles are charged a fee to use the excess capacity in these lanes providing revenues for transit; the public is given mode choices; the lanes can be managed during extreme travel episodes such as for emergency evacuations; the managed lanes preserve right-of-way for potential use of alternative vehicles, evolving needs, and advanced technology; and the cost of BRT is lower than trolley or train costs. (AR 8a:2115, 8b:3778, 190a:13273.)

The multi-modal transportation mix in the 2050 RTP represents the optimum that SANDAG believed to be feasible within the revenue-based constraints imposed by state and federal law. (Gov. Code § 65080(b)(4); 23 CFR § 450.322(f)(10).) Alternatives that provided for even greater transit expenditures or further accelerating transit expenditures were extensively considered during the RTP/SCS review process and found infeasible. (AR 8a:3331-3337; 8b:3778, 3805-3811; 136:9279-9302.)

4. *The Litigation*

The CREED-21 petitioners, followed by CNFF, CBD and the Sierra Club ("CNFF petitioners"), filed separate petitions for writs of mandate challenging certification of the EIR on November 28, 2011. (JA {1}01-13, {2)14-42.) The Attorney General's unopposed application to intervene in the CNFF case was granted by the trial court on January 25, 2013. (JA {20}-{24}98-150, {29}-{30)198-207, {31}208-241 (AG Petition).) The two cases were subsequently consolidated by stipulation on April 9, 2012. (JA {34}251, {38}264-274.)

Briefing on the merits, comprising a total of 7 briefs totaling some 225 pages, was completed in October, 2012. [The briefs consisted of separate opening briefs filed by the CNFF petitioners, CREED-21 and the AG, two SANDAG opposition briefs, and two reply briefs, one jointly filed by the CNFF and CREED-21 and one by the AG. (JA {46}342-380, {47}381-430, {48}431-449, {51}457-523, {52}524-573, {64}773-771, {65}805-843.) The Court denied leave to file amicus briefs offered in

support of SANDAG by the California Association of Governments and Construction Industry Air Quality Coalition on the ground that budget cuts and resulting case load increases did not leave the court sufficient time to review additional briefs in the case. (JA {53}574 – {63}772.)

The trial court released a 10 page tentative decision on November 16, 2012. (JA {70}985-995.) The tentative decision announced tentative rulings in favor of the petitioners on the two major issues addressed in this brief. (JA {70}991-995.) The Court did not address any other issues raised in the petitioners' briefs and pleadings. Most surprising, the tentative decision also declared that the 2050 RTP/SCS had failed to meet the GHG emission reduction targets established under SB 375 – a contention that had been made by none of the petitioners, and which was flatly contradicted by the record.

Lengthy oral argument, focused solely on the issues of GHG impact analysis and GHG mitigation measures addressed in the tentative decision, was conducted on November 30, 2012. On December 3, 2012 the trial court issued its final Ruling on Petitions for Writ of Mandate ("Decision"). (JA {75}1046-1057.) Other than retracting its statement that the RTP/SCS did not satisfy the requirements of SB 375, the Decision generally tracks the tentative decision. In the trial court's estimate, the EIR was "impermissibly dismissive of Executive Order S-0305" because it did not analyze the Executive Order as a basis for its assessment of the significance of GHG impacts. JA {75}1056-1057.) The Decision does not state why SANDAG's reliance on alternate significance criteria specified in Guidelines § 15064.4 was impermissible. With respect to mitigation of GHG impacts, the trial court found that SANDAG's response "has been to 'kick the can down the road' and defer to 'local jurisdictions.'" (JA (75)1057.) According to the Decision, this "perverts the regional planning function of SANDAG, ignores the purse string control SANDAG has over TransNet funds, and more importantly conflicts with Govt. Code section

65080(b)(2)(B)." (Id.) These aspects of the Decision and petitioners' supporting arguments are addressed below.

Judgment was entered on December 20, 2012. (JA {88}1132-1134.) SANDAG's Notice of Appeal was timely filed on December 26, 2012. (JA {92}1140.) Notices of cross-appeals were subsequently filed by the CNFF and CREED-21 petitioners and by the AG on January 23, 2013. (JA {95)1161, {96}1164.)

C. Standard of Review

This Court is undoubtedly familiar with the standard of review governing CEQA cases. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 275-276.) It can be expected that petitioners will contend that the issues they have raised are procedural in nature, and therefore governed by the independent judgment standard rather than the substantial evidence test. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.) The issues addressed in this brief, however, concern the scope and methodologies employed in the EIR's discussion of GHG impacts, and the scope of discussion and feasibility of mitigation measures. Such issues are reviewed under the substantial evidence test, as will be most or all of the issues raised in petitioners' cross-appeals. (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 898; *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 898.)

Under the substantial evidence test, a respondent is generally entitled to rely on the expert opinions of qualified staff and consultants. (*National Parks and Conservation Ass'n v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1364; *Cadiz Land Co., Inc. v. Rail Cycle L.P.* (2000) 83 Cal.App.4th 74, 101-102.) The mere existence of disagreement over the analytical methods employed or the conclusions reached in the EIR are thus not a legitimate basis for attack. (*Id.*; *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 407, 409.) Moreover, the EIR is presumed adequate. (*Preserve Wild Santee*, 210

Cal.App.4th 260, 275.) Petitioners have the burden of disclosing *all* of the relevant evidence in the record pertaining to their claims, and affirmatively showing that there is no substantial evidence to support the respondent's decisions. (*California Native Plant Soc. v. City of Rancho Cordova ("CNPS v. Rancho Cordova")* (2009) 172 Cal.App.4th 603, 626; *Tracy First v. City of Tracy* (2010) 177 Cal.App.4th 912, 934-935.) This burden cannot be met, as petitioners appear to believe, by citation to isolated passages or mere repetition of comments, contentions and expressions of palpably inexpert opinion made during the administrative process.

Even were the errors alleged by petitioners deemed procedural in nature, petitioners must establish that SANDAG violated specific mandates imposed by CEQA or the CEQA Guidelines, and that this error was *prejudicial*. (PRC §§ 21083.1, 21168.5; *Association of Irritated Residents v. County of Madera* ("*A.I.R.*") (2003) 107 Cal.App.4th 1383, 1391; *Western Placer Citizens for an Agr. and Rural Environment v. County of Placer* (2006) 144 Cal.App.4th 890, 899.) The alleged error or omission must be so serious as to "preclude[] informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." (*Id*.; see *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1073-1074.) A challenger asserting inadequacies in an EIR thus must show that omitted information "was *required* by CEQA *and necessary* to informed discussion." (*California Native Plant Soc. v. City of Santa Cruz* ("*CNPS v. Santa Cruz*") (2009) 177 Cal.App.4th 957, 986 (emphasis added).)

III. THE EIR FULLY AND ADEQUATELY ANALYZED GREENHOUSE GAS IMPACTS

The EIR contains a 39-page analysis of existing GHG emission levels and GHG impacts expected to occur from both transportation and non-transportation sources under the Project, utilizing three different significance criteria, and three different time horizons (2020, 2035, 2050). (AR 8a:2553-2591.) The trial court, adopting arguments advanced by the

petitioners, nevertheless found that the EIR was inadequate because it failed to include some further analysis comparing GHG emissions under the Project to the long-term GHG emission reduction targets stated in Executive Order S-03-05 ("EO S-03-05"). (JA {75}1056-1057.)

There is no legal authority requiring such an analysis in an EIR. The EIR contains a lengthy *factual* analysis of potential GHG emissions that fully complies with the applicable CEQA Guidelines. SANDAG did not abuse its discretion by declining to conduct still further analysis utilizing yet another significance criterion.

A. Executive Order 3-03-05 and State Climate Change Strategy

EO S-03-05 was promulgated by Governor Arnold Schwarzenegger in June, 2005. Section 1 of the Order declares, in one short sentence, statewide targets for GHG emission reductions. These targets are reduction to 2000 emission levels by 2010; reduction to 1990 levels by 2020; and reduction to 80% below 1990 levels by 2050. (AR 8a:2561, 319:27050.) Section 2 directs the Secretary of the California Environmental Protection Agency to co-ordinate efforts to reduce GHG emissions by various state agencies which have become known as the state "climate action team." (AR 319:26144-26146, 27050.) The California Resources Agency and ARB are leading members.

Although EO S-03-05 arguably represents the first step in developing a statewide climate action strategy, it was hardly the last. (See AR 8a:2561-2565.) In 2006 the Legislature enacted the California Global Solutions Act – generally known as AB 32 – which required ARB to develop a statewide strategy for GHG emission reductions. (Health & Safety Code § 38501 et seq.) ARB's Climate Change Scoping Plan ("Scoping Plan") was released in 2008. (AR 8a:2561-2562; AR 319:26120-26721.) The Scoping Plan identified specific programs to reduce statewide GHG emissions and established specific reduction targets for each program for 2020, the first benchmark year established by EO S-

03-05. (AR 319:26154-26159.) Most of the 169 million metric tons ("MMT") in GHG reductions will come from major programs such as conversion to renewable energy sources, low-carbon fuels, vehicle efficiency standards, cap-and-trade regulations and energy efficiency standards. A total of 5 MMT, or approximately 3% of the total, are programmed to come from regional transportation related programs. (AR 319:26155, 26159.) These benefits will be secured through establishment of regional targets and development of sustainable communities strategies in each region as directed by SB 375, e.g., the RTP/SCS at issue in this case. (AR 8a:2563, 2578; 319:26185-26189.) In other words, SANDAG is one of multiple regional agencies in California charged with producing a collective total of 3% of GHG reductions necessary to achieve the current EO S-03-05 reduction targets. As will be seen below, both petitioners and the trial court appear to have fundamentally misunderstood the limited role that SANDAG and the RTP are expected to play in reducing state and regional GHG emissions.

The role of CEQA in addressing climate change impacts has also not been neglected. In 2007 the Legislature enacted Senate Bill (SB) 97, directing the Resources Agency and its Office of Planning and Research ("OPR") to develop CEQA Guidelines for analysis and mitigation of GHG impacts. (PRC § 21083.05.) OPR subsequently conducted an intensive public process to develop these guidelines. (See Final Statement, AR 319:25827-25939.) The resulting Guidelines § 15064.4 and other relevant Guidelines which are discussed further below, contain no endorsement for use of the statewide 2050 GHG reduction targets mentioned in EO S-03-05 as a basis for CEQA analysis.

The application of CEQA to GHG issues has also received considerable discussion by other public agencies. In 2008, ARB published draft recommendations for setting significance standards for projects within its regulatory sphere. (AR 320(3):27783-27804.) It does not appear that any agency other than the Attorney General's office, and none serving in

Governor Schwarzenegger's designated climate action team, has recommended use of the EO S-03-05 reduction targets as a standard for analysis of GHG impacts.

B. There is No Dispute that the Analysis of Greenhouse Gas Emissions in the EIR Complies with CEQA Guidelines § 15064.4

Guidelines § 15064.4 was adopted in 2010 to give specific guidance to public agencies evaluating GHG impacts. Guidelines § 15064.4(a) requires a lead agency to make a "good faith effort" to quantify expected GHG emissions from a project. Guidelines § 15064.4(b) provides specific direction as to the criteria to be utilized in determining the significance of and in analyzing GHG impacts. (AR 319:25846-25854.) These recommendations contain no reference to EO S-03-05. Guidelines § 15064.4(b), without trying to limit agency discretion, authorizes three different (but non-exclusive) approaches for analyzing GHG emissions in an EIR. The lead agency may use the traditional "existing conditions" baseline that is standard for most CEQA analysis. (Guidelines § 15064.4(b)(1); see *Communities for a Better Environment v. South Coast Air Quality Management Dist.* ("*CBE v. SCAQMD")* (2010) 48 Cal.4th 310, 320-321; Guidelines §§ 15125, 15126.2(a).) Alternately, it can evaluate GHG impacts against a state, regional or local regulatory plan for the reduction or mitigation of GHG impacts. (Guidelines § 15064.4(b)(3).) Finally, a lead agency may utilize a threshold of significance it independently determines appropriate for the project. (Guidelines § 15064.4(b)(3).)

The EIR in this case conducted *three* separate GHG analyses which utilize two of the specific significance criteria authorized by Guidelines § 15064.4.

The first analysis – "GHG-1" – is an "existing conditions" baseline analysis that deemed *any* increase of GHG emissions over existing conditions to be a significant impact triggering mitigation requirements. (AR 8a:2567-2577.) A comparison with existing baseline conditions is, of

course, the normal mode of impact analysis in virtually all EIRs; indeed, a lead agency has discretion to use an alternate baseline analysis only in extraordinary circumstances. (*CBE v. SCAQMD*, 48 Cal.4th 310, 320-322; *Woodward Park Homeowners Ass'n, Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 706-709.) In normal CEQA practice, a "zero increase" threshold is thus the most environmentally conservative standard possible.

The GHG-1 analysis concluded that while regional GHG emissions are expected to go down from existing levels (28.85 MMT in 2010) until after 2020 under the RTP/SCS, they will increase again to 30.1 MMT above existing levels by 2035 as a result of regional growth, and increase further still to 33.65 MMT (4.8 MMT above existing levels) by 2050, resulting in significant impacts in both of the latter two study years. (AR 8a:2572, 2575, 2578.) These emission increases, incidentally, will come primarily from population growth and development that is beyond SANDAG's control. Transportation-related emissions are expected to remain below existing baseline levels through 2035, and rise only slightly (0.3 MMT/year) above existing levels in 2050. (AR 8a:2574, 2577.) The overall emissions forecasts for 2035 and 2050 are also conservative and likely to overstate actual future emissions because of a number of factors discussed in the EIR. (AR 8b:3821-3823.)

The second GHG analysis (GHG-2) utilized SB 375's GHG reduction targets as a significance criteria, and measured projected GHG emissions from passenger cars and light trucks against these reduction goals. (AR 8a:2578-2581.) This approach is consistent with Guidelines § 15064.4(b)(3) (compliance with adopted plans), and also is obviously appropriate for a Project with a major regulatory goal of achieving compliance with SB 375. The analysis concludes that the RTP/SCS would not have significant impacts under this criterion, because the RTP/SCS will actually meet SB 375's goals for lowered per capita vehicle-related GHG emissions in 2020 and 2035. (AR 8a:2579-2581.)

The third GHG impact analysis (GHG-3 – actually two analyses) performed in the EIR also is based on Guidelines § 15064.4(b)(3). (AR 8a:2581 – 2588.) The GHG-3 impact analysis specifically analyzed whether regional GHG emissions (from both land use and transportation) would be consistent with (1) the statewide ARB Scoping Plan adopted pursuant to AB 32 and (2) SANDAG's adopted Climate Action Strategy. As noted previously, the Scoping Plan is the current, formally adopted state strategy for pursuing the emission reduction goals of EO S-03-05. This Court specifically approved the use of significance standards derived from AB 32 in *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 335-336 "*CREED*"), as did the court in *North Coast Rivers Alliance v. Marin Municipal Water District Board of Directors* (2013) 216 Cal.App.4th 614, 650-653.)

The EIR analysis under GHG-3 concluded that the RTP/SCS would, in connection with other currently operative provisions of the Scoping Plan, achieve the reduction goals of the Scoping Plan for vehicle-related GHG emissions. Land use related emissions (i.e., emissions from industry, home energy use, etc., over which SANDAG has no control) were, in contrast, expected to exceed the Scoping Plan reduction goals because some major components of the overall Scoping Plan strategy, such as cap-and-trade requirements, were not yet being implemented. (AR 8b:2582-2583, 2584.) The RTP, however, was itself consistent with its role in the overall Scoping Plan strategy and with the SANDAG Climate Action Strategy. (AR 8b:2583-2584, 2586, 2588.)

C. SANDAG Did Not Abuse Its Discretion By Relying On Guidelines § 15064.4 For the Significance Criteria Used In the EIR's Analysis of Greenhouse Gas Impacts

Petitioners have never contended that the EIR's analysis of GHG impacts was insufficient under Guidelines § 15064.4. Their argument thus effectively boils down to the contention that SANDAG abused its discretion in this case by relying on the CEQA Guidelines.

As petitioners themselves conceded below, lead agencies generally enjoy substantial discretion is selecting standards or "thresholds" for determining the significance. (JA {47}408:10-22; *CREED*, 197 Cal.App.4th 327, 335-336, *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 243.) On rare occasions, provisions of the Guidelines have been found inconsistent with underlying statutory provisions of CEQA, and therefore invalid. (See, e.g., *Ballona Wetlands Land Trust v. City of Los Angeles* (2012) 201 Cal.App.4th 455, 474.) There is no basis for such a finding here. The significance standards recommended in Guidelines § 15064.4 are consistent with CEQA policy and practice governing analysis of all types of potential environmental effects. The "existing conditions" baseline approach authorized by Guidelines § 15064.4(b)(1) is simply a replication of the standard baseline approach for assessing all types of environmental impacts approved in the CEQA Guidelines and extensive case law. (*CBE v. SCAQMD*, 48 Cal.4th 310, 320-322; Guidelines §§ 15125 and 15126.4.) The alternate (or supplemental) plan-based criteria authorized by Guidelines § 15064.4(b)(3) are consistent with another common CEQA approach to significance determinations, i.e., consistency with adopted regulatory standards or plans. (See, e.g., *Tracy First*, 177 Cal.App.4th 912, 933-934; *National Parks*, 71 Cal.App.4th 1341, 1356, 1358; Guidelines Appendix G, ¶¶ III.a, III.b, IV.e, IV.f, IX.a.)

Petitioners may believe that GHG emissions constitute an extraordinary case because existing state plans call for long-term reductions, and not merely holding the line on existing emissions. Guidelines § 15064.4(b)(3), however, expressly addresses this concern by authorizing analysis based on consistency with state, regional or local GHG reduction plans developed through an open public process, exactly as was done under impact criteria GHG-2 and GHG-3 in this case. There is no basis for finding this approach arbitrary or inconsistent with any statutory mandate of CEQA.

D. The EIR Does Not Omit Any Critical Factual Information on GHG Emissions

Petitioners below also did not seriously argue that the EIR omits any critical substantive information on GHG impacts. Clearly it does not. The EIR generally describes the phenomenon of global climate change and existing global, statewide and county-wide GHG emission levels; summarizes current regulatory plans and initiatives for GHG reductions; and, most important, provides an extensive and detailed *quantitative* analysis of GHG impacts through the year 2050, with separate analysis of both transportation and non-transportation emissions and discussion of their sources. (AR 8a:2553-2557, 2557-2566, 2567-2588; see also EIR Appendix B, AR 8b:3619-3644 and RTP Appendix B, AR 190a:13452-12471.) The methodologies and relevant assumptions underlying these forecasts are also discussed in the EIR. (AR 8a:2567-2568, 8b:3817-3823.) The EIR also fully responds to extensive comments on GHG emissions and the EIR's methods and analysis. (E.g., AR 8b:3766-3770, 3787-3789, 3817-3823, 4303-4305, 4432-4438.) This includes a full discussion as to why EO S-03-05 was not used as a significance criterion in the EIR. (AR 8b:3766-3770, 4432-4433.)

The EIR ultimately concluded that even though the RTP/SCS was consistent with existing state and local GHG emission reduction plans, it would have a significant impact under significance criterion GHG-1, the no-net-increase standard. (AR 8a:2567-2578.) Consequently, the EIR also discusses extensive GHG mitigation measures going beyond the many GHG reduction measures and programs already included in the RTP/SCS. (AR 8a:2588-2590; see Section IV, below.) This is not a case in which a respondent has short-circuited consideration of mitigation or project alternatives by unreasonably deflating the significance of potential impacts.

Petitioners have never explained why the above-described extensive factual analysis in the EIR is insufficient under CEQA. In the trial court proceedings they relied on canards such as the proposition that an EIR is

intended to serve as an "environmental alarm bell." (JA {46}376:5.) They cite no case, however, which has found that an EIR that produces a detailed, objective factual analysis of potential impacts may be found inadequate because it is not subjectively alarming *enough*. It is well settled that an EIR is not required to "include all information available on a subject," nor perform every possible analysis of a subject. (*Clover Valley*, 197 Cal.App.4th 200, 245; *A.I.R.*, 107 Cal.App.4th 1383, 1396-1397; Guidelines § 15204(a).) Petitioners cannot challenge the EIR simply because they believe it is insufficiently dramatic in its analysis or conclusions. (See *Save Cuyama Valley*, 213 Cal.App.4th 1059, 1073-1074.)

E. The EIR Was Not Required to Analyze the Project's Consistency With Executive Order S-03-05

The trial court appeared to believe that since EO S-03-05 is "an official policy of the state of California, SANDAG was not free to "simply ignore it." (JA {75}1056-1057.) The EIR, however, did not simply ignore EO S-03-05. EO S-03-05 is discussed in the main text of the EIR, and the reasons for not utilizing it as a significance standard are fully discussed in responses to public comments. (AR 8a:2561, 8b:3776-3770.) More to the point, there is no legal authority requiring an EIR to analyze the implications of gubernatorial executive orders or every other document that might arguably declare an "official policy of a state" relevant to a project.

Guidelines § 15125(d) does provide that an EIR should discuss "any inconsistencies between the proposed project and *applicable general plans, specific plans and regional plans*." (Guidelines § 15125(d), emphasis added.) Here, however, EO S-3-05 is clearly not an "applicable general

plan, specific plan or regional plan.[2]" (See *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 544; *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1145 fn 7 [to be relevant, an adopted plan must be legally applicable to a particular project].) Indeed, though EO S-03-05 may establish a policy in a very broad sense, it clearly is not a "plan" at all. While petitioners and the trial court may believe that EO S-03-05 is of great significance, they are not free to impose requirements that are not mandated by CEQA or the CEQA Guidelines themselves. (PRC § 21083.1; *Western Placer Citizens*, 144 Cal.App.4th 890, 899.)

The trial court's judgment here also appears to conflict with that of the very state agencies that are charged by EO S-03-05 with developing actual plans for reducing GHG emissions, i.e., the Resources Agency and ARB. As discussed previously, the CEQA Guidelines prepared by the Resources Agency direct lead agencies to assess project consistency against "regulations or requirements adopted to implement a statewide, regional or local *plan*," which has been "*adopted through a public review process*." (Guidelines § 15064.4(b)(3), emphasis added.) ARB, in draft guidelines it has issued to date, has also given no indication of support for use of EO S-03-05 as a significance criterion or consistency standard. (AR 320(3):27783-27794.) Thus even the state agencies directly charged with implementing EO S-03-05 do not believe that the bare two-sentence declaration of long-term GHG reduction issued by the Governor's office in 2005, without benefit of any preceding public process, represents a reasonable or useful method of evaluating GHG impacts under CEQA.

[2] An Executive Order is a written directive by the Governor binding on the executive branch, i.e., subordinate state agencies only. SANDAG is not such an agency. An Executive Order may not invade the Legislature's province of setting state policy through legislation. (63 Ops.Cal.Atty.Gen. 583 (1980); 75 Ops.Cal.Atty.Gen 2673 (1992).)

F. Use of Executive Order S-03-05 is Not Required by "Science"

Petitioners also contended below that use of EO S-03-05 as a measuring standard for GHG impacts is also compelled by "science." (JA {47}408-410.)

The first problem with this argument is that petitioners cannot identify a single scientist who actually supports their opinion on this subject. The two state agencies with the most scientific expertise on the Governor's own designated climate action team certainly have not. Neither Guidelines § 15064.4 nor ARB's draft guidelines make any such recommendation. (AR 320(3):27783-27794.) Petitioners can offer nothing other than their own obviously non-expert opinions that use of EO S-03-05 as a CEQA significance criterion is "scientifically" warranted.

Beyond this, petitioners' argument proves both too much and too little. As Guidelines § 15064.4 and the Governor's climate action team recognize, there may be more than one scientifically valid approach to evaluating GHG impacts. For example, the GHG reduction targets established in the AB 32 Scoping Plan and those established pursuant to Government Code § 65080(b)(2)(A) were clearly based on scientific analysis. These scientifically based targets were utilized for analysis of GHG impacts in the EIR, as was another indisputably scientific analysis, i.e., a basic quantitative analysis of total GHG emissions in absolute terms. Petitioners' argument is thus, in reality, a *policy* argument that use of the EO S-03-05 targets as a baseline for CEQA analysis is a superior or more illuminating method of analyzing GHG impacts. Petitioners' mere disagreement with SANDAG, with Guidelines § 15064.4 and with the members of the Governor's own climate action team on this issue is not a basis for invalidating the EIR. (*North Coast Rivers Alliance*, 216 Cal.App.4th 614, 653; *California Oak Foundation v. Regents of the University of California* (2010) 188 Cal.App.4th 227, 282; *Tracy First*, 177 Cal.App.4th 912, 933-934.)

The significance standards authorized by Guidelines § 15064.4 also have one great virtue that a significance threshold based directly on EO S-03-05 would not have. Comparison of a project's impacts to GHG mitigation goals in an applicable local, regional or state plan enables a lead agency and the public to determine in practical, achievable terms what must be done to maintain reasonable progress. (Guidelines § 15064.4(b)(3).) Calculating the differences between the general long-term statewide emission reduction goals stated in EO S-03-05 and emission reductions achievable in connection with any specific project or group of projects, in contrast, would amount to little more than a statistical exercise yielding impressively large, but ultimately unhelpful, numbers. This is particularly true in the case of RTP/SCSs which, under California's current official GHG emission reduction strategy, are expected to account for less than 3% of the GHG emission reductions necessary to achieve the overall goals of EO S-03-05. (AR 319:26155.) Such analysis would have the same practical informational value as measuring the effects of a local water conservation program against total water consumption in the entire State of California. It would also be of little help in fulfilling an EIR's basic function of assessing a project's impacts on the physical environment, not its impact on existing man-made plans. (*Ballona Wetlands,* 201 Cal.App.4th 455, 473; *Woodward Park*, 150 Cal.App.4th 683, 706-711.)

SANDAG was thus correct in following the adopted state standards for review of GHG impacts set forth in Guidelines § 15064.4. Consistent with these standards, the EIR provided a detailed, concrete quantitative analysis of GHG emissions in absolute terms, and further analyses based on consistency with the reduction targets in all existing concrete plans for GHG reductions. The EIR was not required to engage in the further statistical exercises advocated by petitioners based on comparisons with broad, long-term statewide GHG reduction targets that could never even remotely be approached through regional transportation planning efforts alone.

IV. THE EIR ADEQUATELY ADDRESSED MITIGATION MEASURES FOR GREENHOUSE GAS EMISSIONS

The trial court also found that the EIR was inadequate for failure to adequately address mitigation measures for GHG emissions. The trial court's principle criticism appears to be that the EIR merely "kick[s] the can down the road" and defers responsibility to "local jurisdictions." (JA {75}1057.) According the trial court, SANDAG has refused to assert its full legal powers, including use of "purse string control over *TransNet* funds" to craft "legally enforceable mitigation measure[s] with teeth" that would force other public agencies in the region to further reduce GHG impacts. Ironically, however, the only example offered in the decision of a further mitigation measure that should have been adopted by SANDAG is the suggestion that SANDAG make money available to local governments to help pay the costs of developing local climate action plans. (*Id.*) Such a mitigation measure obviously falls far short of a "legally enforceable" plan to guarantee GHG emission reductions, which was what the trial court opined was necessary.

The trial court's ruling reflects arguments by the petitioners that SANDAG has failed to use some imagined legal powers to impose GHG mitigation plans on the region's local governments and other independent agencies such as the California Department of Transportation (Caltrans), has illegally "deferred" mitigation, and, above all, has simply failed to do enough to mitigate GHG impacts. Petitioners, like the trial court, are nevertheless vague in the extreme as to precisely how SANDAG could impose "legally enforceable" mitigation measures on other government agencies, and, with few exceptions, extremely vague as to precisely what additional mitigation measures the EIR could have included that are (1) actually *feasible*, (2) "legally enforceable," and (3) substantially different or more effective than the mitigation measures that are already included in the EIR or already incorporated into the RTP/SCS. It is, as will be seen, one thing to play the game of imagining additional purported

mitigation measures that allegedly could have been considered by SANDAG, and quite another to find, after meaningful analysis, that the range of mitigation measures considered in the EIR was legally deficient.

The trial court's ruling here was in error. The EIR discusses a reasonable range – indeed, an exhaustive range – of mitigation measures for GHG emissions. The fact that SANDAG cannot legally *force* other public agencies to implement these measures in connection with individual future projects they carry out, but can only recommend that they do so, does not mean the EIR is inadequate.

A. CEQA Requires Only Consideration of a "Reasonable Range" of Mitigation Measures - An EIR Is Not Required to Include Mitigation Measures that Are Infeasible, Redundant or That Will Not Provide Substantial Additional Mitigation

Although the Court is undoubtedly familiar with the subject matter, a brief recap of the standards governing analysis and adoption of mitigation measures may be warranted here. There is no question that analysis of mitigation measures is among the core functions of an EIR. (PRC § 21100(b)(3); Guidelines § 15126.4(a)(1).) A corollary to this rule, however, is that an EIR is not required to give in-depth consideration to mitigation measures that are determined to be *infeasible*. (*Clover Valley*, 197 Cal.App.4th 200, 245; *Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 350.) "Feasible" means "capable of being accomplished in a successful manner within a reasonable period of time, taking into account, economic, environmental, legal, social, and technological factors." (Guidelines § 15364.) Purported mitigation measures, like proposed project alternatives, also may be determined infeasible on policy grounds, or because they will prevent achievement of basic objectives of a project. (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1165-1166; *CNPS v. Santa Cruz*, 177 Cal.App.4th 957, 1000-1003.) A public agency is not required to automatically abandon important long-

established pre-existing plans or policies or ignore important competing social, practical or environmental considerations in order to define acceptable mitigation measures.

An EIR's discussion of mitigation measures, however, is subject to the same "rule of reason" that governs most other requirements for EIRs. (*Cherry Valley*, 190 Cal.App.4th 316, 348.) CEQA "does not require what is not realistically possible, given the limitation of time, energy and funds." (*Id.*, *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 376, quoting *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1083-1084; Guidelines § 15151.) In many situations, it may be appropriate to discuss more than one mitigation measure for a particular type of impact in an EIR. (See Guidelines § 15126.4(a)(1).) This does not mean, however, that an EIR is required to include "analysis of every *imaginable* alternative or mitigation measure." (*Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 935 (emphasis in original).) The proper question is merely whether the EIR includes a "reasonable range" of mitigation measures under the circumstances. (*Cherry Valley*, 190 Cal.App.4th 316, 348; *Concerned Citizens of South Central L.A. v. Los Angeles Unified School Dist.* (1994) 24 Cal.App.4th 826, 843.) Under this standard, a lead agency is not required to evaluate and adopt every "nickel and dime" mitigation measure suggested during the CEQA process, but should focus on measures that will "substantially lessen" significant environmental effects. (*Gilroy Citizens*, 140 Cal.App.4th 911, 935; *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1989) 209 Cal.App.3d 1502, 1519; see also *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 365 [EIR properly declined to analyze minor highway improvement measures that would not substantially mitigate traffic impacts].)

The "rule of reason" that governs selection and analysis of mitigation measures, also necessarily means that, as is the rule for analyses

of project alternatives, an EIR need not give detailed consideration to purported mitigation measures which are in practice mere variations or minor modifications of mitigating measures already considered in the EIR or already included in the project under review. (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 714; *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1028-1029.) A lead agency is not required to evaluate and adopt every mitigation measure suggested during the administrative proceedings or in subsequent legal proceedings, nor to adopt mitigation measures in the precise form suggested by third parties. (*Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042, 1054-1055 ("*SCOPE*"); *A Local & Regional Monitor v. City of Los Angeles* ("*ALARM*") (1993) 12 Cal.App.4th 1773, 1809-1810.)

It also bears mentioning, since petitioners display considerable confusion on this point, that an EIR does not "adopt" or impose mitigation measures. Rather, an EIR, consistent with its fundamentally informational function, must merely "*describe* feasible mitigation measures that *could* minimize significant adverse impacts." (Guidelines § 15126.4(a)(1), emphasis added.) The decision to adopt – or reject – the identified mitigation measures is made at the time a lead agency or responsible agency actually approves the project. (*Laurel Heights*, 47 Cal.3d 376, 401-402.) The basis for adoption or rejection of the mitigation measures must be set forth in findings required by Public Resources Code § 21081 and Guidelines § 15093. (*City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 355.)

CEQA also recognizes – although petitioners apparently do not – that the lead agency that prepares an EIR may not necessarily have the legal authority or practical ability to adopt and implement every mitigation measure listed in an EIR. CEQA does not vest individual state, local or regional agencies with powers that they do not otherwise possess, nor the

ability to exercise authority that is vested by law entirely in other public agencies. (*Sierra Club v. California Coastal Com'n* (2005) 35 Cal.4th 839, 859; *Concerned Citizens of South Central L.A.*, 24 Cal.App.4th 826, 842; PRC § 21004; Guidelines § 15040.) Thus, where a lead agency, such as SANDAG in this case, determines that it does not have the ability to directly adopt or implement an otherwise feasible mitigation measure, it is authorized to make the finding that the specified mitigation measures "are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency." (PRC § 21081(a)(2); Guidelines § 15091(a)(2); *City of Marina*, 39 Cal.4th 341, 366.) This does not mean that an EIR cannot or should not include mitigation measures that can only be adopted and implemented by agencies other than the lead agency. Indeed, such a narrow focus would gravely undermine the informational purposes of an EIR, which is intended to serve as a basis for evaluation and decisionmaking by *all* public agencies potentially involved in or otherwise interested in implementing a program or project, and to similarly inform the public. (PRC § 21002.1(a), (b), (d); Guidelines § 15121.) There is thus no legal basis for petitioners' claims in this case that mitigation measures listed in the EIR were invalid or insufficient merely because their implementation is dependent upon eventual adoption by other independent public agencies.

Claims concerning the feasibility or effectiveness of mitigation measures are reviewed under the substantial evidence test. (*Cherry Valley*, 190 Cal.App.4th 316, 350; *CNPS v. Santa Cruz*, 177 Cal.App.4th 957, 997.) The usual deference applies. "A court's task is not to weigh conflicting evidence and determine who has the better argument when the dispute is whether adverse effects have been mitigated or could be better mitigated." (*Laurel Heights*, 47 Cal.3d 376, 393; *ALARM*, 12 Cal.App.4th 1773, 1809.) As discussed further below, petitioners bear the burden of showing, based on evidence in the record, that the range of mitigation measures considered in the EIR was inadequate, and that there is no

reasonable basis for the lead agency to forego in-depth analysis of purported additional feasible mitigation measures proposed by project opponents. (*Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 199; *CNPS v. Rancho Cordova*, 172 Cal.App.4th 603, 626.)

B. The EIR Considered a Reasonable Range of Mitigation Measures

Any assessment of the adequacy of the GHG mitigation measures considered by SANDAG must begin with what petitioners largely ignore – a fair discussion of the mitigation measures actually listed in the EIR and the many additional mitigating measures that are also already included in the RTP/SCS itself or that were otherwise considered by SANDAG and rejected for valid reasons. When this is done, it is clear that the range of mitigation measures considered is more than reasonable – indeed, it is exhaustive.

1. *The Facts*

a. The RTP/SCS Itself is a Plan for Reducing GHG Emissions

The Project at issue in this case is unusual in that one major component of it – the SCS – is itself largely a program to mitigate GHG impacts. (Gov. Code § 65080(b)(2)(B).) Many of petitioners' complaints about GHG mitigation measures are in substance complaints about the RTP/SCS itself. Petitioners argued below, for example, that the EIR should have considered such things as a regional TOD policy, accelerated investment in public transit projects, and any number of lesser measures to reduce regional GHG emissions. Yet provisions for a regional TOD policy and a host of additional plans and programs to reduce GHG emissions *are* included in the RTP/SCS, if not always in the precise form suggested by petitioners. Other measures were considered but rejected as infeasible due to economic constraints or conflict with the basic objectives and basic legal requirements governing the RTP/SCS. Petitioners' claims that additional mitigation measures should have been considered in the EIR thus must not

only be assessed in light of feasibility considerations, but in light of what is already in the RTP/SCS itself.

The elements of the SCS are discussed in Chapter 3 of the RTP/SCS (AR 192a:13088-13167.) The basic goal of the SCS is to incorporate "smart growth" planning principles into the RTP/SCS to the extent possible given the many other constraints that govern preparation of a realistic and legally valid RTP/SCS. (See, generally, AR 192a:13064-13072, 13075-13078, 13084-13086.) The RTP/SCS, however, does not merely build on past smart-growth planning initiatives (AR 912a:13093), but specifically further focuses these efforts on GHG reductions and augments these efforts with a wide range of specific additional policies and action programs designed to maximize the benefits of smart-growth planning or to otherwise directly reduce GHG emissions. (AR 192a:13089-13091, 13112-13126, 13150-13161, AR 192a:13165-13168 [summarizing goals and action items]. Other elements of the overall GHG reduction strategy are discussed in detail in the RTP/SCS. Expansion and enhancements of public transit systems, which play a major role in the GHG reduction strategy, are addressed in further detail in Chapter 6. (AR 192a:13255-13278.) Transportation System Management ("TSM") strategies intended to increase the efficiency of road systems and public transit systems – and consequently reduce emissions -- are discussed in Chapter 7. (AR 192a:13334-13355.) Transportation Demand Measures ("TDM") intended to reduce overall vehicle use and alleviate traffic congestion and related emissions are discussed in Chapter 8. (AR 192a:13357-13370.) Other provisions of the RTP/SCS mandate ongoing study, monitoring and further planning efforts to pursue further long-term reductions in GHG and other impacts. (AR 8a:2102-2103; 190a:13166-13168.) These include preparation of a proposed regional TOD policy and other measures to promote climate-change planning principles in the next update of SANDAG's Regional Comprehensive Plan. (AR 190a:13166.)

Notwithstanding petitioners' dissatisfaction, the RTP/SCS is projected to be successful in achieving the GHG reduction goals assigned to it by statute. It will, as discussed previously, achieve net reductions in per-capita vehicle related GHG emissions through 2035, as well as net reductions in overall GHG emissions through the year 2020. (AR 8a:2071, 2578-2581.)

b. The EIR Exhaustively Lists Further Potential Mitigation Measures for GHG Emissions

While the RTP/SCS will meet the GHG emission reduction goals of SB 375 and will actually see net reductions in regional GHG emissions through 2020 (and also net reductions of *transportation-related* emissions through 2035), the EIR acknowledges that overall regional GHG emissions are expected to increase above existing (2010) levels by 2035 and through 2050. (AR 8a:2572, 2574-2575, 2578-2581.) Consequently, three sets of further mitigation measures for GHG emissions were discussed in the EIR.

Measure GHG-A commits SANDAG to utilizing its Regional Comprehensive Plan and RPT/SCS update processes to incorporate further GHG reduction measures as these become technically or legally viable in future years, e.g., as local governments modify their own existing general plans and zoning to make further reductions feasible. (AR 8a:2588.)

Measure GHG-B provides that the region's local governments "can and should" adopt a vast array of mitigation measures which only they have the actual legal authority to implement, either through the adoption of local climate action plans ("CAPS") or through ongoing general land use regulation and planning effort. (AR 8a:2588-2590; 8b:3825-3827.) The recommended measures include, to name a few, adoption and implementation of local TOD programs, energy and water efficiency programs, and funding of local transit improvements and transit incentive plans. (AR 8a:2589.) Many of these measures are, ironically, reproduced directly from the Attorney General's own published lists of recommended measures. (Id; see http://ag.ca.gov/globalwarming/pdf/GP_policies.pdf.)

While SANDAG can neither directly adopt nor force local governments to adopt these measures, Mitigation Measure GHG-B also provides that SANDAG will assist local governments in preparing CAPs or other climate strategies, as it has in the past, through implementation of SANDAG's own Climate Action Strategy and Energy Roadmap Program. (AR 8a:2589.)

Measure GHG-C lists Best Available Control Technology measures to be utilized by SANDAG and other agencies to reduce GHG emissions during the construction and operation of projects and other ongoing activities under their control. (AR 8a:2590.) These include use of alternative fuel vehicles where feasible, energy efficiency measures, and recycling of construction debris, to name a few.

All three of these measures conform directly with Guidelines § 15126.4(c)(5), which provides the GHG mitigation measures proposed in connection with adoption of a long range plan "may include the identification of specific measures that may be implemented on a project-by-project basis."

c. SANDAG Also Fully Considered Alternative Transit Development Plans and Other Mitigation Measures and Found Them Infeasible

The mitigation measures formally ultimately listed in the EIR were not the only mitigating measures actually considered by SANDAG during the EIR process. The EIR identifies other additional mitigation measures that were considered but determined to be infeasible. (AR 8a:2591.) Further discussion of potential mitigation measures and alternatives proposed by petitioners to reduce GHG emissions appear in the response to comments sections of the FEIR. (AR 8b:3765-3766, 3778-3779, 3786-3787, 3800-3811, 3824-3829, 3846-3847, 4083, 4154, 4301.) The FEIR also fully explains why most of the additional mitigation measures suggested by commenting parties could not be directly imposed or implemented by SANDAG, but were dependent upon future actions by

local land use authorities or other independent agencies not controlled by SANDAG. (AR 8b:3773-3775, 3827-3828.)

The EIR also considered other means of potentially reducing GHG emissions in its analysis of potential project alternatives. This is significant because petitioners contended below that the EIR should have considered additional mitigation in the form of reshuffling planned transportation improvement expenditures to hasten the development of public transit projects and delay improvements to existing roadways, which petitioners regard as a regressive use of transportation funds. The EIR evaluated four alternative plans that would have accelerated public transit projects. (AR 8a:3140-3161, 3183-3271.) SANDAG concluded that all these alternatives were infeasible given the legal and economic constraints on available transportation funds, and also that these alternatives would not decrease GHG emissions as compared to the approved RTP/SCS; in some cases, they would increase them. (AR 3:136-145; 8a:3192-3193, 3214, 3236, 3258-3259.) The FEIR also discussed additional transit-oriented alternatives suggested by petitioners and concluded they were infeasible. (AR 8b:3805-3811.) Petitioners thus cannot complain that SANDAG failed to consider alterations of public transit plans in the RTP/SCS as a means of reducing GHG impacts. It has long been recognized that the fundamental goal of analysis of project alternatives and mitigation measures is the same: avoidance or reduction of environmental impacts. (*Laurel Heights*, 47 Cal.3d 376, 403.)

d. SANDAG Formally Adopted All Those Mitigation Measures That Are Within Its Power to Implement

At the conclusion of the review process, SANDAG also did what it is required to do by CEQA – consider the mitigation measures and alternatives identified in the EIR, adopt those deemed feasible and within SANDAG's power to implement, make findings regarding the mitigation measures, and adopt a mitigation monitoring program ("MMRP") for compliance. (PRC §§ 21081, 21081.6; AR 3:009-010, 087-092, 182-216.)

The findings and MMRP confirm that SANDAG is committed to implementing the GHG mitigation measures prescribed in the EIR wherever it has the power to do so. (AR 3:87-91, 204-207.) This includes a commitment to condition funding of projects that SANDAG approves upon compliance with applicable mitigation measures prescribed in the EIR where it has the legal power to do so. (AR 3:182, 8b:3774, 3829.) The findings also correctly note that power to implement the mitigation measures in the EIR is in many instances, particularly with respect to future development and land use decisions, vested in other public agencies and that, consistent with PRC § 21081(a)(2), the relevant mitigation measures "can and should be adopted by those other agencies." (AR 3:090, 091.) The findings also address and provide further detailed explanations why additional GHG mitigation measures proposed by petitioners and others were determined to be infeasible or beyond the legal authority of SANDAG to implement. (AR 3:156-161.) Lastly, the findings state in detail why alternatives involving accelerated public transit development, including alternatives proposed by petitioners, were found infeasible. (AR 3:136-145, 161-173.)

C. Petitioners Have Failed to Show that There Actually are Any Additional Feasible GHG Mitigation Measures that Reasonably Should Have Been Included in the EIR

In light of the foregoing, it is impossible to say that the EIR does not include a "reasonable range" of mitigation measures. Nevertheless, a major theme of petitioners' claims below was that SANDAG has failed to undertake serious, adequate efforts to mitigate GHG impacts. The principal claim, with variations, is that SANDAG has passed the buck by refusing to acknowledge the full extent of its powers to impose mitigation measures on future development and future transportation projects in the region, notwithstanding the fact that future development decisions and most transportation projects will actually be carried out by other state and local government agencies. Somewhat inconsistently, petitioners (and the trial court) also complained that SANDAG has not done enough to "encourage"

other public agencies in the region to undertake GHG reduction measures, although mere encouragement or providing of incentives obviously have no legally enforceable effects. These claims are neither factually or legally tenable.

1. *Petitioners Bear the Burden of Identifying Specific, Identifiable Feasible Mitigation Measures that Were Allegedly Wrongfully Omitted From the EIR*

For all their insistence that SANDAG has dragged its heels in pursuing GHG emission reductions, petitioners have been steadfastly vague as to precisely what *specific* additional mitigation measures could and should have been included in the EIR, and vaguer still in explaining why these measures should be considered necessary, feasible and actually likely to produce substantial additional mitigation. Petitioners apparently assume that it is SANDAG's, or this Court's, burden to imagine what further mitigation measures SANDAG might concretely have considered, and then prove that such measures are actually infeasible or were otherwise reasonably omitted from the EIR. Such tactics have become all too common in CEQA litigation. Unfortunately for petitioners, such tactics also doom their claims.

In *Mount Shasta Bioregional Ecology Center v. County of Siskiyou*, (2012) 210 Cal.App.4th 184, the Third Appellate District recently rejected an attack on the alternatives analysis in the EIR because the petitioners had failed to identify any specific additional feasible alternative that the EIR could have evaluated. The EIR at issue in *Mount Shasta* actually evaluated only one project alternative – a "No-Project" alternative (*Id*. at 198.) The Draft EIR listed three other possible alternatives that had been evaluated at the scoping stage but then rejected as infeasible without further evaluation. (*Id*. at 197.) The petitioners complained that the EIR failed to consider a reasonable range (or indeed, any "range") of alternatives. They did not, however, identify any other specific alternatives that were alleged to be potentially feasible. Instead, they contended that the burden of identifying

and evaluating a reasonable range of alternatives was entirely on the agency preparing the EIR. (*Id*. at 199.)

The appellate court rejected this claim, noting,

> it is the appellants' burden to demonstrate the inadequacy of the EIR. An appellant must therefore show the agency failed to satisfy its burden of identifying and analyzing one or more potentially feasible alternatives. An appellant may not simply claim the agency failed to present an adequate range of alternatives and then sit back and force the agency to prove it wrong. (*Id*. at 199.)

The court also noted that when the appellants belatedly attempted to identify a specific alternative that should have been considered in their reply brief, they failed to show (or even discuss) how this alternative would actually have met project objectives, would have been at least potentially feasible under the circumstances, and would have actually reduced the environmental effects of the project. (*Id*.) In short, petitioners had failed to meet any part of their burden of showing that the EIR overlooked a reasonable, potentially feasible alternative that would substantially reduce environmental impacts in practice.

The principles stated in *Mount Shasta* should apply equally to an EIR's analysis of mitigation measures, which are, after all, simply another means of reducing environmental impacts. (*Laurel Heights*, 47 Cal.3d 376, 403; PRC § 21002.1(a); Guidelines § 15002(h), 15021(a).) As noted above, an EIR is required to analyze a reasonable range of *feasible* mitigation measures. An EIR is not required to analyze infeasible mitigation measures, nor myriads of "nickel and dime" measures that will make no substantial difference in environmental outcome, but instead simply compound costs, administrative burdens and monitoring difficulties for little benefit. A petitioner who contends that some necessary or important mitigation measure has been overlooked must then logically at least identify *what that specific mitigation measure is.* Secondly, the petitioner must demonstrate, by citation to relevant evidence, that the proposed measure was at least potentially feasible, would provide substantial further mitigation, and would not merely replicate mitigation

measures already included in the project or in the EIR. A lead agency cannot be found to have committed a prejudicial abuse of discretion by overlooking mitigation measures that are of no significant, practical value. Finally, the petitioner must show that the lead agency's reasons for rejecting the proposed mitigation measure are not supported by any substantial evidence in the record; it is not the respondent's burden to review the relevant evidence in the first instance. (*CNPS v. Rancho Cordova*, 172 Cal.App.4th 603, 626.) If the suggested mitigation measure was not brought to the agency's attention with sufficient specificity to allow some reasoned response during the administrative process, the claim will normally be barred by the petitioner's failure to exhaust administrative remedies. (*Id*. at 616, 629; PRC § 21177(a).) But even if this threshold requirement is deemed satisfied, a petitioner cannot, as petitioners attempted below, overcome the presumption that an EIR is legally adequate by offering mere vague suggestions or general criticisms concerning additional types of mitigation measures that allegedly should have been considered. (*Mount Shasta*, 210 Cal.App.4th 184, 195, 199.*)*

2. *Petitioners Cannot Meet Their Burden by Simply Suggesting Broad Types of Mitigation Measures or Mitigation Strategies, Without Any Evidence of Analysis Concerning Their Potential Viability in Practice*

Virtually all the complaints lodged by petitioners to date about the range of mitigation measures included in the EIR fail for the reasons discussed above. While petitioners suggest that various additional *types* of mitigation measures should have been considered, they have consistently avoided specifics as to precisely what these measures would involve in practice, and where, when and how they could actually be implemented. To the extent the petitioners have addressed feasibility issues at all, they have done so in conclusory terms, relying on nothing more than their own bald opinions, or representations that similar measures have been considered by other public agencies. Conclusory assertions, however,

provide no basis for concluding that the EIR failed to properly consider some important feasible mitigation measures that would both substantially reduce GHG emissions and be significantly different than those already included in the EIR or in the RTP/SCS itself. A few examples will suffice.

One consistent theme below was that SANDAG could reorder the funding priorities of the RTP/SCS to promote public transit development at the expense of highway projects. SANDAG, however, extensively studied alternatives involving these types of changes and concluded that they were not only infeasible, but would not actually decrease GHG emissions. (AR 3:136-147, 163-169; 8a:3140-3161, 3192, 3214, 3236, 3258-3259; 8b:3806-3811.) If petitioners contend that some possible additional variation on funding priorities should have been considered as a "mitigation measure," it is incumbent on them to specify precisely what this variation is, and provide evidence that this variation would actually be feasible and would actually substantially reduce GHG emissions.

Petitioners also extensively argued below that SANDAG could use its fiscal or other imagined powers to impose GHG mitigation requirements on other public agencies who will actually carry out the many individual future transportation projects planned in the RTP/SCS, or who will make the many land use regulatory decisions that will control future growth and development in the region. Even leaving aside the legal feasibility issues addressed below, such arguments merely beg an entire host of further questions, i.e., (1) precisely *what*, if any, specific project-level mitigation measures could be imposed; (2) what, if any, degree of substantive mitigation might be accomplished; (3) whether the mitigation measures would actually be *feasible* in practice for any significant number of the future individual projects; (4) whether, if the implementing agency refused to accept SANDAG's conditions, aborting the project would itself have unacceptable environmental or other consequences, such as increases in traffic congestion and resulting air pollution, or public safety impacts. While SANDAG has committed to condition project funding upon

compliance with appropriate mitigation measures where it has the power to do so (AR 3:182), it would be an impossible task to draft mitigation measures for the EIR that properly accounted for all the factors that must govern how, when and in what manner specific project-level mitigation measures would be designed and imposed on the vast array of future projects anticipated in the RTP/SCS.

As a variation on the foregoing theme, petitioners also argued below that the EIR should have considered "condition[ing] the funding of transportation projects on performance standards requiring reductions in VMT." (JA {47}421:3-16, {65}832-833.) "VMT" stands for "vehicle miles traveled," which is one factor typically considered in models used to estimate transportation-related GHG emissions. (AR 8b:3817-3821.) A performance standard, however, is not a mitigation measure. It is merely a metric for measuring the effectiveness of an actual mitigation measure. As SANDAG explained in the FEIR, VMT reductions are not a particularly useful performance standard in many situations, as actual GHG emissions are affected by a number of additional factors, e.g., vehicle fuel efficiency, rates of travel and traffic conditions. (AR 8b:3823, 3817-3818, 3829, 4305.) But even assuming that there may be instances in which VMT reductions would be an appropriate performance standard, petitioners' argument here simply begs the question of what specific project-level mitigation measures might be available to reduce VMT, and whether such measures would actually be feasible and likely to produce significant GHG reductions from any significant number of future projects.

As a final example, petitioners also briefly argued below that the EIR should have included a regional TOD policy as a form of mitigation. (JA {65}875:16-24.) SANDAG, however, has specifically committed in the RTP/SCS to develop such a policy as part of its next Regional Comprehensive Plan Update. (AR 190a:13166, # 2.) This timing reflects the reality that development of a meaningful regional TOD policy will require extensive study, inter-agency collaboration and public involvement

to determine the contents of the policy and feasible means of implementing it before the policy could be adopted. If petitioners contend that some meaningful and effective regional quick-fix TOD policy could have been developed within the time frame available for preparation of the EIR, they were obligated to state what TOD measures they have in mind with sufficient specificity to allow a determination that adoption and implementation of the policy was feasible in practice, and would result in substantial GHG reductions beyond those already expected to occur under the RTP/SCS.

3. *SANDAG Did Not Abuse Its Discretion by Declining to Further Evaluate or Adopt the Few Additional Specific Mitigation Measures Recommended by Petitioners*

In the trial court proceedings petitioners did identify two potential mitigation measures that are arguably specific enough to allow detailed evaluation. In each instance, however, the record shows that the proposed measures were either considered by SANDAG and rejected for valid reasons, or that there is no valid basis for concluding that the measures are feasible, substantially different than mitigating measures already being implemented by SANDAG, or would lead to substantial additional mitigation of GHG impacts in practice.

a. Funding of Climate Action Plans

Although the trial court was dismissive of SANDAG's overall mitigation efforts, it identified only one single additional mitigation measure that SANDAG purportedly should have included in the EIR – SANDAG funding for local climate action plans prepared by local governments. (JA {75}1057.)

The genesis of this issue reveals how CEQA litigation has often degenerated into pure gamesmanship. Although the petitioners' opening briefs below occasionally refer to climate action plans or "CAPs," none raised the issue of whether SANDAG should be required to commit to provide financial subsidies for local CAPs as a mitigation measure. The

first and only mention of this issue appears in the AG's *reply brief*. (JA {64}796:2-4.) The record indicates that this purported mitigation measure was also mentioned only once in the administrative proceedings, and that by way of an oblique reference in a single sentence buried in a lengthy comment letter submitted by CNFF literally only hours before SANDAG's final hearing on the Project. (AR 320:27733.)[3] While this brief, last minute, comment might possibly be enough to exhaust administrative remedies on the issue (PRC § 21177), it hardly suggests a sincere, good faith effort to secure thoughtful consideration of this additional mitigation measure.

Notwithstanding the decidedly casual manner in which this issue was raised, it is clear from the record that inclusion of the proposed measure in the EIR was not necessary to achieve a reasonable range of mitigation measures. Instead, the record shows that the suggested measure is little more than a variation on measures that SANDAG has already undertaken and committed to continue undertaking to promote adoption of climate change planning measures by local governments.

Mitigation Measure GHG-B expressly provides, among other things, that "SANDAG will assist local governments in preparing CAPS and other climate strategies through continued implementation of the SANDAG Climate Action Strategy and Energy Roadmap Program." (AR 8a:2589.) The record confirms that SANDAG has indeed played a tremendous role in promoting and facilitating the development of local CAPS through these programs and other initiatives. The SANDAG Climate Action Strategy adopted in 2010 provides both guidelines and a readily available toolkit for developing local CAPs. (AR 216:17616-17672.) Over the past decade, SANDAG has also actively promoted local smart growth and climate action

[3] The sentence states: "[The EIR] does not, however, provide either: … or (2) a source of funding so that agencies have the financial means to prepare their own CAPs." (AR 320:27733.)

planning through a variety of additional programs, initiatives and support efforts involving innumerable studies, public hearings and workshops, grants and informal collaboration with local governments and other stakeholders. (AR 8a:2074; 8b:3789; 22:4655-4659 (regional energy strategy); 31:4969-4971; 190a:13093; 216:17646, 17671.)

SANDAG has also provided direct funding to local governments for climate action planning in the form of grants of *TransNet* funds for smart growth projects and planning initiatives. (AR 8b:3789.) The *TransNet* Ordinance allocates up to $280,000,000 for this purpose. (AR 320:28696.) This program will be continued and broadened as part of the RTP/SCS. (AR 190a:13166-13167.) Smart growth principles are, of course, core principles for climate-change-responsive land use planning, and thus a central element of most CAPs. (AR 216:17641-17648.)

Petitioners also can offer no evidence that more direct subsidies for preparation of CAPS will actually achieve any significant GHG emission reductions that are not already being achieved by other means. At the time the EIR was prepared, 10 of the region's 19 local planning jurisdictions (including the City of San Diego and County of San Diego, with by far the largest populations and service areas) had already adopted or were in the process of preparing CAPs. (AR 8b:3827.) As to the remaining jurisdictions, there is no evidence that these local governments are simply awaiting the availability of SANDAG funding before undertaking such plans. Neither is there any evidence that these latter jurisdictions are refraining from undertaking other types of climate-change-responsive planning actions without benefit of a formal CAP. Whether all of the region's local governments ultimately adopt CAPs is ultimately a question for the local governments themselves. In the meantime, given SANDAG's broad ongoing financial and administrative support for responsible climate action planning and the breadth of other measures included in the RTP/SCS or recommended in the EIR to foster GHG reductions, it borders on the absurd to suggest that the EIR is legally inadequate for failure to

recommend a mere variation in form of assistance for local planning efforts.

4. *SANDAG Properly Concluded That a Regional Parking Fee Program Was Not a Feasible Mitigation Measure*

Petitioners also contended below that the mitigation measures included in the EIR should have concluded a regional "parking management" program which would utilize systematic increases in parking fees to disincentivize use of private automobiles for commuting or other travel. (JA {47}419-420.) Although petitioners have never proposed any specifics for such a program, the record shows that the potential benefits and feasibility of parking fee programs were extensively considered during the RTP/SCS process. (AR 103:7767; 126:8632-8633, 8703; 190b:14402-14407.) SANDAG stated its reasons for rejecting a regional parking fee program in the Final EIR. (AR 8a:3019, 8b:3800-3801, 4301.)

First, such measures would not provide substantial mitigation. Computer modeling conducted by SANDAG indicated that manipulation of parking rates would have only a marginal effect on vehicle miles traveled, i.e., tiny fractions of one percent. (AR 8b:3800-3801; 190b:16031-16032.)

Second, it is not practical in the near term to draft and implement a parking fee program on a regional basis given the difficulties of formulating workable uniform measures acceptable to some 19 different planning jurisdictions with widely disparate demographics, geography, infrastructure and development patterns. (AR 8b:3800-3801.) Although SANDAG has also committed in the RTP/SCS to further study the possibilities of developing collaborative regional parking management

plans in its next Regional Comprehensive Plan update (AR 8b:3801)[4], SANDAG was not required to delay completion of the EIR to allow further studies or to develop mitigation programs whose ultimate feasibility and effectiveness is currently speculative. (*National Parks*, 71 Cal.App.4th 1341, 1364-1365; *Concerned Citizens of South Central L.A.*, 24 Cal.App.4th 826, 841-842.).

Finally, a regional parking fee program of the type advocated by petitioners was deemed infeasible for policy reasons and because it would conflict with basic social equity goals of the RTP/SCS. (AR 8a:3109, 8b:3800-3801; 190a:13065, 13171-13173.) Any parking fee increases sufficient to significantly deter vehicle travel would also impose a significant burden on area residents who could least afford it. A lead agency may properly find mitigation measures infeasible for such reasons. (*CNPS v. Santa Cruz*, 177 Cal.App.4th 957, 1000-1001; PRC § 21061.1.)

While petitioners may disagree with SANDAG's conclusions on the foregoing points, they cannot show that these conclusions are unsupported by substantial evidence or based on impermissible policy considerations.

D. SANDAG Was Not Required to Falsely Claim Legal Authority to Impose Mitigation Measures that it Has No Power to Impose

The petitioners' (and the trial court's) second major criticism of the GHG mitigation measures was that they are not legally enforceable by SANDAG, and, therefore, purportedly lack "teeth." (JA {75}1057.) Petitioners are completely vague as to precisely what additional "legally enforceable" mitigation measures could have adopted, and precisely what

[4] Mitigation Measure GHG-B also identifies adoption of locally-tailored parking policy measures by local governments as a potential means of reducing GHG emissions. (AR 8a:2589; 8b:3773-3774, 3800.) This is consistent with past SANDAG studies of parking issues, which have consistently found that parking fee programs generally must be tailored to specific local circumstances to be successful. (AR 103:7767; 126:8632-8633, 8703; 190b:14402-14407.)

statutes or other legal authority allegedly give SANDAG the power to enforceably impose such mitigation requirements on other public agencies.

As discussed previously, SANDAG has committed itself to implementing all mitigation measures that are within its legal power. This includes imposition of applicable mitigation measures on individual future projects that SANDAG controls, which includes most public transit projects, and conditioning funding for other transportation improvement projects in compliance with applicable feasible mitigation measures where it has discretion to do so. (AR 3:182; 8b:3774, 3827-3828.) Petitioners' dissatisfaction, thus, apparently derives from the fact that SANDAG has correctly disclaimed the power to withhold or condition funding for transportation projects that receive only "pass-through" funds administered by SANDAG, and has disclaimed any legal authority to impose mitigation requirements on the local planning and zoning authorities who actually regulate land use and development in the region. (AR 8b:3773-3775, 3827.) There is no merit to petitioners' contentions that SANDAG has somehow wrongfully failed to exercise its full powers to mitigate GHG impacts.

1. *SANDAG Does Not Have the Power to Impose Mitigation Requirements on Local Land Use Planning Agencies*

It is well settled that land use regulatory authority is vested by California constitution and statutory law in city and county governments. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782; Gov. Code § 65300 et seq.) While the Legislature has the power to create and confer additional regulatory powers on state or regional agencies such as the California Coastal Commission, it has conferred no such powers on SANDAG. Petitioners also do not appear to contend that CEQA itself conferred any such powers on SANDAG. They have also never cited any other purported source of legal authority to require that independent public agencies adopt and implement mitigation measures such as those recommended in the EIR if they are not voluntarily willing to do so. CEQA itself does not vest

public agencies with legal powers or authority that they do not otherwise have under their governing statutes. (*Sierra Club v. California Coastal Com'n,* 35 Cal.4th 839, 859; PRC § 21004; Guidelines § 15040(b).)

The trial court appears to believe that Government Code § 65080(b)(2)(B) grants SANDAG the missing authority. (JA {75}1057.) This reflects a fundamental misunderstanding of both Government Code § 65080 and the nature of a RTP/SCS. Although Government Code § 65080(b)(2)(B) requires that a RTP/SCS "utilize the most recent planning assumptions considering local general plans and other factors," it does not authorize SANDAG to dictate to local governments what their general plans must contain or what "planning assumptions" they must accept. Elsewhere, Government Code § 650809(b)(2)(K) makes it clear that a SCS does not "regulate the use of land," and shall not "be interpreted as superseding the exercise of the land use authority of cities and counties within the region." Clearly the Legislature did not intend Government Code § 65080 to change the State's longstanding policy of vesting local land use regulatory authority in local governments.

The trial court also appears to have believed that SANDAG's "purse string control over *TransNet* funds" somehow confers authority to impose mitigation requirements on local government's future land use decisions. (JA {75}1057.) SANDAG funds however, are generally available only for transportation related projects. As further discussed below, SANDAG has only limited authority to condition or withhold transfers of these funds. Even where SANDAG has discretionary authority, however, mitigation requirements may be imposed under CEQA only where there is (1) an actual significant impact to be mitigated; (2) a logical nexus between the impact and required mitigation; (3) rough proportionality between the impact and required mitigation; and (4) the mitigation is otherwise feasible. (Guidelines § 15126(a)(4); *City of Marina,* 39 Cal.4th 341, 362; *Tracy First,* 177 Cal.App.4th 912, 938.) There is no reasonable basis for believing that SANDAG could routinely leverage its powers over

SANDAG funds to force local governments (much less Caltrans) to adopt new land use policies or GHG reduction programs such as those listed under Mitigation Measure GHG-2 as a condition for receiving funds for typical local road widening, intersection improvement or bike-lane additions of the type funded through *TransNet* or other funds administered by SANDAG. (See AR 8a:2124-2128 [local road project list].)

2. *SANDAG Does Not Have the Power to Withhold or Condition Release of Pass-Through Transportation Funds, Including TransNet Funds*

Although the wide-ranging sources of transportation funding that the RTP/SCS will rely on are fully disclosed in the record, petitioners have never identified any state or federal source of funds which they contend could be leveraged to impose GHG mitigation measures on individual future transportation projects, even assuming that such measures are otherwise feasible and would not be voluntarily adopted by the responsible lead agency (usually Caltrans) in any event. (See AR 145:9908-9923, 190a:13237-13244; 190b:13655-13666.) In practice, petitioners' arguments boil down to conclusory assertions that *TransNet* funds administered by SANDAG could be manipulated for this purpose. A review of the *TransNet* Ordinance and its history belie these claims.

a. The *TransNet* Ordinance

The *TransNet* Ordinance and Expenditure Plan was passed by a two-thirds supermajority of the County voters in 2004. (AR 320(30):28689-28738.) The measure authorizes a ½ cent transactions and use tax to fund specified transportation-related projects. Contrary to petitioners' apparent belief, the Ordinance does not establish some vast slush fund. The Expenditure Plan, which is an integral part of the Ordinance, expressly allocates specific percentages of the sales tax revenue to designated projects and activities, including various regional highway improvements, transit capital and operating costs, congestion relief of local roadways, and other programs. (Ordinance, §§ 2.A – 2.F; AR 320(30):28691-28697, 28706-28723.) In order to obtain voter approval, the Expenditure Plan was

required to carefully balance the interests of all classes of voters, from devoted bus and light rail riders to automobile dependent commuters, shoppers, recreational users and commercial vehicle operators, as well as to fairly distribute transportation benefits throughout the region's populated areas.

As petitioners fondly note, some changes in the Expenditure Plan may be approved by the SANDAG Board by a two-thirds supermajority vote, while others, such as allocations for certain "lockbox" projects, such as early completion of State Routes 52 and 76, can only be modified by two-thirds approval of the general electorate. (AR 320(30):28699, 28703, Secs. 4.E.1 and 16.) In practice, however, only extremely minor changes to the Expenditure Plan have been able to obtain the 2/3 Board approval necessary. (See, e.g., AR 195:16919, 206:17466.)

b. Reallocation of SANDAG Funds as Mitigation

Petitioners apparently believe that SANDAG should consider reallocation of SANDAG funds – presumably from road projects to transit projects – as a form of "mitigation" within its legal powers. This argument begs the questions addressed in Section IV.C above as to precisely what specific changes SANDAG was supposed to consider and whether such changes are actually feasible in light of all other relevant considerations, and whether the changes would actually result in GHG emission reductions. But in any event SANDAG was well within its discretion to conclude that this was not a feasible means of pursuing GHG emission reductions for other reasons.

The *Transnet* Expenditure Plan is not a mere administrative wish list, but a regional compact. In order to obtain the supermajority public vote necessary to enact the Ordinance, it was necessary to craft an expenditure plan which reflected the full range of demographic, intra-regional and inter-governmental interests that must be reflected in any rational, achievable, democratically approved transportation plan. Many of the fund allocations in the Expenditure Plan are for projects that have been

planned for many years or even decades as vital elements of a complete and efficient street and highway network, and specifically intended to serve as matching funds for state and federal road funds that cannot be freely reallocated to support other transportations modes. (AR 320(30):28690-28695, 28699 ¶ E.1.) Although the petitioners may feel automobile transportation in general should become a thing of the past, many of these projects are not only critical for relieving traffic congestion and improving the quality of life and highway safety of county voters, but will also reduce air pollution emissions, including GHG emissions, which are increased by poor traffic conditions.

As a matter of law, CEQA does not generally require public agencies to consider major changes to existing legislatively adopted policies and plans as feasible alternatives or mitigation measures. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 573.) Here, SANDAG has legitimately determined that breaking trust with County voters for the sole purpose of pursuing possible incremental decreases in GHG emissions is not feasible as a matter of public policy. SANDAG is not alone in this judgment. In enacting SB 375, the Legislature explicitly declared that the requirements for preparation of a SCS should not affect funding for projects listed in any sales tax ballot measure adopted before 2008, nor "require a transportation sales tax authority to change funding allocations approved by the voters" in any ballot measure enacted before 2010. (Gov. Code § 65080(b)(2)(L).) The fact that petitioners or the trial court have less compunction than the Legislature about tampering with San Diego's voter approved plans does not mean that SANDAG was required to consider changes to the *TransNet* Expenditure Plan as a feasible form of mitigation.

c. Conditioning of *TransNet* Funds

The *TransNet* Ordinance allocates substantial funds for public transit projects and operations, and also establishes special funds for environmental mitigation, transportation for seniors and disabled persons,

the Smart Growth Incentive Program and bicycle, pedestrian and neighborhood safety programs. (Ord. §§ 2.A, 2.B, 4.A-E, AR 320(30)28691-28695, 28697-28699, 28706-28707, 28717-28727.) SANDAG assumes that petitioners do not suggest that these particular funds can or should be leveraged to impose GHG mitigation measures. This leaves the question of whether *TransNet* funds designated for road and highway projects can generally be used in this manner. The answer is no.

i. Highway and Freeway Project Funds

Substantial *Transnet* funds are designated for major highway and freeway projects to relieve traffic congestion, including the addition of managed lanes to better facilitate bus rapid transit. (AR 320:28693-28694, 28706-28723.) These projects are not managed by SANDAG, but by Caltrans, which also generally serves as the lead agency for CEQA purposes for such projects. (Guidelines § 15051.) SANDAG has no power to impose mitigation requirements on Caltrans. It is true that SANDAG may utilize its funding and planning partnership role in such projects to support adoption of feasible GHG (and other) mitigation measures for such projects where warranted. Indeed, there is little reason to doubt that Caltrans would not adopt such measures in any event, and as it has in the past, in compliance with its own duties under CEQA. (AR 8b:3773-3774.) But this does not mean that SANDAG has the legal power to *impose* such requirements.

Petitioners may argue that SANDAG could ultimately withhold funds if Caltrans failed to accept SANDAG's mitigation proposals. This can hardly be considered feasible mitigation. Nothing in the *TransNet* Ordinance authorizes SANDAG to jeopardize the major congestion relief projects listed in the Expenditure Plan by withholding funds on such grounds. As discussed previously, County voters have the right to expect that *TransNet* tax revenues will actually be spent to accomplish the transportation goals embraced in the Expenditure Plan, not used as gambling stakes to pursue some other agenda.

ii. Local Road Projects

The *TransNet* Ordinance allocates 29.1% of tax revenues (after certain set-asides) for local roadway improvements. (Ord. §§ 2.C, 4.D, AR 320(30):28695-28696, 28698-28699.) These funds are allocated to local governments based on a formula set forth in the Ordinance, to be used on projects the local governments select themselves in accordance with priorities stated in the Ordinance. (Id.) Although SANDAG reviews biennial project lists submitted by local governments for consistency with the Ordinance and the RTP, it has no authority to condition the release of funds for qualifying projects or withhold the funds that each local government is entitled to under the formula in the Ordinance. These funds are thus classically "pass-through" funds which SANDAG may not use to impose mitigation requirements or other demands on local governments.

E. SANDAG has Not Unlawfully "Deferred" Mitigation

Petitioners' remaining complaints about the GHG mitigation measures listed in the EIR are that they allegedly unduly vague and constitute unlawful "deferred mitigation." (JA {46}376-379, {47}424:18–425:10.) These arguments simply ignore the programmatic nature of the EIR and the basic proposition that an EIR must be "reviewed in light of what is reasonably feasible." (*In re Bay-Delta*, 43 Cal.4th 1143, 1175; Guidelines § 15151.)

1. *A Program EIR is Not Required to Define Specific Mitigation Measures for Every Individual Future Project Involved in the Program*

A program EIR is properly prepared where a series of future actions are sufficiently related to also be characterized as parts of one larger project. (Guidelines § 15168; see *In re Bay Delta*, 43 Cal.4th 1143, 1169-1175.) Program EIRs are an application of CEQA's "tiering" principles. (PRC § 21093; Guidelines § 15152.) Tiering is intended to "streamlin[e] regulatory procedures," while "avoiding repetitive discussions of the same issues," and "ensuring that environmental impact reports prepared for later projects … concentrate upon environmental effects which may be mitigated

or avoided in connection with the decision on each later project." (PRC § 21093(a).) "Tiering" thus involves "the coverage of general matters in broader EIRs (such as on general plans or policy statements) with subsequent narrower EIRs or ultimately site-specific EIRs …. concentrating solely on the issues specific to the EIR subsequently prepared." (Guidelines § 15385.) "[U]nder CEQA's tiering principles, it is proper for a lead agency to focus a first-tier EIR on only the general plan or program, leaving project-level details to subsequent EIR's (sic) when specific projects are being considered." (*In re Bay Delta*, 43 Cal.4th 1143, 1174-1175; see also *Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29, 36-37.)

Tiering principles also apply to a program EIR's discussion of mitigation measures. An EIR cannot be expected to formulate detailed mitigation measures for future projects where an assessment of future project-specific impacts is outside the scope of the EIR. Thus, "[T]iering is properly used to defer analysis of environmental impacts *and mitigation measures* to later phases when the impacts or mitigation measures are not determined by the first-tier approval but are specific to the later phases." (*Vineyard*, 40 Cal.4th 412, 431 (emphasis added; 1 Kostka & Zischke, Practice Under the California Environmental Quality Act (CEB, 2d Ed.) § 10.18, p. 508.1.)

There can be no question that the EIR in this case was properly designed as a program EIR, and its discussion of mitigation measures tailored accordingly. (AR 8a:2145-2147, 2765, 2767; 8b:3764-3766.) The 2050 RTP/SCS is a comprehensive plan to guide expansion, improvement and management of the entire San Diego region's major transportation systems for up the next forty years. (AR 8a:2071, 2081; 190a:13075-13083.) Actual implementation of the plan will involve literally hundreds of individual freeway, highway, local road, public transit, bikeway and other transportation projects, as well as ongoing development of various mitigation, planning and transportation management programs. (AR

8a:2104-2128; 190a:13252-13314; 190b:13814-13826.) The great majority of these individual projects will not be carried out or regulated by SANDAG, but by the region's 19 local governments or, in the case of highway and freeway projects, by Caltrans. (AR 8b:3773-3775.) These projects will take place in the context of ongoing population growth and development and land use decisions which will be made entirely by these local governments, not by SANDAG. Many of the projects planned in the RTP/SCS will occur ten, twenty or thirty years in the future, when current conditions may have substantially changed, and the RTP/SCS itself will have gone through multiple mandatory updates on a four year cycle. (AR 190a:13268-13269, 13282-13283; Gov. Code § 65080(d).) Perhaps most important, virtually every single individual future transportation project and major development or land use decision will be subject to its own project-level review under CEQA and/or the National Environmental Policy Act.

In this situation, an EIR is not required to attempt the impossible, i.e., undertake detailed evaluation of the potential impacts and appropriate, project-specific mitigation measures for the literally hundreds of individual public transit, roadway improvement and other transportation improvement projects and potentially thousands of future land use decisions that may take place in the 4,200 square mile San Diego region during the next 40 years.

2. *Case Law Concerning Unlawful Deferral of Mitigation for Project-Level Approval are Irrelevant in this Case*

Petitioners contended below that SANDAG has violated rules governing "deferred mitigation" stated in such cases as *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92 ("*C.B.E.*" and *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 669-671. The vices of such "deferred mitigation" are that (1) it creates uncertainty as to whether impacts will actually be effectively mitigated; and (2) it precludes meaningful public review and participation in formulation of the mitigation measures. (See,

e.g., *Communities for a Better Environment v. City of Richmond,* 184 Cal.App.4th 70, 92; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308.) To avoid these problems, formulation of appropriate mitigation measures must normally occur before project approval. *Improper* deferral of mitigation, however, is a matter of degree. Even at the individual project level, a lead agency may defer formulation of fully detailed mitigation measures, provided that it commits itself to mitigation, generally identifies the methods contemplated, and specifies performance standards indicating the level of mitigation which will be achieved. (*CNPS v. Rancho Cordova*, 172 Cal.App.4th 603, 621-622; *San Joaquin Raptor*, 149 Cal.App.4th 645, 670-671; *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1029.)

These rules obviously cannot be mechanically applied to program EIRs, where a lead agency is expressly authorized to reserve detailed evaluation of project-specific impacts and mitigation measures for a later, project-level EIR. (*In re Bay Delta*, 43 Cal.4th 1143, 1174-1175; *Vineyard,* 40 Cal.4th 412, 431; PRC § 21093.) This is particularly true where the program at issue involves literally hundreds of future projects, the great majority of which will be carried out by public agencies over which the lead agency has no legal control.

The rules governing deferred mitigation and program EIRs also must be read together with other basic principles that govern CEQA review. The degree of specificity required in an EIR depends on the nature of the project under review; an EIR for a general plan or other planning-level documents will necessarily be less detailed than an EIR for a specific construction project. (Guidelines § 15146.) Where program approval will not foreclose or otherwise prejudice consideration of project-specific mitigation measures, there is little reason to engage in premature analysis which may simply be wasteful and distract from the larger issues addressed in a first-tier EIR. And in all cases, the adequacy of an EIR is determined by what is reasonably feasible, in light of factors such as the magnitude and

geographic scope of the project, and the nature and severity of its environmental impacts. (Guidelines §§ 15151, 15204(a); *In re Bay Delta,* 43 Cal.4th 1143, 1175; *National Parks,* 71 Cal.App.4th 1341, 1364-1365.) CEQA does not "demand what is not realistically possible, given the limitation of time, energy and funds." (*Cherry Valley*, 190 Cal.App.4th 316, 348.) As the Supreme Court recently reaffirmed, "[C]ommon sense … is an important consideration at all levels of CEQA review." (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 175.)

The EIR clearly does present a broad range of measures that may be applied to mitigate GHG impacts in the future. (See *Sacramento Old City Assn.*, 229 Cal.App.3d 1011, 1029-1030.) These measures were not pulled out of thin air, but derived from lengthy past study and current standard practices concerning mitigation for GHG and air quality impacts. Many are drawn directly from the Attorney General's own website list of recommended measures. (See, AR 8a:2269; 8b:3824-3829; 216:17643-17660.)

To go further than this in the current EIR is neither realistically feasible nor likely to be of any practical value in the long run. The EIR could not possibly specify meaningful project-specific mitigation measures or performance standards for a myriad of different types of second-tier future projects conducted in a myriad of locations over a 40-year time span by multiple different lead agencies, each bound by its own locally adopted general plans, zoning regulations and other individual standards and policies, and each of which must also address project-specific physical, social and budgetary considerations. Formulation of appropriate and feasible project-specific mitigation measures will necessarily and unavoidably require focused future action by the individual lead agencies that will actually carry out or approve individual future projects, accompanied by similarly focused project-level CEQA review. The EIR was not legally inadequate because it reflects this reality.

V. CONCLUSION

The trial court clearly erred in finding the EIR legally deficient in this case. The EIR more than adequately analyzed potential greenhouse gas emissions, and realistically and honestly assessed feasible mitigation measures for these impacts to the extent legally possible and practical in a Program EIR for a project of the scope of the RTP/SCS. The judgment should be reversed with directions to the trial court to deny the petitions for writs of mandate.

DATED: July 11, 2013 THE SOHAGI LAW GROUP, PLC

By: Margaret M Sohagi

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CERTIFICATION OF WORD COUNT

The text of the APPELLANT SAN DIEGO ASSOCIATION OF GOVERNMENTS' OPENING BRIEF consists of 16,777 words, including footnotes. The undersigned legal counsel has relied on the word count of the Microsoft Word 2007 Word processing program to generate this brief. (Cal. Rules of Court, Rule 8.204(c)(1).)

DATE: July 11, 2013 By: Margaret Sohagi

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Cleveland National forest Foundation; Sierra Club; Center for Biological Diversity; CREED-21; Affordable Housing Coalition of San Diego; People of the State of California v. San Diego Association of Governments; San Diego Association of Governments Board of Directors
Court of Appeal, Fourth Appellate District, Division 1
Case No. D063288

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 11999 San Vicente Boulevard, Suite 150, Los Angeles, California 90049.

On July 11, 2013, I served true copies of the following document(s) described as **APPELLANT SAN DIEGO ASSOCIATION OF GOVERNMENTS' OPENING BRIEF** on the interested parties in this action as follows:

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

Executed on July 11, 2013, at Los Angeles, California.

Cheron J. McAleece
Printed Name

Signature

Cleveland National forest Foundation; Sierra Club; Center for Biological Diversity; CREED-21; Affordable Housing Coalition of San Diego; People of the State of California v. San Diego Association of Governments; San Diego Association of Governments Board of Directors
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