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 COUNTY

Petitioners, Respondents, and Cross-Appellants

v.

SAN DIEGO ASSOCIATION OF GOVERNMENTS; SAN DIEGO ASSOCIATION OF GOVERNMENTS BOARD OF DIRECTORS; and DOES 1 through 20, inclusive

Respondents and Appellants

PEOPLE OF THE STATE OF CALIFORNIA

Intervener, Respondent, and Cross-Appellant

Appeal From a Judgment Entered in Favor of Petitioners
San Diego County Superior Court
Case No. 37-2011-00101593-CU-TT-CTL
Consolidated with Case No. 37-2011-00101660-CU-TT-CTL
Honorable Timothy B. Taylor, Judge

RESPONDENTS' BRIEF AND CROSS-APPELLANTS' OPENING BRIEF

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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
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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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Date: October 3, 2013

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(TYPE OR PRINT NAME)

▶ Rachel B. Hooper
(SIGNATURE OF PARTY OR ATTORNEY)

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INTRODUCTION

Respondents and Cross-Appellants Cleveland National Forest Foundation, Sierra Club, Center for Biological Diversity, CREED-21, and Affordable Housing Coalition of San Diego County ("Petitioners") challenge the October 2011 decision of the San Diego Association of Governments ("SANDAG") to approve the 2050 Regional Transportation Plan/Sustainable Communities Strategy ("Plan" or "Project"). The trial court found SANDAG's Environmental Impact Report ("EIR") for the Project inadequate under the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 *et seq.*,[1] in two major respects: (1) the EIR misinformed the public regarding the severity of the Project's long-term contribution to global warming; and (2) it failed to identify measures that might avoid or mitigate that contribution. The court's strongly-worded opinion was correct, and its judgment invalidating the EIR should be affirmed.

The challenged Project was intended to serve two functions. First, the Regional Transportation Plan ("RTP") establishes a blueprint for the region's transportation network over the next 40 years. Second, the Project includes the state's first Sustainable Communities Strategy ("SCS") pursuant to Senate Bill 375. Adopted by the California Legislature in 2008, SB 375 aimed to fundamentally change the status quo by requiring regional transportation

[1] All statutory references are to the Public Resources Code except as noted.

plans—and, by extension, future development dependent on transportation networks—to achieve greenhouse gas reductions consistent with state-established targets.

SANDAG repeatedly touts the Project as a "sustainable" plan that encourages "smart growth" and robust public transit. Appellant's Opening Brief ("AOB"):1-2. The record, however, reveals an entirely different picture. In fact, the Project retains a "business as usual," automobile-centered approach to transportation planning, continuing massive freeway expansions and deferring most transit projects for decades.

Most importantly, despite the Plan's stated goal to *reduce* greenhouse gas emissions, under SANDAG's approach emissions will dramatically *increase* between 2020 and 2050. This upward emissions trajectory directly contravenes the *downward* trajectory established by California's Executive Order S-3-05, which maps out the steep greenhouse gas reductions that are necessary, over this same time period, to stabilize the climate. The EIR ignored the Executive Order—and the scientific data supporting it—and thus failed to analyze the true significance of the Plan's long-term emissions increases in light of science and policy demanding lasting reductions. The trial court emphatically held that this omission violated CEQA:

> The court agrees with petitioners that the failure of the EIR to cogently address the inconsistency between the dramatic increase in overall GHG [greenhouse gas] emissions after 2020 contemplated by the RTP/SCS and the statewide policy of reducing same during the same three decades (2020-2050)

> constitutes a legally defective failure of the EIR to provide the SANDAG decision makers (and thus the public) with adequate information about the environmental impacts of the [Project].

Joint Appendix ("JA") 75:1057.[2]

SANDAG offers a parade of excuses for this glaring omission, but none is convincing. For example, it notes that the EIR evaluated the Plan's emissions against three separate "significance thresholds." AOB:15-17. Each of SANDAG's chosen thresholds, however, masked the severity of the Plan's actual long-term impacts. SANDAG also claims that the EIR can simply *ignore* the Executive Order because that order is not a general or specific plan, and "binds" only state agencies. AOB:20-21. However, Executive Order S-3-05 articulates the state's climate policy and, based on accepted science, establishes the reductions in greenhouse gas emissions necessary to stabilize the climate by 2050. The trial court correctly rejected this excuse, noting that the Executive Order "was designed to address an environmental objective that is highly relevant under CEQA (climate stabilization)." JA 75:1057.

None of SANDAG's other excuses—including its vain attempt to minimize its role in reducing emissions and its glib denial of the Executive Order's scientific basis—can save the EIR. By failing to disclose the Project's inconsistency with the Executive Order's emissions reduction trajectory—a

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[2] Citations to the Joint Appendix ("JA") and the Administrative Record ("AR") appear herein as: "JA [tab number:page number]" and "AR [tab number:page number].

trajectory consistent with scientific requirements for climate stabilization—the EIR omitted fundamental information and subverted CEQA's core purposes of ensuring public participation and agency accountability. *See Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392 ("*Laurel Heights I*").

The EIR not only refused to face the full significance of the Project's long-term climate impacts; it also failed to identify enforceable measures to mitigate the significant impacts that it did identify. Remarkably, the three purported greenhouse gas mitigation measures in the EIR largely postponed actual climate mitigation until a later RTP/SCS or deferred mitigation to other agencies. Noting the obvious uselessness of this approach, Petitioners proposed a host of other feasible measures for SANDAG to consider. The agency, however, refused to include any of them in the EIR. Instead, it promised to look into a few of these measures in the future. The trial court held that SANDAG's decision "to kick the can down the road" flatly violates CEQA. JA 75:1057; *see* § 21002 (lead agency must adopt any feasible mitigation measure that can substantially lessen the project's significant impacts); *San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 669-71 (county improperly deferred mitigation by relying on land management plan to be designed later).

SANDAG offers no viable excuses for neglecting its mitigation obligations under CEQA. First, SANDAG claims that the EIR's

"programmatic" nature authorizes deferral of mitigation. AOB:3, 51-52. The agency is wrong. CEQA expressly requires public agencies to adopt all feasible measures that would substantially lessen a project's significant effects. § 21002. Program EIRs are *not* exempt from this requirement. Indeed, "program-wide mitigation" plays an especially important role "at an early time, when the agency has greater flexibility to deal with basic problems or cumulative impacts." Guidelines § 15168(b)(4).[3]

Second, SANDAG claims to lack legal "authority" to mitigate its Project's impacts because other agencies will ultimately approve many individual roadway projects. AOB:45. The argument is specious. Although SANDAG asserts that it must defer to local agencies, SB 375 calls for a *regional* approach, whereby SANDAG and its sister transportation agencies will coordinate transportation and land use planning throughout the state to combat global warming. Administrative Record ("AR") 8a:2071.

In fact, SANDAG exerts powerful control over regional development through its transportation decisions. As the trial court noted, SANDAG's attempt to pass its mitigation responsibilities on to other agencies "perverts the regional planning function of SANDAG, [and] ignores the purse string control SANDAG has." JA 75:1057. As the primary planning and funding authority for San Diego's vast transportation network, SANDAG has both the power

[3] The CEQA Guidelines, Cal. Code Regs., tit. 14 § 15000 et seq., are referred to herein as "Guidelines."

and the duty to adopt appropriate programs to reduce greenhouse gases. SANDAG implicitly conceded as much when it promised to study some of Petitioners' proposed mitigation for the next RTP. AR 6:223; AOB:43-44 (SANDAG commitment to study policies for transit-oriented development and parking management). SANDAG's attempt to portray itself as a powerless agency that merely administers "pass-through" funding collapses under scrutiny.

Third, SANDAG claims that its mitigation options are legally constrained by TransNet, the local sales tax measure that funds most of the region's transportation projects. AOB:46-48. Again, SANDAG is wrong. The TransNet ordinance expressly provides that the SANDAG Board *may* amend the measure upon a two-thirds vote. TransNet also *requires* SANDAG to reevaluate its plan for spending the funds with every new RTP. Thus, SANDAG's refusal to re-prioritize projects in the RTP — for example, to advance important transit projects — stemmed not from a legal barrier, but from simple bureaucratic intransigence.

Rather than accept its duty under CEQA to mitigate the Project's climate impacts, SANDAG mocks Petitioners as seeking "utopian planning" and "social engineering." AOB:2; *see also id.* at 1 (asserting Petitioners engage in "wishful thinking"). But SANDAG, not Petitioners, is the party ignoring reality. The stakes for this region are high: as the trial court found, climate damage will directly affect local populations. JA 75:1057 (court

noting that "hundreds of thousands of people in the communities served by SANDAG live in low-lying areas near the coast, and are thus susceptible to rising sea levels associated with global climate change"). Yet SANDAG's counsel declared at trial that there is no need for immediate action to combat climate change. *See* Reporter's Transcript of Hearing, November 30, 2012 ("Hearing Transcript"), p. 62 (SANDAG counsel stating that "It's still 2012. We've got some time to work [] out [how to reduce greenhouse gas emissions.]").

State law and policy—predicated on scientific fact—dictate otherwise. As first articulated in Executive Order S-3-05 and incorporated into the California Air Resources Board's "Scoping Plan" for achieving the state's climate goals, state policy declares that immediate and lasting reductions in greenhouse gases are essential to stabilize the climate and avert the worst effects of climate change. *See, e.g.*, AR 320:27848. Even SANDAG's own Climate Action Strategy recognizes this scientific fact. AR 216:17627. SANDAG's assertions to the contrary in this litigation are breathtakingly out of step with both science and policy.

Finally, SANDAG contends that regional transportation agencies play only a "small" role in securing the reductions in greenhouse gas emissions necessary statewide. AOB:1. Yet, as the Court of Appeal found, such a "relative comparison is meaningless." *Friends of Oroville v. City of Oroville* (2013) 218 Cal.App.4th 1352, 1359 (holding comparison between project and

statewide emissions is "worse than apples to oranges"). Both SANDAG's own Climate Action Strategy (AR 216:17629-72) and CEQA dictate that the agency must do its share by reducing, if feasible, the RTP/SCS's emissions consistent with the state's long-term reduction targets. *See Oroville*, 218 Cal.App.4th at 1359-60. If agencies like SANDAG refuse to curb the greenhouse gas emissions of their plans, the state cannot possibly reach its overall reduction targets.

In sum, SANDAG erred in refusing to recognize and mitigate the true climate impacts of its 40-year Plan. CEQA performs a vital service by forcing the agency to grapple with the consequences of its choice to *increase* greenhouse gases over the long run, in the face of clear science and state policy demanding lasting *reductions* to stabilize our existing climate. SANDAG abused its discretion by certifying an EIR that both misinformed the public and decision-makers about the severity of the Project's effects and failed to analyze effective mitigation. The judgment below was correct and should be affirmed.

STATEMENT OF THE CASE

I. Statement of Facts.

A. Environmental Setting for the Project.

The San Diego region encompasses more than 4,200 square miles of coastal plain, foothills, mountains, and desert. AR 8a:2141. This landscape is home to more than three million people, largely concentrated in the region's

more urbanized western part. AR 7:1031; 190a:13094. The County's unincorporated areas remain predominantly rural, and agriculture is a primary land use. AR 8a:2175. The County's 6,687 farms comprise the fifth largest component of the region's economy. *Id.* These farms tend to be small and family-owned; more than two-thirds of them are less than ten acres in size. AR 305:20422.

The region suffers from very poor air quality. The American Lung Association ranks San Diego County as having the 7th worst ozone pollution and 15th worst particulate pollution of the nation's 277 metropolitan areas. AR 320:27707, 28010-12; *see also* AR 8a:2214 (air basin has not attained state standards for ozone and particulate pollution). As the Attorney General informed SANDAG, and as the agency admits, the "region has some of the most serious local air quality problems in the state and the nation—in substantial part caused by vehicle emissions." AR 8b:4418. This air pollution causes myriad health problems. Extensive scientific evidence shows that people residing or attending school near heavily traveled roadways suffer increased respiratory symptoms, increased risk of heart and lung disease, and elevated mortality rates. AR 8a:2218.

The San Diego region also emits millions of tons of greenhouse gases every year—a substantial contribution to global climate change. AR 8a:2553-56. Vehicles are by far the largest source of regional greenhouse gases emissions. AR 8a:2556. These emissions are high not only because of the

region's pattern of auto-dependent, sprawling development, but also because SANDAG has relied almost exclusively on road expansion to meet transportation demand. AR 8a:2079 (describing history of dispersed development and roads); 8b:3939-40 (lack of transit use due to dispersed land use); 296:19750, 19671, 19687. While 91 percent of residents commute to work in private vehicles on the region's road network, only 6.5 percent take public transit, and less than 4 percent bike or walk. AR 8a:2981. As a result, on average a local resident travels on transit *less than half a mile* annually. AR 8a:2984. In contrast, each resident travels an average of 24.2 miles per day, or 8,833 miles per year, in private vehicles. AR 8a:2982.

B. Regulatory Setting for the Project.

SANDAG is a regional Council of Governments, with representatives from the County of San Diego and the 18 cities in the region. AR 8a:2071. It serves as the Regional Transportation Commission and federally designated Metropolitan Planning Organization for the region. *Id.* SANDAG is charged by law with developing the region's long-range RTP, which it must update every four years. AR 8a:2993. The RTP contains all of SANDAG's proposed highway and transit enhancements for the coming years. *Id.* SANDAG prioritizes and allocates funds for these transportation projects in the RTP, and it also administers TransNet, the local sales tax measure that funds a large number of the projects. AR 8a:2991-95.

In 2005, Governor Schwarzenegger established California's long-term climate change policy in Executive Order S-3-05. This order, which remains fully effective, set target dates for progressively reducing statewide greenhouse gas emissions: (1) by 2010, reduce emissions to 2000 levels; (2) by 2020, reduce emissions to 1990 levels; and (3) by 2050, reduce emissions to 80 percent below 1990 levels. AR 8a:2561.

In 2006, the state enacted "AB 32," the Global Warming Solutions Act, which requires the state to reduce its greenhouse gas emissions to 1990 levels by 2020. AR 8a:2561. As required by AB 32, the Air Resources Board adopted its "Climate Change Scoping Plan" in 2008. *Id.* The Scoping Plan includes a variety of recommended measures to reduce greenhouse gas emissions, and it functions as a roadmap for the Air Resources Board's plans to achieve AB 32's reduction mandates. *Id.* The Scoping Plan also emphasizes that the task of reducing emissions does not end in 2020. *See, e.g.*, AR 320:27848, 27858, 27959. Rather, it expressly incorporates the Executive Order's 2050 greenhouse gas emissions reduction goal, which "represents the level scientists believe is necessary to reach levels that will stabilize the climate." AR 320:27864. The Scoping Plan measures are intended to meet the 2020 reduction target but also to:

> put the state on a path to meet the long-term 2050 goal of reducing California's greenhouse gas emissions to 80 percent below 1990 levels. This trajectory is consistent with the reductions that are needed globally to help stabilize the climate.

AR 320:27875.

To further its goal of reducing greenhouse gas emissions, the state enacted SB 375 in 2008. This law requires each metropolitan planning organization to adopt an SCS as part of its RTP. AR 8a:2563. An SCS coordinates regional transportation, housing, and land use plans to reduce greenhouse gas emissions associated with passenger vehicle trips. AR 8a:2071. SB 375 recognizes that passenger vehicles account for 30 percent of the state's emissions and that the state cannot meet AB 32's reduction targets unless improved transportation features and changed land use patterns significantly reduce those emissions. Stats. 2008, ch. 728 § 1(a), (c) (S.B. 375); AR 333:29380. Accordingly, an SCS must:

> set forth a forecasted development pattern for the region, which, when integrated with the transportation network, and other transportation measures and policies, will reduce the greenhouse gas emissions from automobiles and light trucks to achieve, if there is a feasible way to do so, the greenhouse gas emission reduction targets approved by the state.

Gov. Code § 65080(b)(2)(B)(vii). The state-established targets for the San Diego region require a 7 percent reduction in per capita passenger vehicle greenhouse gas emissions by 2020, and a 13 percent reduction by 2035, as compared to 2005 emissions. AR 8a:2080.

Compliance with SB 375's 2020 and 2035 reduction targets is only a first step. To achieve the state's 2050 greenhouse gas reduction goals, SANDAG must continue to reduce vehicle miles traveled and concurrent

emissions beyond 2035, as SANDAG's own Climate Action Strategy recognizes. AR 216:17628 (charting reductions needed to meet 2020 and 2050 goals); *see* Supplemental Administrative Record ("SAR") 344:30143 (Air Resources Board criticizing SANDAG RTP's failure to achieve continuing emission reductions past 2035).

C. SANDAG's Plan: the 2050 RTP/SCS.

SANDAG was the first California metropolitan planning organization to approve an SCS. AR 8a:2075. Its RTP/SCS is the blueprint for the transportation system—including highways, local streets, transit, bicycling, walking, airports, and systems for managing travel demand—that will serve the San Diego region over the next four decades. AR 8a:2071.

As SANDAG's EIR explained, the Plan's "goal is to create communities that are more sustainable, walkable, transit-oriented, and compact—thereby providing transportation options and lowering GHG emissions." AR 8a:2077. In particular, the Plan "envisions an ambitious and far-reaching transit network that significantly expands the role that transit plays in meeting the region's needs for mobility and reducing GHG emissions." AR 8a:2078.

Unfortunately, SANDAG's adopted Plan does not achieve these goals. The Plan contemplates that a majority of future housing will be constructed in an urbanized area designated the "Urban Area Transit Strategy Study Area." AR 8b:4438; 190b:14217 (map of study area). According to SANDAG,

regional investments in transit would have maximum effect in this area. AR 190b:14214. SANDAG's Plan, however, fails to make this investment; instead, it prioritizes numerous expansions of freeways and arterial highways within the Transit Strategy Study Area. These projects include expansions of the I-5, I-8, I-15, I-805, SR-52, SR-56, SR-94 and SR-125. *See* AR 8a:2116-21 (map and list of early projects); 190b:14217 (map of Transit Strategy area); *see also* AR 190b:14214. The Plan also calls for widening highways in the region's suburban and rural communities, thus facilitating travel to the County's "back country" and other rural areas. AR 8a:2118; 190b:14217 (maps showing planned road widening projects in rural locations outside of Transit Strategy area).

Critically, although the Plan would fund some transit projects, the Plan postpones their construction for decades. AR 190a:13247 (75% of transit expenditures after 2030), 13267-69 (majority of transit projects built in Plan's later decades). Moreover, many of SANDAG's "transit" projects require widening highways to include "managed lanes." AR 8a:2109 (early transit projects rely heavily on rapid bus routes), 2115 (bus routes rely on freeways and managed lanes), 2112 ("The 2050 RTP/SCS includes an extensive network of Managed Lanes . . . "). While buses and carpools can use these lanes, single-occupant vehicles can also use most of them for a price. AR 8a:2112. Independent reviewers concluded that, far from promoting regional transit, the Plan's dramatic increase in freeway capacity "will perpetuate auto-

oriented development and reduce transit's competitiveness." AR 320:28481; *see also* AR 8b:3940-41 (expert commenter criticizing Plan's reliance on bus rapid transit as a "transit" measure).

SANDAG anticipates meeting SB 375's greenhouse gas reduction goals for 2020 and 2035 (AR 8a:2104), but its Plan deserves little credit for that outcome. Rather, the reductions necessary to meet those targets result largely from the current economic downturn and state-mandated vehicle efficiency and fuel standards. AR 8a:2571; 190a:13156. *Moreover, these early greenhouse gas reductions are not sustainable.* SANDAG admits that, as it implements its RTP/SCS, the region's emissions will *increase* after 2020 and exceed current levels by 2050. AR 8a:2104, 2577.

SANDAG also concludes that, despite its alleged emphasis on public transit, vehicle miles traveled will balloon by more than 50 percent over the Plan's life. AR 8b:4436. And this increase is not solely due to population growth; under the Plan, individuals in 2050 also will drive more miles daily on a *per capita* basis than they do now. AR 8b:4435 (Tables 2, 3).

D. Public Comment on SANDAG's Plan and EIR.

Petitioners and others submitted comments heavily criticizing SANDAG's Plan and, in particular, its postponement of transit measures. *See, e.g.*, AR 224:17972-75; 227:18053-55; 229:18119-204; 230:18205-08; 239:19037-48; 296:19667-19768. Petitioners warned that the Project incorrectly assumed that its planned highway expansion would not affect

patterns of land use development and employed incorrect assumptions in predicting transit ridership. AR 292:19657; 296:19678-79. Petitioner Cleveland National Forest Foundation developed a comprehensive alternative that accelerated transit investment by "front-loading" transit projects within the first 10 years of the Plan. AR 296:19748-68. This alternative—termed the "50-10 Plan"—would ensure transit's viability throughout the Plan's life and cause far greater reductions in greenhouse gas emissions than the adopted Plan. *Id.*

Petitioners and others also criticized the EIR's failure to comply with CEQA. For example, the Draft EIR not only improperly analyzed the Project's impacts on climate change (AR 296:19683-91; 306:24881-82), but also omitted an alternative that would reduce greenhouse gas emissions over the Plan's life. AR 296:19688-91; 306:24882-85; *see also* AR 308:25002-08 (Governor's Office of Planning and Research requesting that SANDAG prioritize transit projects over highway expansion and analyze a true environmentally superior alternative). Nor did the Draft EIR identify enforceable mitigation for many of the Project's significant environmental impacts, including climate impacts and public health impacts from air pollution. AR 296:19681-83, 19687-88; 306:24881-82; 311:25634-40.

Petitioners and others also commented extensively on the Final EIR (AR 3:8; 320:27695-27745), which failed to correct the Draft EIR's most serious inadequacies, including its faulty climate and air quality analyses. AR

320:27704-19. Petitioners also criticized the EIR's gross underestimate of the Project's impacts on agricultural land. AR 320:27724-25.

E. Approval of the Project.

On October 28, 2011, SANDAG held a public hearing on the proposed Project and Final EIR. AR 324:29240-29338. Despite extensive testimony in opposition (*e.g.*, AR 324:29263-79, 29241), the SANDAG Board of Directors adopted resolutions certifying the Final EIR and approving the Project. AR 6:223-24. On the same day, SANDAG filed a Notice of Determination for the Project under CEQA. AR 1:1-3.

II. Procedural History of Litigation.

Petitioners Cleveland National Forest Foundation and Center for Biological Diversity filed a Petition for Writ of Mandate and Complaint for Injunctive Relief on November 28, 2011, challenging SANDAG's approval of the Plan and certification of the EIR. JA 2:14-42. On January 23, 2012, they filed an amended petition and complaint adding Sierra Club as a Petitioner. JA 25:151-89. CREED-21 and the Affordable Housing Coalition of San Diego County timely filed a separate action challenging the Plan and EIR. JA 1:1-13.

On January 25, 2012, the trial court granted the California Attorney General's motion to intervene on behalf of People of the State of California. JA 29:198-99. On April 9, 2012, the cases were consolidated for all purposes. JA 38:264-74.

The trial court held a hearing on the merits of the case on November 30, 2012. *See* Hearing Transcript. On December 3, 2012, the court ruled in favor of Petitioners, holding that SANDAG failed to adequately analyze or mitigate the Project's significant climate impacts. JA 75:1046-59. In particular, it found the EIR legally defective for failing "to cogently address the inconsistency between the dramatic increase in overall GHG emissions after 2020 contemplated by the RTP/SCS and the statewide policy of reducing same during the same three decades (2020-2050)." JA 75:1057. Because the EIR "simply ignore[d]" this inconsistency, the EIR "fail[ed] . . . to provide the SANDAG decision makers (and thus the public) with adequate information" about the Project's impacts. *Id.*

The court also ruled that SANDAG failed to use the many tools at its disposal to adopt adequate mitigation for the Project's greenhouse gas impacts. Instead, SANDAG improperly "defer[ed] to 'local jurisdictions'" by vaguely suggesting that other agencies could adopt some type of mitigation in the future. *Id.* Finding that it could "resolve the case solely on the inadequate treatment in the EIR of the greenhouse gas emission issue," the court chose not to address any of Petitioners' other CEQA issues. JA 75:1058.

The trial court entered Judgment on December 20, 2012. JA 88:1132-1134. SANDAG filed its Notice of Appeal on December 26, 2012. JA 92:1140-44. On January 23, 2013, Petitioners and the People timely filed

notices of cross-appeals of the CEQA issues not addressed by the court below. JA 95:1161-63; 96:1164-68.

ARGUMENT

I. Standard of Review.

This action challenges the adequacy of the Project's EIR. As the Supreme Court has explained, the EIR is "the heart of CEQA," an "environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." *Laurel Heights I,* 47 Cal.3d at 392 (citations omitted). The EIR is the "primary means" of ensuring that public agencies "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state." *Id.* (quoting § 21001(a)).

The EIR's central purpose is to identify the significant environmental effects of proposed projects and evaluate ways of avoiding or minimizing those effects. §§ 21002.1(a), 21061. CEQA also requires the lead agency to adopt feasible mitigation measures or alternatives that can substantially lessen the project's significant environmental impacts. § 21002; Guidelines § 15002(a)(3).

This Court reviews SANDAG's compliance with CEQA de novo. *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946 ("[t]he appellate court's 'task . . . is the same as that of the trial court'") (citation omitted). Thus, this Court must determine whether

SANDAG prejudicially abused its discretion either by: (1) failing to proceed in the manner required by law; or (2) reaching a decision unsupported by substantial evidence. § 21168.5; *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426-27.

As the Supreme Court has explained, "a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." *Vineyard*, 40 Cal.4th at 435. The court must "determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements.'" *Id.* (quoting *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564). Because CEQA's information disclosure requirements are procedural, courts must determine *as a legal matter* whether an EIR omits relevant information and precludes informed decision-making. *Vineyard*, 40 Cal.4th at 435; *see also Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712; *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 428 ("*Ojai*"). "[T]he ultimate decision of whether to approve a project . . . is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project" required by CEQA. *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829.

By contrast, courts apply the more deferential "substantial evidence" standard to an agency's "substantive factual conclusions." *Vineyard*, 40 Cal.4th at 435. However, "the existence of substantial evidence supporting the agency's ultimate decision on a disputed issue is not relevant when one is assessing a violation of the information disclosure provisions of CEQA." *Assn. of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392.

Accordingly, this Court must determine de novo "whether the EIR is sufficient as an informational document." *Kings County*, 221 Cal.App.3d at 711. Here, as the trial court found, SANDAG's EIR "fail[ed] to carry out its role as an informational document to inform the public about the choices made by its leaders." JA 75:1056. In particular, because the EIR failed to evaluate the Project's increased greenhouse gas emissions through 2050 in light of the steep mid-century reductions demanded by both science and state policy, the document omitted information necessary to understand the Project's actual environmental significance. Despite SANDAG's argument to the contrary (AOB:11), the substantial evidence test does *not* apply to this challenge. Petitioners do not dispute SANDAG's factual determinations regarding greenhouse gas emissions (*see id.*); instead, they assert that the EIR failed *as a matter of law* to provide information critical to understanding the significance of those emissions. *See Ojai,* 176 Cal.App.3d at 428.

The EIR's omissions pertaining to mitigation also require de novo review. "An EIR that incorrectly disclaims the power and duty to mitigate identified environmental effects based on erroneous legal assumptions is not sufficient as an informative document." *City of Marina v. Bd. of Trustees of the California State University* (2006) 39 Cal.4th 341, 356; *see also Kings County*, 221 Cal.App.3d at 728 (applying de novo standard and concluding that failure to evaluate whether a mitigation agreement was feasible was "fatal to a meaningful evaluation by the city council and the public").

While SANDAG cites two cases on this issue (AOB:11), neither holds otherwise. Indeed, both cases affirm the settled principle that procedural violations are reviewed de novo, while substantial evidence review is reserved for factual determinations. *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 898-900; *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 899.

Accordingly, on SANDAG's appeal the substantial evidence test applies only to Petitioners' challenge to SANDAG's factual findings that mitigation measures were infeasible. *See, e.g., Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 598-99. "Substantial evidence" is "evidence of ponderable legal significance, reasonable in nature, credible, and of solid value, evidence that a reasonable mind might accept as adequate to support a conclusion." *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1070.

Here, no credible evidence, let alone substantial evidence, supported SANDAG's refusal to adopt feasible mitigation that could reduce or avoid the Plan's significant environmental impacts.

Finally, the EIR's omissions here were prejudicial. By preparing an EIR that precluded informed decision-making and meaningful public participation, SANDAG prejudicially abused its discretion. *Ojai,* 176 Cal.App.3d at 428; *see also* 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2013 Update) § 23.37, p. 1177 (violation of CEQA that results in failure to disclose important environmental information is presumed "prejudicial"); *Neighbors for Smart Rail v. Exposition Metro Line Construction Auth.* (2013) 57 Cal.4th 439, 463 (an EIR's omission of "substantial relevant information about the project's likely adverse impacts" is prejudicial).

II. The EIR Failed to Inform the Public of the Long-Term, Adverse Climate Impacts of SANDAG's Plan.

SANDAG adopted a Plan that allows regional greenhouse gas emissions to rise steadily after 2020 and to exceed current levels by 2050. CEQA required the agency to prepare an EIR that evaluated the significance of these emission increases in light of one central, undisputed fact: stabilizing the climate will require sharp and permanent *reductions* in emissions between now and 2050. The EIR failed to provide that analysis. Instead, it offered an incomplete discussion that provided no meaningful assessment of the Plan's

serious, long-term impacts. This flawed discussion violated CEQA, and the trial court correctly ruled that this error was prejudicial.

SANDAG summons an array of excuses for its analytic failure (AOB:12-23), but none has merit. The EIR entirely failed to examine a critical impact—perhaps *the* most critical impact—of the Plan's policy choices.

A. The EIR Violated CEQA By Failing to Evaluate the Significance of the Plan's Long-Term Emissions in Light of the Emissions Reductions Needed to Stabilize the Climate.

The science is conclusive. To have any chance of averting the worst effects of climate change, atmospheric concentrations of greenhouse gases must quickly stabilize. AR 216:17622-23; AR 320:27791. To do so, sources cannot continue emitting climate pollutants at current levels. *Id.* Rather, if current emissions levels continue, atmospheric concentrations of greenhouse gases will still rise because many climate pollutants, including carbon dioxide ("CO_2"), accumulate in the atmosphere and exert their warming influence for decades or even centuries. *See, e.g.*, AR 216:17623; 320:27805-06, 27995, 27997. Thus, the cumulative nature of greenhouse gas emissions makes it necessary to greatly *reduce* emissions below current levels in order to stabilize atmospheric concentrations of greenhouse gases and preserve a climate something like the one we have today.

Scientists have concluded that "an 80 percent reduction of greenhouse gases from 1990 levels by 2050" is necessary to stabilize the climate and avoid the most catastrophic impacts of climate change. AR 320:27848; *see also* AR 320:28007-08. California's Executive Order S-3-05 adopted this long-term trajectory of emissions reductions as the foundation of state climate policy. AR 320:27848, 27977, 28007-08.

The facts in the present case are also undisputed. SANDAG projects that under its Plan, regional greenhouse gas emissions will decline somewhat through 2020. AR 8a:2572; 8b:3820-21, 4435; 190a:13091. Then, however, emissions caused by the Plan will start to rise again, and by 2050 they will actually *exceed* existing 2010 emissions.[4] AR 8a:2577; 8b:3820-21, 4435. The EIR acknowledged that by 2050, regional land-use and transportation-related greenhouse gas emissions will be about 15 percent higher than current emissions. AR 8a:2578 (33.64 million tons in 2050 versus 28.84 million tons in 2010). However, the document then declared this impact significant and unavoidable, and dropped the subject without analysis. *See* AR 8a:2578, 8b:3769. Crucially, the EIR never evaluated the significance of the Plan's

[4] The EIR uses a variety of metrics to analyze greenhouse gas emissions. The emissions trajectory is similar for all metrics. For example, the document states that per capita greenhouse gas emissions from vehicles will decrease slightly between 2010 and 2020, but will then begin rising, eventually exceeding 2010 emissions. AR 8b:3820-21. Similarly, overall greenhouse gas emissions from transportation and land use changes will decrease slightly through 2020, but then rise above current levels by 2050. AR 8a:2572, 2577.

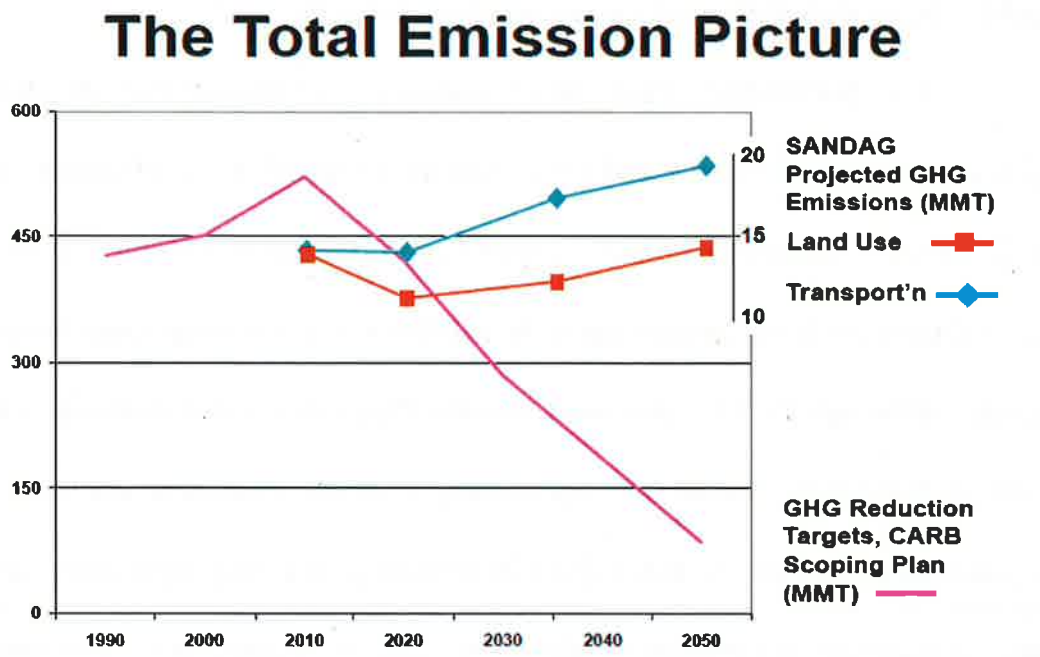
rising emissions against the trajectory of long-term emissions *reductions* needed for climate stabilization and called for by the Executive Order.

The EIR's omission is indefensible. SANDAG's own Climate Action Strategy explicitly recognized that the Executive Order's "2050 reduction goal is *based on the scientifically-supported level of emissions reduction needed to avoid significant disruption of the climate* and is used as the long-term driver for state climate change policy development." AR 216:17627 (emphasis added). Comparing the Plan's 2050 emissions increases against the Executive Order's mandate for 2050 emissions reductions is therefore the most realistic and scientifically justified method for evaluating the significance of the Plan's long-term climate impacts. Indeed, because SANDAG's Plan extends through 2050 (AR 8a:2071), such an evaluation was essential to understanding the Plan's true long-term impacts.

Instead of providing this analysis, SANDAG's EIR analyzed the Plan's emission trajectory only against nearer-term climate goals and existing emissions. This truncated analysis failed to consider the Plan's true, long-term impacts and left the misleading impression that the Plan is actually consistent with all relevant state climate objectives, when it is not.

A graph submitted to SANDAG (AR 185:12684) starkly contrasts land use and transportation emissions allowed by the Plan—rising between 2035 and 2050—and the steeply declining trajectory identified by the Executive Order as necessary for climate stabilization. As the graph demonstrates, the

fundamental problem with the Plan's emissions trajectory is not obvious when comparing it to the Scoping Plan's emissions trajectory for 2020, as the EIR did here. Rather, the Plan's true impacts become obvious only when comparing the Plan's emissions trajectory in 2050 to the reductions called for in the Executive Order and Scoping Plan:



SANDAG dismisses the EIR's failure as merely a question of tone or a quibble about whether the document is "subjectively alarming enough" (AOB:20), but this response is just misdirection. The legally relevant question is whether the EIR provided sufficient information about the significance of the Plan's impacts to permit informed decision-making and intelligent public comment. As the California Supreme Court emphasized, an EIR "must present information in such a manner that the foreseeable impacts of pursuing the project can actually be understood and weighed." *Vineyard*, 40 Cal.4th at

449-50. That information is crucial to holding SANDAG accountable for its choice to pursue a long-range Plan that is fundamentally inconsistent with climate stabilization. *See Laurel Heights I*, 47 Cal.3d at 392 ("If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly . . . .").

Here, SANDAG's Plan allows emissions to increase over the time period during which science and policy require steep emissions reductions. Its EIR, however, failed to accurately portray how significant that increase will be or evaluate how it will impede the state's ability to meet its long-term climate goals. Although the EIR disclosed that the Plan's emissions increase over current conditions would be significant, it never evaluated the actual significance or extent of that impact in relation to the long-term emissions targets necessary for climate stabilization. California appellate courts have repeatedly condemned similar attempts to shortcut the environmental review process by declaring impacts significant without providing adequate, accompanying analysis. *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1370-71 ("*Berkeley Jets*") (holding EIR inadequate where agency declared health effects significant and unavoidable without conducting health risk assessment to determine extent of harm); *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1123 (holding EIR inadequate for concluding impacts of

fugitive dust on vineyards were significant without disclosing how significant those impacts would be); *Santiago County*, 118 Cal.App.3d at 831 (holding inadequate EIR's bare conclusion that supplying water to project would significantly affect supplies to other customers; "What is needed is some information about how adverse the adverse impact will be.").

The EIR's omission was prejudicial because it left the public and decision-makers without the necessary context to understand the Plan's long-term, upwards emissions curve. By ignoring the Plan's inconsistency with the continuous downward emissions curve necessary through 2050 to stabilize the climate, the EIR deprived decision-makers and the public of information necessary to understand the Plan's true long term climate impacts. Such an incomplete analysis of the Plan's impacts "preclude[d] informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process." *Kings County*, 221 Cal.App.3d at 712, 734-35 (prejudicial error where absence of relevant data precluded public from accurately comparing and understanding the significance of impacts).

In addition, the EIR's truncated analysis curtailed consideration of mitigation and alternatives that could have reduced or offset the Plan's significant climate-related impacts. Although the EIR found that greenhouse gas impacts were significant, and therefore considered some mitigation (*see* AOB:19), that mitigation is entirely inadequate to address even the vastly understated impacts presented in the EIR. *See infra* Part III.B. If the EIR had

properly analyzed the true severity of the Plan's impacts, the public and decision-makers may well have demanded *more* mitigation, and the Plan could have been more accurately compared to alternatives.[5] *Cf. Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1073-74 (no prejudice where EIR contained all relevant data, improperly concluded that an impact was not significant, but fully mitigated the impact anyway). The EIR's errors are not the type of "insubstantial, technical error" that courts have found to be harmless. *Neighbors for Smart Rail*, 57 Cal.4th at 464. Rather, they cut to the heart of the EIR's role as an informative document.

B. SANDAG's Excuses Do Not Justify Its Failure to Evaluate Climate Impacts in Light of the Emissions Reduction Trajectory Established by the Executive Order.

SANDAG's Final EIR stated that the agency did not compare the Plan's emissions to the trajectory for climate stabilization in the Executive Order largely because executive orders do not bind regional and local agencies. *See* AR 8b:3767, 3769-70. On appeal, that insufficient excuse has now been relegated to a footnote (AOB:21 fn. 2), and SANDAG's other explanations equally lack merit.

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[5] Notably, SANDAG improperly deferred many climate mitigation measures until future RTP/SCSs. *See infra* Part III.B. If the EIR had accurately portrayed the Plan's true impacts, there would be even more reason, and even more pressure, for SANDAG to approve additional mitigation in conjunction with *this* RTP/SCS.

1. The EIR Used Thresholds of Significance that Masked the Significance of the Plan's Long-Term Climate Impacts.

SANDAG primarily contends that it properly followed CEQA Guidelines section 15064.4 by selecting three "thresholds of significance" to evaluate the Plan's impacts, and thus could not have abused its discretion. SANDAG is incorrect.

To begin with, SANDAG claims Petitioners have never contested the EIR's compliance with Guidelines section 15064.4. AOB:17. The record shows otherwise. *See, e.g.*, JA 47:408 (arguing SANDAG cannot use a threshold of significance under Guidelines § 15064.4 to foreclose evidence of an impact's significance), 410 (arguing SANDAG did not predicate its significance determination on "scientific and factual data" as required by Guidelines § 15064.4(a)); JA 65:822 (same). The Attorney General also disputed SANDAG's compliance with this guideline. *See, e.g.*, JA 64:792-93; Hearing Transcript, p. 33:6-12, 36:5-9.

SANDAG then touts its use of three thresholds of significance in the EIR. However, use of these thresholds misleadingly discounted the significance of the Plan's long-term impacts. An agency may not use compliance with a threshold as a shield to foreclose consideration of substantial evidence of an impact's significance. *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 ; *see also Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 342.

a. The EIR's Comparison to Existing Conditions Failed to Fully Disclose the Project's Long-Term Climate Impacts.

The EIR compared greenhouse gas emissions under the Plan in 2020, 2035, and 2050 to existing (2010) emissions. AR 8a:2567-78 (Impact "GHG-1"). Based on this analysis, the EIR concluded that increases in 2035 and 2050 emissions above 2010 levels constituted a significant impact. AR 8a:2575, 2578. SANDAG claims this comparison to existing conditions, using a "zero threshold" (*e.g.*, 2010 emission levels), was the "most environmentally conservative" approach available. *See* AOB:15-16.

In other contexts, a "zero threshold" approach based on existing emissions levels might be conservative. Here, however, this approach masks the magnitude of the Plan's long-term climate impacts. As the Scoping Plan repeatedly recognizes, stabilizing the climate will require steep and lasting emissions *reductions* by 2050. *See, e.g.*, AR 320:27848, 27851, 27864, 27875, 27973, 27977. SANDAG's Climate Action Strategy adopts the same conclusion. *See* AR 216:17623.

The Supreme Court recently emphasized that, although agencies have some discretion in choosing how to measure the significance of a project's impacts, they must select an approach "that will give the public and decision makers the most accurate picture practically possible of the project's likely impacts." *Neighbors for Smart Rail,* 57 Cal.4th at 449. Often, agencies can accurately analyze a project's impacts by simply comparing those impacts to

existing environmental conditions. *Id.* at 451-52. However, where a comparison with existing conditions "would be uninformative or misleading to decision makers and the public," an agency may use another standard that "provid[es] a more accurate picture of a proposed project's likely impacts." *Id.* at 453. "The key, again, is the EIR's role as an informational document." *Id.*

Here, the EIR's comparison between existing and 2050 emissions levels hid the Plan's long-term consequences. The comparison informed readers only that the Plan would allow emissions to increase by 15 percent over current levels by 2050. *See* AR 8a:2578. The EIR's disclosure of this seemingly modest increase, combined with the EIR's deceptive conclusion that the Plan was consistent with other, *shorter*-term climate stabilization goals (*see infra*), was profoundly misleading. By omitting any information about state policy—or the underlying science—calling for dramatic reductions by 2050, the EIR created the impression that the Plan would actually take a modest step toward helping the state achieve all of its greenhouse reduction goals.

A more accurate measurement of the Plan's emissions would have avoided giving this false impression. To fully disclose the Plan's true impacts, the EIR was required to compare the Project's emissions trajectory through 2050 with the emissions trajectory, contained in the Executive Order, that scientists have identified as necessary to stabilize the climate. This analysis

would have disclosed the undeniably crucial facts that: (1) the Plan's 2050 overall emissions would be *600 to 900 percent higher* than a trajectory consistent with long-term climate stabilization; and (2) the Plan's per capita emissions from vehicles would be as much as *2000 percent higher* than that trajectory. *See* AR 8a:2576-77, 8b:4435, 4446; 185:12605.

In short, the EIR's comparison between existing emissions and projected 2050 emissions, standing alone, simply did not tell the whole story. Because the EIR never disclosed that the Plan's long-term greenhouse gas emission trajectory directly contravened the scientifically recognized and state-adopted trajectory necessary to stabilize the climate, the EIR inaccurately portrayed the Plan's climate impacts.

Finally, the EIR's bald conclusion that the Plan's emissions increase is significant does not save the EIR's lack of analysis. Courts have repeatedly held that agencies may not "travel the legally impermissible easy road to CEQA compliance . . . [by] simply labeling the effect 'significant' without accompanying analysis." *Berkeley Jets,* 91 Cal.App.4th at 1371. *See also Galante Vineyards*, 60 Cal.App.4th at 1123; *Santiago County*, 118 Cal.App.3d at 831.

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b. The EIR's Comparison to SB 375's Goals Was Misleading Because It Ignored the Plan's Long-Term Environmental Effects.

The EIR similarly misinformed the public and decision-makers by evaluating the Plan's consistency with the greenhouse gas reduction targets set for SANDAG under SB 375. AR 8a:2578-81 ("Impact GHG-2"). The Plan met SB 375's 2020 target, albeit largely due to the recent recession's effects on emissions. 190a:13156. It also met the 2035 target of a 13 percent reduction in per capita greenhouse gas emissions by a close margin—but only by taking credit for fuel and vehicle efficiency measures that will occur regardless of the Plan. AR 8a:2571. On this basis, the EIR concluded that the Plan's climate impact is less than significant. AR 8a:2581.

The EIR's analysis *ignored* that, by 2035, emissions under the Plan will not be falling as SB 375 envisioned, but rather *rising and continuing to rise*. As the Air Resources Board explained in reviewing SANDAG's draft Plan:

> Although the staff review shows that the draft SCS would meet ARB targets, the trend in per capita GHG emissions is unexpected. The San Diego SCS would achieve double the 2020 target and just meet the target in 2035. During the target setting process, including in meetings of ARB's Regional Targets Advisory Committee, there was an expectation that the benefits of an SCS would increase with time given the nature of land use patterns and transportation systems. ARB set regional targets with that expectation.

SAR 344:30143; *see also id.* at 30144, 30188-89.

Discussion of the Plan's technical compliance with SB 375's near-term targets therefore failed to provide the public and decision-makers with the

information necessary to understand the Plan's long-term environmental consequences. CEQA requires this information. § 21001(d) ("the long-term protection of the environment . . . shall be the guiding criterion in public decisions"); § 21083(b)(1) (agencies must analyze both short-term and long-term environmental goals). The EIR's narrow focus on the fact that the Plan met SB 375's targets cannot substitute for an analysis of the Plan's long-term trajectory of rising emissions.

c. The EIR Did Not Accurately Compare the Plan to Relevant Provisions of the Scoping Plan and SANDAG's Climate Action Strategy, and Thus Failed to Examine the Project's Long-Term Impacts.

The EIR also pronounced the Plan consistent with the overall goals and strategies of the Scoping Plan and SANDAG's Climate Action Strategy, and on this basis concluded that the Plan would not cause any significant impact. AR 8a:2581-88 ("Impact GHG-3"). However, once again, the EIR never evaluated the Plan's rising post-2020 emissions in terms of those documents. Its conclusions thus misled readers about the Plan's true impacts.

The EIR refused to analyze post-2020 emissions in light of the Scoping Plan, claiming that "[t]he Scoping Plan does not have targets established beyond 2020." AR 8a:2586, 2588. Yet the Scoping Plan repeatedly cautioned that the task of reducing emissions does not end in 2020:

> The 2020 goal was established to be an aggressive, but achievable, mid-term target, and the 2050 greenhouse gas emissions reduction goal represents the level scientists

> believe is necessary to reach levels that will stabilize the climate.

AR 320:27864; *see also id.* at 27848, 27858, 27959. The Scoping Plan thus *expressly incorporated* the Executive Order's 2050 trajectory into its analysis. Indeed, because the year 2020 provided only a short-term target, the Scoping Plan did not evaluate proposed greenhouse gas reduction measures solely in terms of whether they would help achieve the 2020 reduction goal. Rather, it also considered whether these measures would put California on track to meet the Executive Order's 2050 trajectory. *See, e.g.*, AR 320:27851 (assessing "how well the recommended measures put California on the long-term reduction trajectory needed to do our part to stabilize the global climate"), 27875 (Scoping Plan's 2020 measures "put the state on a path to meet the long-term 2050 goal of reducing California's greenhouse gas emissions to 80 percent below 1990 levels"), 27882 (measures in plan designed "to initiate the transformations required to achieve the 2050 target").

Case law has also recognized that the Scoping Plan incorporates the 2050 target. In *Assn. of Irritated Residents v. Cal. Air Resources Bd.* (2012) 206 Cal.App.4th 1487, 1496 ("*AIR*"), the Court of Appeal described the Scoping Plan's 2020 reductions as "but a step towards achieving a longer-term climate goal." The purpose of the Scoping Plan, explained the court, is to "permit the state to reach goals that are attainable by 2020, *as a step toward the ultimate objective by 2050.*" *Id.* (emphasis added).

The EIR's dismissal of the Scoping Plan beyond 2020 was deeply misleading. The Scoping Plan directly addressed the post-2020 future and emphasized the need to comply with the Executive Order's emissions trajectory to remain consistent with global climate stabilization efforts. SANDAG's truncated consideration of the Scoping Plan failed to follow Guidelines section 15064.4(b)(3), which requires agencies to consider how a project complies with statewide plans.

The cases that SANDAG cites in defense of its limited analysis of the Scoping Plan do not justify its refusal to analyze long-term impacts. *See* AOB:17 (citing *North Coast Rivers Alliance v. Marin Municipal Water Dist.* (2013) 216 Cal.App.4th 614 and *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327 ("*CREED*")). Neither case addressed the question presented here: whether an EIR must evaluate *how significant* greenhouse gas emissions from a long-term transportation plan will be in light of the emissions reductions required over that same time period to stabilize the climate.

Moreover, in both *CREED* and *North Coast Rivers Alliance*, the challenged documents actually analyzed the projects' consistency with the emissions reductions required to meet the thresholds articulated by the lead agency over the projects' relevant time frames. *See CREED*, 197 Cal.App.4th at 337 (project would meet AB 32-derived emissions reduction goals); *North Coast Rivers Alliance*, 216 Cal.App.4th at 651-52 (analysis showed emissions

consistent with county goal of reducing emissions 15 percent below 1990 levels by 2020). SANDAG's EIR, in contrast, entirely failed to disclose, much less analyze, the Plan's *inconsistency* with the post-2020 emission reduction goals of the Scoping Plan.

Equally troubling, the EIR repeated the same mistake with respect to SANDAG's own Climate Action Strategy. This document explicitly acknowledged that by 2030, the region must "be well on its way to doing its share for achieving the 2050 greenhouse gas reduction level." AR 216:17629. *See also, e.g.,* AR 216:17628 (referencing Executive Order's 2050 goals). However, the EIR never analyzed the Project's inconsistency with the long-term goals for reduction of greenhouse gases established by SANDAG's Climate Action Strategy, instead focusing only on short-term consistency.

In sum, two of SANDAG's selected "thresholds"—the comparison to existing conditions and the comparison to SB 375 targets—avoided disclosure of the Project's key long-term impacts. And its use of the third threshold, which compared the Plan to the Scoping Plan and Climate Action Strategy, failed to disclose the Plan's fundamental inconsistency with both plans. As a result, SANDAG did not comply with CEQA Guidelines section 15064.4, much less meet its fundamental statutory responsibility to provide the public and decision-makers with adequate information.

2. SANDAG's Role in California's Effort to Mitigate Climate Impacts Is Neither Uncertain Nor Negligible.

SANDAG protests that it is responsible for only a portion of the three percent of statewide emissions reductions expected from regional transportation planning efforts. AOB:14, 23.[6] SANDAG implies that, as a result, it need not fully address the consequences of allowing emissions to increase under its Plan.

The Court of Appeal recently rejected a similar claim in *Oroville*, which involved replacement of an existing Wal-Mart with a new "supercenter." The lead agency's analysis found that the project's emissions increase was a miniscule percentage of California's overall emissions. 218 Cal.App.4th at 1354, 1358. The court, however, characterized this "relative comparison" as "meaningless" and "worse than apples to oranges." *Id.* at 1359. Instead, the court explained, the "relevant question" was whether the project, whatever its size, was consistent with the emissions reductions necessary to achieve AB 32's goals. *Id.* at 1359-60.

Here, SANDAG suggests that it did not need to examine the long-term impacts of allowing emissions to increase because it is only responsible for a

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[6] SANDAG also continues to mischaracterize Petitioners' arguments. *See, e.g.*, AOB:2 (claiming Petitioners were disappointed that the RTP was not a "knock-out punch against global climate change"). The trial court admonished SANDAG against similar distortions. Hearing Transcript, p. 10:14-21.

relatively small portion of the state's emissions reductions. This "relative comparison" is the same type of "meaningless" comparison rejected in *Oroville*.

In any event, SANDAG wrongly portrays its responsibility as minimal. As the Ninth Circuit Court of Appeals noted in *Center for Biological Diversity v. National Highway Traffic Safety Admin.*, "[w]e cannot afford to ignore even modest contributions to global warming. If global warming is the result of the cumulative contributions of myriad sources, any one modest in itself, is there not a danger of losing the forest by closing our eyes to the felling of the individual trees?" (9th Cir. 2008) 538 F.3d 1172, 1217 (citations omitted). Likewise, the United States Supreme Court has recognized that reducing transportation-related greenhouse gas emissions "is hardly a tentative step," even if it will not solve the climate problem "in one fell regulatory swoop." *Massachusetts v. EPA* (2007) 549 U.S. 497, 524. Thus, even if local agencies cannot alone solve the problem, each agency must do its part. Specifically, agencies such as SANDAG must ensure that all projects within their jurisdictions are "on an emissions trajectory that, if adopted on a larger scale, is consistent with avoiding dangerous climate change." AR 320:27778.

The Air Resources Board has also described California's effort to confront climate change as a "shared challenge" involving all levels of government, business, and individual action. *See, e.g.*, AR 320:27859-60, 27886-87 (Scoping Plan emphasizing role of local government). The Air

Board's Scoping Plan explicitly cited the importance of plans like SANDAG's in meeting the Executive Order's 2050 objective:

> 2020 is by no means the end of California's journey to a clean energy future. In fact, that is when many of the strategies laid out in this plan will just be kicking into high gear.
>
> Take, for example, the regional transportation-related greenhouse gas emissions targets. In order to achieve the deep cuts in greenhouse gas emissions we will need beyond 2020 it will be necessary to significantly change California's current land use and transportation planning policies. Although these changes will take time, getting started now will help put California on course to cut statewide greenhouse gas emissions by 80 percent in 2050 as called for by Governor Schwarzenegger.

AR 320:27858-59; *see also id.* at 27879-80 (improved regional transportation planning is "essential for meeting the 2050 emissions target").

Before this litigation, SANDAG itself recognized the importance of its role. The agency's own Climate Action Strategy acknowledged the need for all levels of government, including SANDAG, "to engage in immediate and sustained actions to reduce greenhouse gas emissions." AR 216:17625. It cited the need for the San Diego region to be "well on its way [by 2030] to doing its share for achieving the 2050 greenhouse gas reduction level." AR 216:17629. SANDAG's current attempts to minimize its role in long-term mitigation efforts cannot justify the EIR's failure to inform decision-makers and the public of the full significance of the Plan's effects.

3. SANDAG Erroneously Claims that Analysis of the Executive Order Was Not Legally Required.

SANDAG insists that it was not legally required to address the Plan's inconsistency with the Executive Order's 2050 emissions trajectory. AOB:20-21. SANDAG first tries to avoid the import of the Executive Order by variously asserting that the Order is not a general or specific plan, and that such orders bind only state agencies. SANDAG then says that neither the Resources Agency nor the Air Resources Board has expressly endorsed the Executive Order as a measure of significance under CEQA. *See id.*

All of SANDAG's protestations avoid the point. Disclosure and analysis of the Plan's inconsistency with the emissions trajectory outlined in the Executive Order were necessary to adequately convey information critical to understanding the significance of the Plan's long-term impacts. Thus, *CEQA itself* required this analysis.

Again, the Executive Order's emissions trajectory reflects the reductions necessary to stabilize the climate by 2050. AR 320:27851, 27875, 27882. SANDAG's own Climate Action Strategy recognizes this key scientific fact. It recommends analyzing long-term policy measures for their "effectiveness in helping to achieve" California's 2050 emissions reduction goals (AR 216:17624)—exactly what Petitioners asked SANDAG to do here. By refusing to compare the Plan's emissions increases to the emissions

reduction trajectory necessary to achieve those goals, SANDAG has buried the full significance of the Plan's long-term emissions.

SANDAG also complains that the Executive Order was not adopted through a public process. AOB:21 (citing Guidelines § 15064.4(b)(3)). But the Scoping Plan, which expressly incorporated the Executive Order's goals and emissions reduction trajectory, *was* adopted following an extensive public process. AR 320:27848-49, 27861-62; *AIR*, 206 Cal.App.4th at 1491.

Finally, SANDAG argues that neither the Final Statement of Reasons for the adoption of Guidelines section 15064.4, nor an Air Resources Board "Preliminary Draft Staff Proposal" for assessing climate impacts, expressly endorsed the Executive Order as a measure of significance. AOB:14, 21. Neither contention has merit.

The Final Statement of Reasons did not "endorse" the use of *any* metric in assessing an impact's significance. Indeed, the Statement reiterated that: (1) "there is no ironclad definition of 'significance'"; (2) "lead agencies must use their best efforts to investigate and disclose all that they reasonably can regarding a project's potential adverse impacts;" and (3) analysis of significance "must be based 'to the extent possible on scientific and factual data.'" AR 319:25846. If anything, this discussion *supports* using the Executive Order's emissions trajectory where, as here, it is indispensable to adequately informing decision-makers and the public about the Plan's environmental consequences.

SANDAG's attempt to wield the Air Resources Board's Preliminary Staff Proposal as a shield is even more misguided. That proposal outlined specific thresholds only for "industrial, residential, and commercial projects." AR 320:27789, 27793. It set no threshold for long-range transportation plans like the one that SANDAG adopted here.

At the same time, the proposal specifically identified the Executive Order's 2050 trajectory as "consistent with the scientific consensus of the reductions needed to stabilize atmospheric levels of GHGs at 450 ppm by mid-century." AR 320:27791. The proposal then expressly cautioned that CEQA significance thresholds "must be sufficiently stringent to make substantial contributions to reducing the State's GHG emissions peak, to causing that peak to occur sooner, *and to putting California on track to meet its interim (2020) and long-term (2050) emissions reduction targets*." AR 320:27792 (emphasis added). Therefore, rather than excusing SANDAG's lack of analysis, the Preliminary Draft Staff Proposal supports Petitioners' argument.

4. The EIR Cannot Substitute Raw Data on Long-Term Plan Emissions in Place of a Meaningful Analysis of the Plan's Climate Impacts.

Next, SANDAG insists that the EIR included sufficient raw data for readers to understand the Plan's climate impacts. AOB:19. For example, the EIR provided a data point representing total land-use and transportation-related greenhouse gas emissions in 2050. AR 8a:2578; *see* AOB:19 (citing same). It also provided a technical spreadsheet of vehicle emissions outputs.

AR 8b:3619-44; *see* AOB:19 (citing same). SANDAG claims Petitioners never "seriously argue[d]" these data were insufficient. AOB:19. But the record below shows otherwise. JA 65:820-21.

In any event, the EIR's raw data were insufficient because they did not provide the necessary context for understanding the significance of the Plan's emissions. SANDAG suggested in the court below that readers of the EIR could have understood the significance of the Project's impacts in relation to the Executive Order trajectory by taking the "raw figures" regarding the Plan's greenhouse gas emissions and "do[ing] the math themselves." JA 51:479. Members of the public, however, "are not required to . . . make their own deductions regarding whether the project would significantly affect the existing environment" in the first place. *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351, 1390-91 (disapproved on other grounds by *Neighbors for Smart Rail*, 57 Cal.4th at 457); *see also Vineyard,* 40 Cal.4th at 442 ("The data in an EIR must not only be sufficient in quantity, it must be presented in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project.").

Moreover, the EIR provided *no* information about the per capita emissions reductions necessary to meet the Executive Order's trajectory. Nor did it disclose any information about the total transportation and land use emission reductions necessary to meet those goals. Instead, SANDAG

mentioned these data only in a staff memo released on the *very day* that it approved the Plan. AR 185:12604-05. This type of eleventh-hour release of information cannot satisfy CEQA. As Petitioners pointed out below, late disclosure of information "at the end of the environmental review process without analysis or the benefit of public scrutiny or participation does not fulfill the informational function of an EIR." *Sunnyvale West*, 190 Cal.App.4th at 1388.

The EIR thus deprived readers of any relevant point of comparison between the Plan's 2050 emissions rate and the emissions rate required by 2050 for climate stabilization. By doing so, the EIR left readers with the misleading impression that the Plan's most significant climate impact was merely a marginal increase over existing emissions several decades in the future. Thus, contrary to SANDAG's assertion, the EIR *did* "short-circuit[]" understanding of the project "by unreasonably deflating the significance of potential impacts." AOB:19. CEQA requires public agencies to make a good faith effort to disclose all they reasonably can about their projects. Guidelines §§ 15144, 15151. Agencies cannot thwart public understanding by hiding the ball, as SANDAG did here.

5. Well-Established Climate Science Required Analysis of the Plan's Inconsistency with the Executive Order Trajectory.

SANDAG saved its most audacious argument for last. It asserts that "science" did not require use of the Executive Order as a point of comparison

for the Plan's long-term impacts. *See* AOB:22-23. SANDAG claims that Petitioners "cannot identify a single scientist who actually supports their opinion on this subject," and that the Air Resources Board and the Resources Agency "certainly have not." *See* AOB:22-23.

Again, SANDAG is demonstrably wrong. The Air Resources Board repeatedly cited the underlying science when it referenced and incorporated the Executive Order's 2050 goals into the Scoping Plan. *See, e.g.*, AR 320:27864, 27977. The Board's scientists also contributed to an influential report on California climate impacts that expressly references the Executive Order and its 2050 goals. AR 320:28007-08. And Air Resources Board staff bluntly warned that CEQA significance thresholds must be "sufficiently stringent" to put projects on track toward meeting the Executive Order's 2050 goals. AR 320:27792. The Board's scientists support Petitioners' claims, not SANDAG's argument.

Having ignored the sound climate science underlying the Executive Order, SANDAG cannot now credibly claim that science supports the EIR's climate impacts analysis. AOB:22-23. The EIR's analysis of consistency with the Scoping Plan stops as of 2020 (AR 8a:2586, 2588), but climate change will not. By adopting a Plan that allows greenhouse gas emissions to rise through mid-century, SANDAG abdicated its responsibility for reducing its non-trivial share of the state's long-term emissions. If SANDAG wishes to ignore the "science" while leaving the rest of California to take up its slack in the

collective effort to confront climate change, it must disclose the effects of its actions so that the public may hold the agency accountable. The EIR here failed to do so.

III. SANDAG Failed to Adequately Mitigate the Significant Impacts Caused by the Project's Greenhouse Gas Emissions.

SANDAG claims that the EIR analyzed an "exhaustive" list of mitigation measures. AOB:25, 29. In reality, the EIR included just three measures (MM GHG-A, B, and C), and its "analysis" barely filled four pages. AR 8a:2588-91; AOB:31-32. While SANDAG asserts that these mitigation measures are sufficient under CEQA, the measures are vague and unenforceable, largely deferring mitigation to the future. As the trial court correctly found, the measures merely "kick the can down the road" and fall "well short" of CEQA's mitigation requirements. JA 75:1057.

SANDAG's approach to mitigation violates two of CEQA's core directives. First, the agency largely ignored CEQA's procedural requirement that it analyze effective mitigation measures in the EIR, thereby thwarting the act's informational purposes. Second, SANDAG failed to heed CEQA's "substantive mandate" that the agency adopt any feasible measures capable of reducing the Project's significant impacts. Instead, SANDAG took the position that *any* effective mitigation—including the specific proposals offered by Petitioners—would be infeasible. That position is both contrary to law and unsupported by substantial evidence.

A. CEQA Establishes Both Procedural and Substantive Mitigation Requirements.

An EIR's central purposes are to identify a project's significant environmental effects and to evaluate ways of avoiding or minimizing them. §§ 21002.1(a), 21061. An EIR generally may not defer evaluation of mitigation until a later date. Guidelines § 15126.4(a)(1)(B). Rather, an EIR must evaluate each mitigation proposal that is not "facially infeasible," even if such measures would not completely eliminate an impact or render it less than significant. *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1029-31 ("*LA Unified*"). Furthermore, for every mitigation measure evaluated, the agency must demonstrate either that the mitigation measure: (1) will be effective in reducing a significant environmental impact; or (2) is ineffective or infeasible due to specific legal or "economic, environmental, social and technological factors." *Oroville,* 218 Cal.App.4th at 1359-61; §§ 21002, 21061.1; Guidelines §§ 15021(b), 15364.

If an agency ultimately determines that mitigation proposed in the EIR is infeasible, it may decline to adopt the measure. However, in that event CEQA requires that the agency explain the reasons for this determination in detailed findings, which must be both legally accurate and supported by substantial evidence. §§ 21081(a)(3), 21081.5; Guidelines §§ 15091(a)(3), (b); *Village Laguna of Laguna Beach, Inc. v. Bd. of Supervisors* (1982) 134 Cal.App.3d 1022, 1032-35. And if the project's impacts will remain

significant even after mitigation, the agency must issue an additional statement of overriding considerations, also supported by substantial evidence, demonstrating that the project's benefits outweigh its effects. § 21081(b); *see* Guidelines §§ 15091(f), 15093.

In additional to these procedural requirements, CEQA also has substantive "teeth," as the trial court recognized. *See* JA 75:1057. The lead agency must *actually adopt* any feasible mitigation that can substantially lessen the project's significant environmental impacts. § 21002; Guidelines § 15002(a)(3); *City of Marina*, 39 Cal.4th at 368-69. In addition, the agency must "ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded." *Federation of Hillside and Canyon Assns. v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261 (italics omitted); Guidelines § 15126.4(a)(2).

SANDAG attempts to evade these requirements by asserting that it must evaluate only a "reasonable range" of mitigation measures. *See, e.g.*, AOB:25-26, 29, 34. SANDAG misstates the law. CEQA requires analysis of a "reasonable range" of *alternatives* (Guidelines § 15126.6), not mitigation measures.[7] Although both mitigation measures and alternatives aim to reduce significant impacts, CEQA contains distinct requirements for each. §§

[7] Petitioners also claim that SANDAG's EIR failed to analyze a reasonable range of alternatives. *See infra*, Cross-Appellants' Opening Brief, Part IV.

21100(b)(3), (4); Guidelines §§ 15126.4, 15126.6. An EIR must present alternatives to the *entire* project, in addition to mitigation measures addressing individual impacts. To present a "reasoned choice" to the agency, the alternatives analysis must compare the impact of each alternative to that of the project, for every impact category. Guidelines §§ 15126.6(d), (f). Given the depth of the analysis required, CEQA requires that the agency present only a "range of reasonable alternatives." Guidelines § 15126.6(a). In contrast, the EIR must "identify mitigation measures for each significant environmental effect," and must include all measures that "could reasonably be expected to reduce adverse impacts." Guidelines § 15126.4(a)(1)(A).

A few cases have referenced the "reasonable range" terminology with respect to mitigation (*see* AOB:26), but only to demonstrate that an EIR need not evaluate truly *infeasible* mitigation measures. *See, e.g., Concerned Citizens of South Central Los Angeles v. Los Angeles Unified School Dist.* (1994) 24 Cal.App.4th 826, 843 (EIR need not evaluate economically infeasible measure of replacement housing); *Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 349-51(EIR not required to further analyze measures to mitigate agricultural impacts where substantial evidence supported economic infeasibility of such measures). These cases are irrelevant where, as here, the Project has unmitigated significant impacts and commenters offered reasonable measures to lessen those impacts. In this situation, the agency must consider the measures or

provide a substantiated response as to why they are infeasible. *See LA Unified*, 58 Cal.App.4th at 1029-31; *Flanders Foundation v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603, 615-17.

As detailed below, SANDAG utterly failed to meet that requirement here.

B. SANDAG Improperly Deferred Mitigation to Reduce the Project's Climate Impacts.

As the trial court found, SANDAG's three climate mitigation measures (MM GHG-A through C) are vague, unenforceable, and incapable of lessening the Project's significant impacts. JA 75:1057. Rather than seriously address the Project's significant climate impacts, these measures: (1) "kick[ed] the can down the road" by impermissibly deferring development of regional mitigation; and (2) improperly passed the buck to other public agencies. *Id.*; AR 8a:2588-90. At the same time, the EIR offered no valid reason why the agency could not analyze and adopt effective mitigation now.

CEQA allows a lead agency to defer mitigation only when three narrow, specific prerequisites are met: (1) an EIR contains criteria, or performance standards, to govern future actions implementing the mitigation; (2) practical considerations preclude development of the measures at the time of initial project approval; and (3) the agency has assurances that the future mitigation will be both "feasible and efficacious." *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 94-95 ("*CBE*");

San Joaquin Raptor, 149 Cal.App.4th at 669-71; Guidelines § 15126.4(a)(1)(B). Here, SANDAG met none of these requirements.

1. Measures GHG-A through C Did Not Commit SANDAG to Effective Climate Mitigation.

SANDAG claims that measures GHG-A through C did not defer mitigation but rather committed the agency to certain and effective greenhouse gas reductions. AOB:31, 34. This argument, however, immediately collapses under scrutiny.

a. Measure GHG-A.

Measure GHG-A purports to obligate SANDAG to "update" future RTPs to include unspecified "policies and measures" that "may be derived" from member agencies' plans or from "other sources" and that "lead to reduced GHG emissions." AR 8a:2588. The measure, however, adds nothing to legal requirements previously imposed on SANDAG. CEQA *already requires* SANDAG to adopt feasible mitigation measures for all of its projects, including its future RTPs. *Edna Valley Assn. v. San Luis Obispo County and Cities Area Planning Coordinating Council* (1977) 67 Cal.App.3d 444, 447-48; § 21002. Thus, SANDAG's "commit[ment]" to unspecified future mitigation (AOB:31), merely restates what the law requires; it identifies no actual, concrete mitigation. Accordingly, this measure improperly defers development of adequate mitigation, which is needed *now* to address the significant impacts of *this* Plan. *See CBE,* 184 Cal.App.4th at 93-95.

Significantly, SANDAG has a history of deferring greenhouse gas mitigation for its RTPs. In conjunction with the 2007 RTP, SANDAG expressly committed to develop a climate "action plan" as mitigation within three years. AR 320:28549. Then, when SANDAG developed its Climate Action Strategy in 2010, it stated that the "actual mix of measures implemented by SANDAG to reduce greenhouse gas emissions from on-road transportation will be determined through the development of the 2050 Regional Transportation Plan." AR 216:17643. Yet, in developing the 2050 RTP/SCS, SANDAG did not fulfill this promise; rather, mitigation for the Project's climate impacts once again remains illusory under measure GHG-A. AR 8a:2588. SANDAG's continued practice of deferring the identification of mitigation suggests that, absent judicial intervention, the agency may *never* fulfill its obligation to mitigate climate impacts on a regional level.

b. Measure GHG-B.

Measure GHG-B is just as meaningless. It declares that local agencies "can and should" adopt climate action plans that SANDAG will "assist local governments in preparing." AR 8a:2588-89. Yet this measure provides neither performance standards nor enforceable guidelines for such climate action plans, and it includes no enforceable mechanism to ensure their adoption. AR 8a:2588-90. Rather, any action by SANDAG or its member agencies remains entirely voluntary with respect to these plans. As SANDAG

itself admits, "mere encouragement or providing of incentives obviously have no legally enforceable effects." AOB:34-35.

SANDAG claims that CEQA authorizes the "can and should" language for measures outside an agency's control. AOB:34 (citing § 21081(a)(2)). However, this statutory language does not relieve SANDAG of its responsibility under CEQA to mitigate those impacts of the Plan that lie within its *own* control. *City of Marina*, 39 Cal.4th at 366 (agency may "disclaim[] the responsibility to mitigate environmental effects . . . only when the other agency said to have responsibility has *exclusive* responsibility" for the mitigation) (emphasis in original); *Citizens for Quality Growth v. City of Mount Shasta* (1988) 198 Cal.App.3d 433, 442, fn. 8 (city cannot avoid responsibility to mitigate project impacts by pointing to potential action of another agency).

Here, as explained below (*infra*, Part III.C.2), while SANDAG does not have ultimate approval authority over some aspects of the mitigation measures, the agency is far from powerless. Rather, it possesses substantial authority to ensure the measures' implementation. For example, SANDAG could: (1) commit itself to directly fund local climate action plans; or (2) condition the allocation of discretionary funds to member agencies on a commitment to adopt such plans. *See Neighbors for Smart Rail,* 57 Cal.4th at 465-66 (upholding mitigation for a project with overlapping agency jurisdiction, where one agency agreed to study and fund mitigation that was

under approval control of another agency). SANDAG cannot dismiss mitigation that lies well within its authority.

c. Measure GHG-C.

SANDAG's third measure, GHG-C, is equally ineffectual in reducing greenhouse gas impacts. SANDAG notes that GHG-C "lists Best Available Control Technology measures to be utilized by SANDAG and other agencies to reduce GHG emissions." AOB:32. Like GHG-B, however, GHG-C once again states only that other agencies "can and should" utilize these measures (AR 8a:2590); it does nothing to *require* their implementation for many projects. *See* AR 8b:4047, 4081, 4083 (commenters requesting such technology be required for all projects by, *e.g.*, "withholding of funds for non-compliance").

Thus, GHG-C does not constitute sufficient mitigation for the Project's significant greenhouse gas emissions. Furthermore, the measure lists technology that applies primarily to the *construction* of transportation projects. AR 8a:2590. Such construction emits far less than one percent of the Project's 2050 transportation emissions—a mere 10,000 metric tons of the 14.69 *million* metric ton total. AR 8a:2577 (Table 4.8-12). Vehicles emit the vast remainder of this pollution, and GHG-C largely ignores that source. *Id.*

In sum, measures GHG-A through C impermissibly deferred climate mitigation without identifying any relevant performance standards or enforcement measures ensuring their implementation. This deficiency is

"prejudicial because [it] precluded informed decisionmaking and public participation." *San Joaquin Raptor*, 149 Cal.App.4th at 672.

2. Guidelines Section 15126.4(c)(5) Did Not Authorize SANDAG's Deferred Mitigation.

SANDAG next claims that measures GHG-A through C satisfy requirements for climate mitigation under Guidelines section 15126.4(c)(5). AOB:32. That section allows agencies adopting long-range plans to "include the identification of specific measures that may be implemented on a project-by-project basis" to reduce greenhouse gas impacts. § 15126.4(c)(5). But SANDAG's mitigation measures do not approach satisfying this requirement.

To begin with, GHG-A does not "identif[y] specific measures" at all. And GHG-B states only that: (1) San Diego County and local cities "can and should" adopt their own climate action plans; and (2) these plans "should, when appropriate," incorporate land use and planning measures recommended by the Attorney General. AR 8a:2588-89. A hortatory plea that an optional plan "should" incorporate policies is a far cry from identifying specific measures.

Further, SANDAG's argument removes language in section 15126.4(c) from its context. That section expressly requires that mitigation measures must be "[c]onsistent with section 15126.4(a)." This latter section, in turn, requires both that: (1) formulation of mitigation "should not be deferred until some future time;" and (2) measures must be "fully enforceable" through

"legally-binding instruments" and actually "incorporated into the plan." Guidelines § 15126.4(a)(1)(B) and (a)(2). Here, except for the application of Best Available Control Technology to SANDAG's own construction projects, measures GHG-A through C are largely "deferred until some future time" and completely lack any "legally-binding instruments" to ensure that the mitigation is "fully enforceable." Indeed, the language of these measures renders them entirely optional. The trial court easily saw through SANDAG's game, finding that, "'encouraging' an optional local plan that 'should' incorporate regional policies falls well short of a legally enforceable mitigation commitment with teeth." JA 75:1057.

Nor can SANDAG rely on the language in Guidelines section 15126.4(c)(5), allowing "incorporation" of "adopted ordinance[s] or regulation[s]" that reduce emissions. Measures GHG-A and B reference only *potential future* policies; they incorporate no adopted ordinances or regulations. Guidelines section 15126.4(c)(5) also does not pertain to Measure GHG-C, which virtually ignores the Project's vast, transportation-related climate impacts.

3. The Sustainable Communities Strategy Itself Was Not Project Mitigation.

Facing the patent inadequacy of measures GHG-A through C, SANDAG next presents a new argument on appeal: that the SCS *itself* contains measures satisfying CEQA's mitigation requirements. AOB:29-31.

In other words, while the EIR must identify mitigation for the RTP/SCS's impacts, SANDAG now says such mitigation was unnecessary because the SCS mitigated these impacts. This late entry in SANDAG's parade of excuses fails dismally as well.

First, SANDAG argued below that it *did not* consider components of the SCS to be mitigation. *Compare* AOB:30 *with* JA 51:511; AR 6:223; AR 190a:13166-67. Under long-settled law, SANDAG may not now change its position on appeal. *Ernst v. Searle* (1933) 218 Cal. 233, 240-41.

The reason for SANDAG's earlier position was both obvious and unsurprising. The measures in the SCS, including the "action items" adopted at the approval hearing, included no performance standards or other legally enforceable means to ensure they would actually lessen the Plan's impacts. *See* AR 190a:13166-67; *see also* JA 47:425-26). As explained, without such standards or means, the measures cannot satisfy CEQA.

The record also belies SANDAG's new theory. The EIR never analyzed the effectiveness of "mitigation" contained in the SCS, and SANDAG made none of the required CEQA findings regarding such mitigation. *See* AR 3:33-130, 182-216; 8a:2588-90; JA 51:511. Indeed, despite repeated requests from the public to do so, SANDAG refused to consider and respond to thousands of public comments on the SCS in the Final EIR. *See, e.g.*, AR 320:27699; 185:12566, 12625. Instead, it claimed that the two documents were entirely separate. AR 185:12538. Having taken this

position, SANDAG cannot now employ the SCS to cure the EIR's failure to adequately address mitigation.

Finally, the EIR revealed that SANDAG's Plan, *including* the SCS measures that SANDAG now suddenly sees as mitigation, will have significant global warming impacts. AR 8a:2572, 2575, 2579. It is mitigation for *these* significant impacts, admitted by SANDAG, that the EIR must address. While CEQA allows an agency to incorporate a mitigation measure into a project to ensure the measure's enforceability (Guidelines § 15126.4(a)(2)), CEQA does not authorize an agency to claim—after the fact—that the *project itself* is the mitigation. *See Vineyard,* 40 Cal.4th at 443-44. Such a circular outcome would defeat CEQA's purpose to "inform both the public and the decisionmakers, *before the decision is made,* of any reasonable means of mitigating the environmental impact of a proposed project." *Flanders*, 202 Cal.App.4th at 616-17 (emphasis in original).

4. Because SANDAG Never Quantified the Greenhouse Gas Reductions Resulting from Its Mitigation Measures, No Substantial Evidence Supported the Agency's Conclusions About The Measures' Effectiveness.

Despite the obvious vagueness and inadequacy of measures GHG-A through C, both SANDAG's EIR and findings concluded that these measures would reduce the Project's significant greenhouse gas impacts. AR 3:90; 8a:2588-90. To support such a conclusion, however, an EIR "must provide a quantitative or qualitative determination or estimate of the mitigation

measures' effect on GHG emissions." *Oroville*, 218 Cal.App.4th at 1360-62; *see also CBE*, 184 Cal.App.4th at 93 (invalidating EIR for failing to "calculate what, if any, reductions in the Project's anticipated greenhouse gas emissions would result from each of [the EIR's] vaguely described future mitigation measures").

Here, neither the EIR nor the findings actually calculated or otherwise analyzed the *amount* of the alleged reductions. AR 3:90; 8a:2588-91; 177:11919. Indeed, the agency admitted that measures GHG-A through C "do not provide a mechanism that guarantees GHG emission reductions." AR 3:90, 8a:2591. Under such circumstances, no substantial evidence supports SANDAG's finding that measures GHG-A through C would "reduce the significant impact from increased GHG emissions." AR 3:90; 8a:2590; *see also Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 280-82 (improperly deferred mitigation measures cannot support a finding that measures will reduce project impacts).

Adequate findings are, of course, necessary to ensure that mitigation is actually incorporated and implemented. *Federation*, 83 Cal.App.4th at 1260-61. But they also serve another important purpose: they enable the public and the courts to trace the analytic route that the agency followed from evidence to action. *Citizens for Quality Growth*, 198 Cal.App.3d at 441; *see also Village Laguna*, 134 Cal.App.3d at 1035-36. SANDAG's failure to support its finding with substantial evidence thus constitutes a prejudicial abuse of discretion. *Id.*

Finally, neither SANDAG's conclusion that the Project's impacts would remain significant after mitigation (AR 3:90) nor its statement of overriding considerations (AR 3:179-81) can rescue SANDAG's flawed mitigation measures and findings. CEQA requires adequate mitigation and findings regardless of whether an agency also adopts a statement of overriding considerations. *City of Marina*, 39 Cal.4th at 368-69; *LA Unified*, 58 Cal.App.4th at 1030, fn. 11.

C. SANDAG's Claim that Further Greenhouse Gas Mitigation Was Both Infeasible and Unnecessary Is Without Merit.

The remainder of SANDAG's arguments amount to excuses as to why the agency could not, or need not, do more to mitigate the Project's significant climate impacts. Initially, SANDAG attempts to shift most of its climate mitigation responsibility to the other agencies that will ultimately implement the various roadway projects listed in the Plan. SANDAG rests this argument on two related premises: (1) the "programmatic" nature of the Project (and EIR) justifies the lack of mitigation; and (2) as a mere "pass-through" funding agency, SANDAG has no legal authority to require mitigation. Because these premises find no support in the law, however, SANDAG's "lack of authority" excuse is untenable.

SANDAG also claims that Petitioners have not met their "burden" of demonstrating that there are other feasible measures SANDAG could have evaluated. This argument, too, lacks merit. CEQA places the burden of

developing mitigation on the lead agency, not the public. In any event, Petitioners and others proposed several specific measures that could have effectively reduced the Plan's greenhouse gas emissions. SANDAG's refusal to study these in the EIR violated CEQA.

1. Use of a Program EIR Does Not Excuse An Agency's Failure to Mitigate a Project's Significant Environmental Impacts.

SANDAG claims that because its EIR is "programmatic" and local agencies will impose mitigation later at the project level, it cannot do more to mitigate the Plan's significant greenhouse gas impacts. *See* AOB:3, 51-53. But SANDAG misunderstands CEQA: the statute does not exempt programmatic projects from mitigation. *See Federation*, 83 Cal.App.4th at 1260-62; *LA Unified*, 58 Cal.App.4th at 1030 (city may not postpone mitigation for land use plan "until specific projects are proposed for development under the plan"). To the contrary, CEQA recognizes that "program wide mitigation" must occur "at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts." Guidelines § 15168(b)(4); *see* AR 218:17761-62 (RTP Guidelines stating "[t]he purpose of the [RTP's] program EIR is to enable the MPO to examine . . . program wide mitigation").

Contrary to SANDAG's assertions (*see* AOB:52-53, citing *Vineyard*, 40 Cal.4th at 431), Petitioners have never asked SANDAG to mitigate the climate impacts of individual roadway projects listed in the Plan. Rather, they

have repeatedly requested that SANDAG evaluate and adopt crucial *program-level* measures to reduce the significant greenhouse gas emissions caused by its Plan. *See infra*, Part III.C.3 (discussing feasible programmatic mitigation measures). For example, one of the most effective ways to mitigate the Project's sizable emissions is to reduce driving. *See, e.g.*, AR 8a:2577-78 (largest contributor to Project's greenhouse gas impacts is vehicle emissions); 8b:3856 ("Change in VMT is an important criterion with respect to . . . GHG emissions . . ."). Such mitigation can occur only through programmatic, region-wide measures, such as demand management and transit funding. As SANDAG recognizes, "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 [] the next forty years." AOB:52.

The Project's regional *system*, and not individual road *segments* of that system, promotes increased driving, with resultant greenhouse gas emissions. *See* AR 7:359 (Project is to complete an interconnected "regional transportation system"); 8b:4435-36 (vehicle miles traveled increases over the Project's life). Thus, SANDAG must adopt programmatic mitigation for greenhouse gas emissions *now*. Local agencies approving later, individual roadway projects will be unable to mitigate climate impacts through aggressive regional approaches; only SANDAG has that power. *See, e.g.*, *Oroville*, 218 Cal.App.4th at 1360-61 (noting that greenhouse gas mitigation

measures "related to transportation were inapplicable" to local agency because they must be implemented at the programmatic level).

Programmatic mitigation for the Plan is also essential because subsequent projects may receive streamlined environmental review or be exempt from CEQA entirely. §§ 21155, 21155.1 & 2 ("transit priority" projects consistent with SCS are either exempt from CEQA or eligible for streamlined review); § 21159.28 (residential and mixed-use residential projects consistent with SCS may receive streamlined environmental review, provided they incorporate mitigation required by prior EIR). Thus, while SANDAG suggests that future mitigation will work because each individual project will undergo its own detailed CEQA review (AOB:53), that review may well not even exist.

SANDAG heavily relies on *Bay Delta* (AOB:51-52), but that decision supports Petitioners, not SANDAG. The Supreme Court there recognized that policy-setting programs, which "consist[] of multiple possible actions that are . . . described in general terms," may receive less detailed environmental analysis and mitigation. *In Re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1170, 1172 ("*Bay Delta*") (setting policy goals for massive, statewide water supply program that did not commit agency to developing any particular water sources). Importantly, however, it also found that agencies approving more detailed programs must provide correspondingly specific environmental

analyses and mitigation. *See id.* at 1171-72 (courts require detailed analysis and mitigation for projects on identified sites with quantifiable impacts).

SANDAG's Plan is not a broad, policy-level document that describes future actions only in general terms. Rather, it consists of a detailed program for funding, building, and connecting *specific* roadway and transit segments at *specific* locations in San Diego County. JA 51:475 (SANDAG acknowledging transportation projects planned for the next 25 years are already designed); AR 8a:2115-2129 (showing specific location, design parameters and cost of future projects); 190a:13384-13451 (same). SANDAG's Project thus in no way resembles the type of broad, "policy-setting" programs—like the plan at issue in *Bay Delta*—that may receive less detailed environmental analysis. *See Bay Delta,* 43 Cal.4th at 1169-72. Accordingly, because the Plan is specific, the EIR for the Plan must identify specific mitigation that is commensurate with the Plan's impacts. *Vineyard,* 40 Cal.4th at 431-32.

SANDAG's other cited cases likewise support Petitioners, not SANDAG. The *Koster* decision holds that, *prior to* any specific development proposal, an agency must analyze the large-scale planning decision of whether new towns should be built at all, and must provide mitigation. *Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29, 41-42 (questioning "how seriously any subsequent study would consider alternative sites for the new towns"). Similarly, *Vineyard* makes clear that CEQA's demand for

meaningful information "'is not satisfied by simply stating information will be provided in the future.'" 40 Cal.4th at 431 (citation omitted).

Finally, SANDAG defends its mitigation by complaining that conditions may change in future years and that the current RTP/SCS will no longer be relevant. AOB:53. This argument, however, again contravenes established Supreme Court precedent. CEQA requires an agency to "assume that all phases of the project will eventually be built." *Vineyard*, 40 Cal.4th at 431. A contrary holding would allow an agency to *continuously* delay the formulation of mitigation for long-range plans. Indeed, SANDAG has a history of engaging in precisely this practice. *See supra*, p. 55.

2. SANDAG's "Legal Infeasibility" Excuse Fails As a Matter of Law.

SANDAG next contends that it has no legal authority to adopt further mitigation because: (1) such measures require action by other agencies; and (2) SANDAG lacks authority to reallocate or place conditions on transportation funding. Once again, these excuses lack merit.

a. As the Regional Transportation Authority with Control Over Billions in Funding, SANDAG Had Broad Power to Impose Mitigation.

SANDAG is both a state-designated Regional Transportation Commission and a federally designated Metropolitan Planning Organization. AR 8a:2071. Great power and responsibility accompany both designations. For example, SANDAG is empowered to: (1) plan and prioritize virtually all

regional transportation projects (AR 11:4465; 190b:13656); and (2) coordinate transportation and land use to ensure that the state meets its greenhouse gas reduction targets (AR 11:4465; 18:4585). SANDAG is thus firmly in charge of both the overall vision and strategic planning for a coordinated transportation system. *See, e.g.*, AR 8a:2071; 218:17687 (RTP Guidelines stating that regional transportation agencies "have the flexibility to be creative in selecting transportation planning options that best fit their regional needs"); Pub. Util. Code §§ 120300, 132051. In addition, SANDAG directly builds specific transportation projects and even owns individual roadways (*e.g.*, State Route 125). AR 8b:3827-28 (SANDAG is responsible for "transit planning, funding allocation, project development, and eventually construction of major public transit projects"); 190a:13615-25; 190b:13901.

Equally important is the scope of SANDAG's funding authority. SANDAG obtains and allocates billions of dollars annually for projects identified in its Plan. AR 190a:13237-38, 13246-47. This authority is both vast and comprehensive. As SANDAG states, "[t]he RTP establishes the basis for programming virtually all local, state, and federal funds for transportation within a region." AOB:4 (citing AR 218:17692). As a result, SANDAG wields immense indirect power over development patterns. Obviously, if no transportation is available at a given location, development projects there become far less likely. Accordingly, SANDAG's insistence that it has no influence over local land use planning (AOB:46-47) is not credible.

b. SANDAG Should Have Mitigated the Impacts of Its Project Even If Other Agencies Had Approval Authority Over Specific Measures.

SANDAG protests that it lacks legal authority to impose mitigation on projects that other agencies will ultimately implement. AOB:45-46. But this argument contradicts the Fourth District's decision in *County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86. In that case, the District similarly claimed that it lacked legislative authority to fund off-campus roadway improvements to mitigate the significant traffic impacts of its long-range master plan, asserting that only the County possessed such authority. *Id.* at 97. The court disagreed. Harmonizing the District's broad authority to expend funds for "construction[] or completion of any project" under the Community College Construction Act with CEQA's "substantive mandate" for mitigation (*id.* at 103, 105), the court found that the District was "implicitly authorized" to fund off-campus mitigation. *Id.* at 106.

Like the District in *County of San Diego*, SANDAG has broad statutory authority to allocate revenues to implement the RTP. This authority includes powers "[t]o construct, acquire, develop, jointly develop, maintain, operate, lease, and dispose of work, property, rights-of-way, and facilities." Pub. Util. Code § 132305, 132354. Indeed, it was "the intent of the Legislature" to endow SANDAG with "sufficient power and authority to solve the transportation problems in the San Diego region and the needed

comprehensive transportation system." Pub. Util. Code § 132350.1; *see also* Pub. Util. Code §§ 132302; 132353(d) (explicitly recognizing that SANDAG's obligations will require environmental review, and providing funding therefore).

Pursuant to *County of San Diego*, this broad authority must be harmonized with CEQA's requirement that SANDAG implement and fund mitigation in approving the Project. 141 Cal.App.4th at 105-06; *see also* Guidelines § 15040(c) ("Where another law grants an agency discretionary powers, CEQA supplements those discretionary powers by authorizing the agency to use the discretionary powers to mitigate or avoid significant effects on the environment when it is feasible to do so with respect to projects subject to the powers of the agency."). Numerous cases so hold. *See Golden Gate Bridge, Highway and Transportation Dist. v. Muzzi* (1978) 83 Cal.App.3d 707, 713 (power to condemn property for project construction necessarily includes power to condemn for mitigation of the project's impacts); *San Diego Trust & Savings Bank v. Friends of Gill* (1981) 121 Cal.App.3d 203, 213-14 (implied power to deny permit to effectuate CEQA's purposes).

Whether SANDAG is authorized to issue final permits for some transportation projects is beside the point. SANDAG has the authority—and the duty—to mitigate the significant impacts caused by its Plan.

c. SANDAG's Claim that It Lacked Authority to Mitigate State Highway Projects Is Unfounded.

Continuing to disclaim any ability to act, SANDAG next wrongly suggests that it lacks authority to mitigate the impacts of state highway projects. AOB:50. In fact, TransNet expressly provides that SANDAG shares "joint responsibility" with Caltrans for state highway projects listed in TransNet's expenditure plan, and that "[a]ll major project approval actions . . . shall be jointly agreed upon" by both agencies. AR 320:28699 (Section 4(E)(4)). Given this authority, SANDAG cannot evade its duty to mitigate Project impacts by passing the buck to Caltrans. *See City of Marina*, 39 Cal.4th at 366 (agency cannot claim mitigation is sole responsibility of another agency if it has concurrent jurisdiction over the project).

SANDAG nevertheless believes it would be *improper* to use its partnership authority to require mitigation for highway projects. SANDAG states, "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." AOB:50. But mitigating a project's impacts is *required* by CEQA, and complying with that law is neither "gambling" nor pursuing "some other agenda." *See County of San Diego*, 141 Cal.App.4th at 103, 106.

In sum, as the lead agency responsible for developing and adopting the RTP/SCS, SANDAG is both empowered and required to mitigate the

significant impacts of that Plan. AR 8a:2066. Indeed, the agency's multiple promises to formulate adequate mitigation at some point in the future confirm that authority. *See, e.g.*, AR 6:223.

d. SANDAG's Alleged Fiscal Constraints and Commitment to TransNet's Expenditure Plan Did Not Excuse the Agency's Failure to Mitigate.

SANDAG then repeats the same argument in another form, describing itself as merely a "pass-through" funding agency, "fiscally constrained" by state and federal law. AOB:4, 45-51. But the premise of this argument is faulty; *any* project that draws on state and federal funds is similarly constrained. *See, e.g., County of San Diego*, 141 Cal.App.4th at 103-06. No such constraint prohibits agencies approving a regional plan or other project from adopting mitigation. Indeed, in presenting its "fiscal constraint" theory, SANDAG fails to cite a single statute or regulation that prevents it from adopting mitigation for its Plan.

Furthermore, SANDAG both inflates the "constraints" that it faces and shrinks its available legal authority. During the administrative process, SANDAG admitted that some state and federal funds are "flexible," and it has previously redistributed such funds. AR 8b:3778; 171:10547-10556; 172:10560-61. Additionally, in its capacity as the San Diego County Regional Transportation Commission, SANDAG often acts as a direct source of funding in administering the TransNet program. AR 190b:13656.

SANDAG next cites its allegedly irrevocable commitment to the list of projects in TransNet's expenditure plan, claiming that it cannot alter this "regional compact" to accommodate mitigation. AOB:48. However, the expenditure plan is not immutable; TransNet has a built-in procedure to modify that plan when necessary. AR 320:28700, 28703. Indeed, SANDAG has invoked that procedure and modified the expenditure plan four times between 2004 and 2012: (1) a 2006 amendment to include completion of the SPRINTER transportation project; (2) a 2008 amendment to extend the deadline to fund habitat conservation plans; (3) a 2009 amendment regarding auditing; and (4) a 2009 amendment to extend the deadline to fund habitat conservation plans. AR 8b:3811.

SANDAG's vision of TransNet's expenditure plan as a fixed, unchangeable commitment also conflicts with *Sustainable Transportation Advocates of Santa Barbara v. Santa Barbara County Association of Governments* (2010) 179 Cal.App.4th 113. In that case, the court held that a voter-approved expenditure plan like TransNet's was not a "project" subject to CEQA review. The court reasoned that, because a two-thirds vote of the regional transportation commission could amend the expenditure plan, "as a practical matter" the commission did not "commit[] itself to the implementation of the transportation projects" in that plan. *Id.* at 120, 123. It explained: "Measure A does not qualify as a project within the meaning of CEQA because it is a mechanism for funding proposed projects that may be

modified or not implemented depending upon a number of factors, including CEQA review." *Id.* at 123.

Here, it is even clearer that SANDAG is not irrevocably committed to implement the projects contained within the expenditure plan. TransNet not only allows amendments to the expenditure plan (in most cases by a two-thirds vote of the SANDAG Board), but it also specifically *requires* SANDAG to amend the expenditure plan after each revision to the RTP. AR 320:28700, 28703. The purpose of the required amendment is to ensure that TransNet's expenditure plan is consistent with each iteration of the RTP. AR 320:28700. In addition, TransNet provides that even projects prioritized for funding under the expenditure plan must first undergo "environmental clearance." AR 320:28699 (Section 4(E)(1)). Thus, like the expenditure plan at issue in *Sustainable Transportation Advocates*, TransNet expressly recognizes that environmental review of the expenditure plan may result in an amendment to the plan. If, under *Sustainable Transportation Advocates*, the TransNet expenditure plan is not even sufficiently binding to constitute a "project" under CEQA, it certainly does not present the type of "irrevocable commitment" that might preclude mitigation here.

e. SANDAG May Not Rely on SB 375 or Its Own "Policy Reasons" to Avoid Its Duty Under CEQA to Mitigate.

SANDAG offers some last-ditch arguments centered on a single theme: the agency simply does not *wish* to impose mitigation that would delay or alter

TransNet projects. SANDAG claims that SB 375 authorizes it to refuse such mitigation because the law does not require amendments to expenditure plans. AOB:49 (citing Gov. Code § 65080(b)(2)(L)). Again, SANDAG takes statutory language out of SB 375's broader context. *Other* provisions of SB 375 provide that the law must work in tandem with CEQA. *See, e.g.,* Gov. Code §§ 65080.01; 65080; 65081.3; §§ 21155, 21159.28. Nowhere does SB 375 eliminate CEQA's mitigation requirements, and SANDAG cannot claim otherwise.

SANDAG also insists that CEQA does not require an agency to consider major legislative changes. AOB:49 (citing *Goleta*, 52 Cal.3d at 573). However, altering the expenditure plan cannot constitute a major legislative change when TransNet expressly anticipates such changes after every RTP revision. AR 320:28700, 28703. As *Goleta* recognizes, an agency cannot "disregard an otherwise reasonable alternative which requires some form of implementing legislation." 52 Cal.3d at 573; *see also Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1459. Here, the implementing legislation itself authorizes SANDAG to act.

Finally, SANDAG briefly claims it may forgo amending TransNet for "policy reasons" that it favors. AOB:44. However, CEQA does not allow an agency to dismiss mitigation out-of-hand simply because the agency does want to impose it. *See City of Marina*, 39 Cal.4th at 368-69 ("CEQA does not authorize an agency to proceed with a project that will have significant,

unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible."). Such a rule, if it existed, would render CEQA's mitigation requirements meaningless.

While courts have upheld an agency's rejection of *alternatives* for "policy reasons," they have done so only in situations where: (1) substantial evidence demonstrates that the measure would obstruct a major project objective; and (2) the agency has explained this rationale in detailed findings. *See, e.g.*, *Bay Delta*, 43 Cal.4th at 1165 (upholding rejection of alternative because it would compromise project's water supply objective); *Cal. Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 972, 1000-01 (unpaved trail alternative clearly conflicted with goals of developing ADA-compliant and connected trail). SANDAG cites no case extending these limited rationales for rejecting alternatives to the mitigation context. In any event, the EIR offered no evidence that effective greenhouse gas mitigation would somehow impede the Project's objectives, and the Board's findings set forth no such conclusion. AR 3:87-92; 8b:3824-29. Indeed, as SANDAG acknowledges, the foremost objective of the SCS "is to provide for reductions of emissions of greenhouse gases—the cause of global climate change—through better transportation and land use coordination." AOB:1. Effective mitigation is central to this objective, not contrary to it.

In sum, SANDAG argues that the EIR may omit a discussion of any mitigation involving changes to transportation funding or TransNet's expenditure plan because the agency is allegedly unable or unwilling to make such changes, but that position is contrary to law. This legal error constitutes a prejudicial abuse of discretion. *See City of Marina*, 39 Cal.4th at 356 ("An EIR that incorrectly disclaims the power and duty to mitigate identified environmental effects based on erroneous legal assumptions is not sufficient as an informative document.").

3. The Trial Court Correctly Held that Additional Feasible Mitigation Measures Were Available that SANDAG Could Have Adopted to Reduce the Project's Significant Climate Impacts.

SANDAG next veers off in a new direction, blaming Petitioners for the lack of effective climate mitigation. According to SANDAG, Petitioners failed to meet their "burden" under CEQA to propose feasible measures. AOB:35-37. This argument is unavailing. The lead agency, not Petitioners, bears the burden of identifying proper mitigation. Moreover, Petitioners *did* propose several specific measures that could have reduced the Plan's significant greenhouse gas impacts, but SANDAG refused even to study those measures, much less adopt them.

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a. CEQA Does Not Impose a Burden on Members of the Public to Develop Mitigation Measures for Projects.

The law is long-settled regarding which party bears the burden of mitigating. "Under CEQA, *the public agency bears the burden of affirmatively demonstrating that*, notwithstanding a project's impact on the environment, the agency's approval of the proposed project followed meaningful consideration of alternatives and mitigation measures." *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134 (emphasis added); *see also Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 724 (agency "cannot acknowledge a significant impact, refuse to do or find anything else about it, and approve the project anyway"); Guidelines § 15126.4(a)(1). Furthermore, the EIR, not the public, must address whether the proposed mitigation would "'substantially lessen'" the project's impact. *LA Unified,* 58 Cal.App.4th at 1031 (quoting § 21002). SANDAG's contention that Petitioners bear this burden (AOB:35-37) is wrong.

Nonetheless, if members of the public *do* suggest a way to mitigate a project's significant impacts that is not patently infeasible, the agency must carefully consider it. *LA Unified,* 58 Cal.App.4th at 1029-30. In *Flanders*, the court invalidated an EIR for failing to respond to a commenter's proposal that the agency mitigate recreational impacts by selling a smaller parcel of parkland. 202 Cal.App.4th at 616. Because the commenter "reasonably

questioned whether [the parkland] impact could be reduced by reducing the size of the parcel," the City's obligation under CEQA "was to explain in the FEIR 'in detail giving reasons why' the City" could not pursue such an option. *Id.* Similarly here, SANDAG erred by rejecting out-of-hand several feasible mitigation proposed by Petitioners.

SANDAG relies on *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184 (AOB:35-37), but the case is inapposite for several reasons. First, *Mount Shasta* addressed a petitioner's burden to prove its case in court, while the issue raised by SANDAG is the alleged "burden" on Petitioners to propose changes at the administrative level. 210 Cal.App.4th at 195, 199. Here, the trial court concluded that Petitioners met their burden of proof. JA 75:1057. Second, *Mount Shasta* did not address the adequacy of mitigation for a project's impacts, but the distinct requirement of whether the EIR evaluated a reasonable range of alternatives. 210 Cal.App.4th at 196-99. Finally, and perhaps most importantly, the petitioner in *Mount Shasta* never presented *any* alternative to the proposed project, feasible or otherwise. 210 Cal.App.4th at 189-90, 197, 199. By contrast here, Petitioners offered several feasible ways that SANDAG could have mitigated the impacts of its Plan.

Nor is SANDAG assisted by *Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042, 1054-55 ("*SCOPE*"). *See* AOB:27. In that case, a comment on an EIR for a

hospital project included a list of more than 50 generic GHG mitigation measures prepared by the Attorney General's office. 197 Cal.App.4th at 1055. Acknowledging that many of these measures could be irrelevant to the proposed project, the comment "did not ask the city to consider any specific mitigation measure." *Id.* at 1055, 1057. The agency then approved the project, adopting only some of the listed mitigation. *Id.* at 1057. Under these circumstances, the court held, CEQA did not require the agency to analyze additional measures that the objectors "never articulated." *Id.* at 1056.

In contrast, Petitioners offered SANDAG specific, feasible measures to mitigate the RTP/SCS's significant climate impacts and expressly requested that SANDAG analyze these measures in its EIR. *Infra*, Part III.C.3.b. Unlike the *SCOPE* measures, the proposed measures here were precisely designed to reduce the RTP/SCS's greenhouse gas impacts, the overarching goal of the Project. Nothing in CEQA required Petitioners to do more.

b. Petitioners Proposed Several Specific Mitigation Measures Addressing the Project's Climate Impacts, and SANDAG Failed to Provide Substantial Evidence that Such Measures Were Infeasible.

SANDAG accuses Petitioners and the People of being "completely vague" as to what additional mitigation measures SANDAG should have imposed. AOB:44; *see also* AOB:35. The record contradicts this accusation. In fact, Petitioners provided detailed suggestions, including at least five specific measures: (1) a regional transit-oriented development policy; (2) a

parking management program; (3) a commitment to local climate action plans; (4) reprioritization of transit projects; and (5) a restriction on funding based on reductions in vehicle miles traveled. Because SANDAG failed to provide substantial evidence that any of these measures were infeasible, its EIR and findings are inadequate under CEQA. *County of San Diego*, 141 Cal.App.4th at 108.

i. Transit-Oriented Development Policy.

As SANDAG acknowledges (AOB:39), Petitioners asked the agency to evaluate and adopt a regional transit-oriented development policy, which would increase transit ridership and thereby mitigate the Plan's significant climate impacts. AR 320:27733-34. Such policies reduce emissions by encouraging high-quality development within walking distance of transit stations. AR 320:28499.

Petitioners asked SANDAG to analyze a transit-oriented development policy in the EIR for *this* Project. They even presented an exemplar policy recently adopted by the Metropolitan Transportation Commission, SANDAG's sister agency. AR 185:12560; 320:27733-34; 320:28499-504; 310:25210. The Commission's policy requires any agency seeking discretionary funds for a transit extension project to demonstrate that local governments have permitted a sufficient number of housing units near the transit station. AR 320:28501-504. SANDAG completely ignored this

example, however, and refused to include *any* transit-oriented development policy in its EIR.

SANDAG now claims that its promise to develop such a policy in the future is sufficient mitigation to satisfy Petitioners' concerns. AOB:30, 39-40; *see* AR 6:223. This argument strains credulity. First, SANDAG argued below that the action items it adopted at the approval hearing—including the promise to develop a transit-oriented development policy—did *not* constitute Project mitigation. SANDAG stated, "These action items [including the development of a transit-oriented development policy] were not considered, or treated as, 'mitigation measures' by SANDAG. None were relied on in the CEQA findings adopted by the Board." JA 51:511; AR 6:223.

Second, even if SANDAG had made the requisite CEQA findings as to this "mitigation," which it did not, no substantial evidence would support them. The agency never set any performance standards for a transit-oriented development policy or explained why it could not be developed now. AR 6:223. Without those actions, and as Petitioners demonstrated at trial, SANDAG's deferral of the policy to a later date was unlawful. JA 47:425-26; *Preserve Wild Santee*, 210 Cal.App.4th at 280-82. SANDAG now argues on appeal that deferral of the transit-oriented development policy "reflects the reality" that such a policy would require study and collaboration. AOB:39-40. But CEQA does not allow an agency to escape its mitigation requirements merely because the task of complying may be difficult. *CBE*, 184 Cal.App.4th

at 96. Nor does it allow an agency to conjure *post hoc* rationalizations for its actions. *Flanders*, 202 CalApp.4th at 616. And, in any event, SANDAG did *nothing* to specify the content for such a policy.

SANDAG also claims that Petitioners did not sufficiently specify what a transit-oriented development policy might include. AOB:40. SANDAG is wrong again. Petitioners and others provided SANDAG with the Metropolitan Transportation Commission's *complete* regional policy, as well as other examples. AR 320:27733-34, 28499-504; *see also* AR 310:25210 (early comment giving specific examples of transit-oriented development policies, including Commission's policy); 320:28505-40 (Petitioners providing SANDAG with Reconnecting America, *Financing Transit Oriented Development in the San Francisco Bay Area: Policy Options and Strategies*). CEQA required SANDAG either to evaluate the proposed transit-oriented development measure in the EIR or to demonstrate its infeasibility. *Flanders*, 202 CalApp.4th at 616-17; *Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal.App.3d 357, 361, 364-65 (setting aside County's approval for failure to analyze mitigation of impacts to one-quarter acre of wetland). SANDAG did neither.

ii. Regional Parking Management Measures.

As SANDAG acknowledges (AOB:43), Petitioners also suggested that SANDAG analyze a regional parking management program. This program

would encourage people to drive less and thus reduce the Project's significant greenhouse gas impacts. *See, e.g.*, AR 296:19682; 320:27731-32; 8b:4154-55, 4214, 4402; 319:26496. SANDAG originally recognized the benefits of parking management. AR 190b:14401-03; 216:17651-52; 126:8630-32. Later, however, it shifted its position and refused to include such a measure in the EIR or adopt it as Project mitigation. AR 8b:3800-01.

SANDAG offers five untenable excuses for this refusal. First, SANDAG again blames Petitioners, stating that they "never proposed any specifics for such a program." AOB:43. Not so. In fact, Petitioners provided SANDAG with detailed examples of successful parking management programs. *See, e.g.*, AR 296:19682; 320:27731-32; 8b:4154-55, 4173-75, 4214-30, 4301, 4402; 319:26496.

Second, despite its early recognition of parking management as an effective tool, SANDAG now claims parking management "would not provide substantial mitigation" but instead affect vehicle miles traveled by only "tiny fractions of one percent." AOB:43. SANDAG's only "evidence" for this claim is out-of-context figures taken from one "sensitivity test" and purportedly showing that SANDAG's transportation model is not sensitive to parking costs. AR 190b:16031-32. SANDAG's complete "sensitivity" study, however, shows that SANDAG's transportation "model *is sensitive* to parking costs." AR 190b:16031 (emphasis added). As the study explains, the smaller percentage figures, now cited by SANDAG, are "attributed . . . to the limited

geographic scope of paid parking areas." *Id.* When one considers increased parking costs across the region, the study shows that as parking costs increase, driving decreases. *Id.* (emphasis added); *see also id.* at 16025 (same report concluding that "[t]ransit ridership and vehicle miles traveled are *most sensitive* to changes in the cost of travel") (emphasis added).

This evidence confirms SANDAG's repeated recognition that parking management is a cost-effective method for reducing car travel. *See, e.g.*, AR 103:7778 (SANDAG parking study showing increased probability of transit use as relative parking costs increase); 190b:14400 (SANDAG report stating "transit usage is more sensitive to parking cost than to transit service levels or fare prices"), 14401 ("both parking supply and cost has been shown to directly impact [VMT] and transit mode share"); 216:17651-52 (SANDAG Climate Action Strategy noting "most parking policies could achieve greenhouse gas savings relatively quickly"). SANDAG's out-of-context citations to a few percentage figures in a chart do not constitute substantial evidence that parking management is ineffective as mitigation. Guidelines § 15384(a).

SANDAG's third excuse—in contrast to its claim that parking management is ineffective—is that regional parking management is too important and complex to develop with the Project. AOB:43-44 (announcing intent "to further study the possibilities of developing collaborative regional parking management plans in its next Regional Comprehensive Plan update"). SANDAG cannot have it both ways. If parking management is a critical

mitigation measure, SANDAG cannot defer its consideration and adoption until some future time after approval of the RTP/SCS. *San Joaquin Raptor*, 149 Cal.App.4th at 671. The record amply demonstrates that SANDAG had more than enough information and time to develop an effective regional parking program *now* (*see, e.g.*, AR 103:7758-85 (SANDAG's 2010 "Parking Strategies for Smart Growth")), or at least to identify and commit to specific performance criteria for a future program. *San Joaquin Raptor*, 149 Cal.App.4th at 670.

Fourth, SANDAG claims that it rejected a parking management program for a purported "policy reason": increased parking fees would "burden [] area residents who could least afford it," thus conflicting with the "social equity goals of the RTP/SCS." AOB:44. However, SANDAG offers no evidence that such a burden would materialize or, if it did, that it would conflict with the Plan's goals. *See County of San Diego,* 141 Cal.App.4th at 107-08 (agency must provide evidence to substantiate claim that mitigation is infeasible). Instead, the record is replete with SANDAG's contrary statements that: (1) parking management can help achieve regional goals; and (2) SANDAG will consider parking management in conjunction with the next Regional Comprehensive Plan Update. *See, e.g.*, AR 190b:14401 ("[P]arking policies and management strategies . . . can be valuable tools for supporting regional goals regarding Smart Growth, VMT reduction, and increasing transit mode share."). Furthermore, this excuse fails to address other suggested types

of parking management measures that would *not* increase parking costs, such as programs rewarding commuters who forego a parking spot by carpooling or taking transit. *See, e.g.*, AR 8b:4173-75, 4214-15; 103:7778; 216:17651-52; 296:19682; 320:28527.

Finally, in a footnote, SANDAG claims that, by advising local agencies that they "can and should" develop locally-tailored parking policies, SANDAG adopted sufficient mitigation under CEQA. AOB:44, fn. 4. The footnote is just another example of SANDAG's attempts to evade the mitigation that CEQA requires it to carry out. The state's RTP Guidelines specifically direct *regional* agencies to consider parking management in their plans. AR 218:17911. SANDAG's sister agencies have already done so. *See* 108:8170 (Southern California Association of Governments); 320:28527 (Metropolitan Transportation Commission).

Moreover, even assuming that local programs would reduce driving, SANDAG did nothing to ensure their adoption. For example, as Petitioners explain, SANDAG could have adopted a measure to fund local parking programs if they met identified performance criteria for reducing vehicle miles traveled. *See infra*, pp. 94-96. Because SANDAG failed to exercise any such "purse string" controls, it failed to satisfy CEQA's mandate. JA 75:1057. Mere suggestions made to local government do not constitute actual mitigation.

iii. Reprioritization of Transit Projects.

Petitioners repeatedly informed SANDAG that, to mitigate the Project's significant climate impacts, SANDAG must alter its "business as usual" approach to prioritizing highway projects. *See, e.g.*, AR 296:19668; 320:27696. Supported by the work of transportation experts, Petitioners demonstrated that early investment in the transit network would be more effective and would encourage more people to use it. AR 296:19678-79; 320:27722-23. One expert even provided a detailed alternative under which SANDAG could complete many of the RTP/SCS's transit projects during the Plan's first ten years. AR 296:19748-19768. Such prioritization of transit would significantly reduce the Project's significant greenhouse gas impacts over the life of the Plan. AR 296:19690-91. SANDAG not only refused to consider this alternative (*see infra*, Cross-Appellants' Opening Brief, Part IV), but also rejected all other mitigation that would meaningfully reprioritize transit projects.

None of SANDAG's now-familiar excuses for refusing this mitigation survive scrutiny. First, SANDAG protested that reprioritizing, or advancing, transit projects is financially infeasible due to TransNet restrictions on funding. AR 8b:3810-11. However, as explained above, the SANDAG Board may modify TransNet upon a two-thirds vote. *Id.; see also* AR 320:27739-40. Furthermore, Petitioners identified other feasible methods, outside of TransNet, to shift funds from highway projects to transit. AR 320:27740-41.

Tacitly recognizing these options, SANDAG again deferred the issue, promising to consider reprioritization of transit projects in future RTP/SCSs. AR 8a:3018-19. But no substantial evidence supports SANDAG's refusal to do so in *this* Plan.

Second, SANDAG claims that prioritizing transit would be legally infeasible because the RTP/SCS must be consistent with local agencies' current land use assumptions, over which SANDAG has no control. *See, e.g.*, AOB:34; AR 8b:4301. As explained above (*supra* Part III.C.2), however, SANDAG possesses expansive authority to guide the region's land uses via its transportation planning. Moreover, SANDAG contradicted this contention of legal infeasibility by asserting at the last minute that it would "[e]valuate alternative land-use scenarios as part of the Regional Comprehensive Plan (RCP) Update in an attempt to address the . . . 'backsliding' of greenhouse gas levels between years 2035-2050." AR 6:223.

Third, SANDAG again employs its procedural "burden" argument, claiming that if Petitioners believed it was feasible to vary the order of projects in the Plan, it was "incumbent on them to specify precisely what this variation is." AOB:38. Again, SANDAG bore the burden of analyzing Petitioners' reasonable mitigation proposals. *LA Unified*, 58 Cal.App.4th at 1028-30. SANDAG may not: (1) dismiss Petitioners' mitigation as too "extreme" (AR 8b:3786; 8a:3334); (2) analyze other options that differ only slightly from the

Project[8]; and then (3) refuse to consider other realistic possibilities that might mitigate the Project's significant climate impacts, as many commenters suggested. *See, e.g.*, AR 8b:3851, 3929; 185:12560; 284:19482; 285:19485; 287:19489; AR 296:19682.

Importantly, SANDAG cites no credible evidence that it lacks the ability to advance transit projects *at some levels* now to reduce the Project's significant climate impacts. To the contrary, SANDAG admits to some flexibility with respect to reprioritizing projects. AR 8b:3778 ("In situations where funds are flexible, funding could be spent on highway or transit projects."); *see supra*, Part III.C.2 (SANDAG has authority to modify projects in expenditure plan).

iv. Support of Climate Action Plans.

Petitioners asked SANDAG to consider a mitigation measure that would ensure preparation of local climate action plans. This type of action plan typically requires a local agency to inventory greenhouse gas emissions and adopt policies, like green building standards, to reduce them. *See, e.g.*, AR 319:26441; 320:28570-28685. Specifically, Petitioners urged SANDAG to: (1) prepare a model climate action plan for local agencies to adopt or

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[8] SANDAG claims it evaluated alternatives that prioritized transit and found that they would not actually decrease greenhouse gas emissions. AOB:38. However, as explained *infra* (Cross-Appellants' Opening Brief, Part IV), the EIR did not analyze any transit-prioritizing alternatives that differed meaningfully from the RTP/SCS.

modify; and (2) provide the necessary funding for local agencies to prepare climate action plans. AR 296:19687; 320:27733. Petitioners also provided SANDAG with a model climate action plan that detailed the measures such a plan would contain. AR 320:28570-28685.

As the trial court held, SANDAG violated CEQA by refusing to consider funding local climate action plans. JA 75:1057 (finding such a measure was well within SANDAG's ability). The Supreme Court's recent ruling in *Neighbors for Smart Rail* supports this holding. In that case, a transit line was expected to generate "spillover parking" impacts in local areas outside of the transit agency's control. "To mitigate this potential impact, the EIR proposed, and the agency adopted, a series of measures" including parking monitoring near the transit line and the funding of local permit parking programs. 57 Cal.4th at 465. Because only local agencies could adopt these permit programs, however, the transit authority agreed to assist in tangible ways. The court found this mitigation to be adequate, especially because the transit agency committed to funding the local programs if necessary. *Id.* at 465-66. By contrast, SANDAG's mitigation, which states only that member agencies "can and should" adopt climate action plans, did not fund or otherwise support local agencies. AR 8a:2588.

SANDAG now alleges that it has provided climate planning assistance to local agencies in the past. AOB:41. This argument is unavailing, for any such past efforts have been entirely voluntary and largely ineffective. In fact,

only five of SANDAG's 19 member agencies even have climate action plans. AR 8b:3827. Given SANDAG's mission under SB 375 to provide leadership in guiding the region to a more sustainable transportation future, a requirement that SANDAG provide both a model and funding for climate action plans is certainly a "reasonable means" of mitigating the Project's significant climate impacts. *Flanders*, 202 Cal.App.4th at 617. Indeed, SANDAG already has access to millions of dollars under TransNet to fund such mitigation. *See* AR 320:28696 ("Smart Growth Incentive Program" consisting of an estimated $280 million to fund initiatives such as "community planning efforts related to smart growth and improved land use/transportation coordination."); Hearing Transcript, p. 23-24) (SANDAG's counsel stating these funds were available for climate action planning). The agency's failure to respond to this mitigation proposal thus constitutes a prejudicial abuse of discretion under CEQA. *Flanders*, 202 CalApp.4th at 617.

Finally, SANDAG charges Petitioners with belatedly proposing climate action plans as mitigation only "hours" before Project approval, and of failing to raise this issue adequately in the trial court. AOB:40-41. SANDAG misstates the record on both counts. In fact, Petitioners' comments on the Draft EIR specifically requested that SANDAG "identif[y] a source of funds to local agencies to further encourage the preparation of CAPs." AR 296:19687. SANDAG thus had *months* during which to consider a more

stringent measure regarding these local plans.[9] Moreover, Petitioners and the People fully litigated this issue in the trial court. JA 47:424-25; 64:778, 796; 65:838; Hearing Transcript, p. 50. In any event, SANDAG waived this defense by never raising any objection at trial, despite ample opportunity to do so. *See, e.g., Id.* at 19, 23-25.

v. Funding Conditioned on Reduced Vehicle Miles Traveled.

Lastly, SANDAG also improperly rejected a proposed mitigation measure that would condition the funding for transportation projects on performance standards requiring reductions in vehicle miles traveled. AR 8b:3829. SANDAG offers three unconvincing reasons why it could not adopt such a measure.

SANDAG claims that vehicle miles traveled is not always an accurate performance standard because "GHG emissions are affected by a number of additional factors, *e.g.*, vehicle fuel efficiency, rates of travel and traffic conditions." AOB:39; AR 8b:817-18. But not only does SANDAG admit elsewhere that reductions in vehicle miles traveled *would* reduce climate impacts, it also recognizes that such reductions are critical to meeting the

[9] In comments on the Final EIR, Petitioners noted that SANDAG failed to properly address their proposal regarding climate action plans, including their suggestion that SANDAG serve as a funding source. AR 320:27733. Given that SANDAG provided the public with only ten days to review the very lengthy Final EIR, despite requests for additional time (AR 320:27696), the timing of Petitioners' comments on the Final EIR is not only lawful (§ 21177(a)), it is completely understandable.

state's 2050 emissions reduction goals. AR 8b:3818, 3823; 216:17644. SANDAG's own Climate Action Strategy concludes that, *in addition to fuel efficiency and alternative fuels*, per capita vehicle miles traveled must be reduced "about five percent below the baseline 2005 level" to meet the state's 2050 emissions target. AR 216:17644. SANDAG's objection to reductions in vehicles miles traveled as an allegedly ineffective standard—the only basis cited in the EIR for rejecting such a measure (AR 8b:3829)—is therefore unsupportable.

Undaunted, SANDAG proceeds to invent two additional justifications on appeal for rejecting this measure. First, SANDAG proclaims that reducing vehicle miles traveled is legally infeasible. AOB:46-47, 49. But this *post hoc* rationale is erroneous for the reasons set forth above. Indeed, SANDAG admits that it *can* "condition the implementation" of mitigation measures when the agency is "the direct source of funding for transportation network improvement projects" (AR 3:182), as it is for many of the projects funded via TransNet (AR 190b:13656).

SANDAG next declares that reduction in vehicle miles traveled is not a mitigation measure, but instead is merely a "performance standard." AOB:39. This distinction does not help SANDAG. According to CEQA, "measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way." Guidelines § 15126.4(a)(1)(B). Here, a SANDAG policy conditioning

transportation funds on reductions in vehicle miles traveled is a perfectly logical method of encouraging strategies, such as transit prioritization and parking management, that will reduce the Project's climate impacts. As such, it is a feasible mitigation measure worthy of pursuit. SANDAG's unsubstantiated rejection of the measure violated CEQA. *LA Unified*, 58 Cal.App.4th at 1029.

In sum, SANDAG abused its discretion by: (1) rejecting potentially feasible mitigation proposals without substantial evidence; and (2) failing to respond to comments raising reasonable suggestions for mitigating the Project's significant climate impacts. Such errors were prejudicial because they precluded informed decision-making and resulted in a failure to mitigate the Project's significant climate impacts.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court affirm the judgment below, holding that SANDAG violated CEQA by failing to adequately analyze or mitigate the Project's climate impacts.

CROSS-APPELLANTS' OPENING BRIEF

STATEMENT OF THE CASE

The trial court ruled that the EIR for the RTP/SCS violated CEQA by failing to adequately inform the public and decision-makers about the Project's significant climate impacts, or to mitigate those impacts. However, the court did not reach Petitioners' other, equally serious challenges to the EIR. JA 75:1058 (ruling); 88:1132-34 (judgment). Petitioners bring this cross-appeal to ensure that, in the event this Court upholds the trial court's judgment, SANDAG will be required to comply fully with CEQA before it proceeds further with the Project. The claims in this cross-appeal also serve as alternate bases on which to uphold the trial court's judgment.

Like the EIR's paltry discussion of climate impacts, the EIR's air quality analysis suffered from a stark omission that downplayed environmental effects and undercut its usefulness as an informational document. Specifically, although the EIR calculated the Project's air pollutant emissions, it ignored how this pollution would actually affect human health. Remarkably, the EIR never even identified the number and location of "sensitive receptors"—a generic term for people, such as children and the elderly, who are particularly susceptible to harm from air pollution—who live near the Project's planned freeways, airports and other sources of toxic air pollution. *See* AR 8a:2249. While SANDAG claims that no universally accepted methodology exists for such a health risk analysis, the Court of Appeal

rejected this exact excuse in *Berkeley Jets,* 91 Cal.App.4th at 1368-70 (lack of universally accepted method for correlating health impacts to pollution levels does not excuse agency's failure to "find out and disclose all that it reasonably can"). The EIR also improperly deferred air quality mitigation.

The EIR's analysis of impacts to agriculture was similarly flawed. Rather than disclosing and evaluating the Project's full effects on all important farmland in the region, the EIR grossly discounted those effects. For example, the document assumed that no farmland would be converted to non-agricultural use when rural areas are subdivided. This unsupported assumption is contradicted by overwhelming record evidence. The EIR also used a mapping system that omitted impacts on thousands of farms that are less than 10 acres in size. As a result of these faults, the EIR underestimated the Plan's impact on farmland by tens of thousands of acres.

Finally, the EIR failed its primary task of analyzing project alternatives that could substantially reduce the Plan's most serious impacts, such as those on air quality and climate. Instead, each of the EIR's six alternative plans authorized construction of all or most of the Plan's highway projects, and *none* of them would increase the number or meaningfully advance the timing of transit projects. By failing to evaluate a reasonable range of alternatives, including one that "would substantially lessen the [Project's] significant environmental effects," the EIR violated CEQA. *See* § 21002; Guidelines § 15126.6(a).

Thus, SANDAG abused its discretion in certifying an EIR that omitted vital information about Project impacts and excluded the required range of alternatives. Because these omissions were prejudicial, Petitioners urge the Court to grant their appeal and direct the trial court to revise the judgment and writ in light of these additional CEQA violations.

STATEMENT OF APPEALABILITY

This is an appeal from a final judgment entered on December 20, 2012. JA 88:1132-34. The judgment carries out the trial court's ruling that SANDAG violated CEQA by failing to adequately analyze and mitigate the Project's climate impacts. JA 75:1046-1059. Although this portion of the trial court's decision is in Petitioners' favor, the court did not reach Petitioners' other CEQA claims, and the judgment therefore did not address them. These claims included Petitioners' challenges to the EIR's analysis and mitigation of air quality and agricultural impacts, and to its discussion of alternatives. JA 75:1058 (ruling); 88:1132-34 (judgment); *see* JA 25:167-169; 47:383-384 (listing Petitioners' other claims). Because the trial court did not address these claims, it declined to grant the relief that Petitioners requested with respect to them. JA 89:1135-37 (writ of mandate commanding SANDAG to set aside its certification of the EIR and to cure the greenhouse gas-related defects, but not ordering any relief related to other alleged defects); 1:5-8 & 25:167-169 (Petitions for Writ of Mandate); 84:1105-09 (Petitioners' Objections to SANDAG's Requested Remedy).

Where a party secures a judgment in its favor, it may appeal those portions of the judgment unfavorable to it. Courts have long recognized that "[a]party who is awarded less than he or she has demanded may appeal from the unfavorable part of the judgment." 9 Witkin, California Procedure (5th ed. 2008) Appeal § 42, p. 103; *see also Knight v. McMahon* (1994) 26 Cal.App.4th 747, 752-53 (an otherwise successful party may appeal because it was aggrieved by the trial court's refusal to decide an issue), disapproved on other grounds in *Am. Fed'n of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1037-41. Indeed, SANDAG itself acknowledged that Petitioners are aggrieved by the trial court's failure to reach all claims and may appeal those claims. AOB:2, fn. 1 (observing that Petitioners may wish to pursue issues not reached below in their cross-appeal). Accordingly, Code of Civil Procedure sections 902 and 904.1, subdivision (a)(1) provide Petitioners with the right to appeal the portions of the judgment on which they did not prevail. Code Civ. Proc. §§ 902 ("Any party aggrieved may appeal in the cases prescribed in this title."), 904.1(a)(1) (an appeal may be taken from a final judgment).

Furthermore, it is settled law that, because courts of appeal "are concerned with the correctness of the trial court's ruling, and not its reasoning, [they] may affirm on a ground raised by the parties in superior court but not ruled upon by the trial court." *Idell v. Goodman* (1990) 224 Cal.App.3d 262, 268-69; *see also Little v. Los Angeles County Assessment Appeals Bds.* (2007)

155 Cal.App.4th 915, 925, fn. 6 (same). Here, this Court should consider Petitioners' other claims as additional bases on which to uphold the trial court's judgment that SANDAG's EIR was deficient.

For several reasons, CEQA cases are particularly appropriate for courts of appeal to adjudicate all claims, including ones not decided below. First, in CEQA cases, "the appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo." *Vineyard*, 40 Cal.4th at 427. Accordingly, "because an appellate court's role in a CEQA case is essentially the same as the trial court's [citation], it would serve no useful purpose to remand the case" for the trial court to decide issues in the first instance. *California Building Industry Assn. v. Bay Area Air Quality Mgmt. Dist.* (2013) 218 Cal.App.4th 1176, 1192. Rather, having this Court decide all issues now will promote judicial efficiency and prompt resolution of the parties' dispute. *See National Parks and Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1353-1354 (rejecting argument that appellate review in CEQA case must be limited to deficiencies in the EIR identified by superior court); *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1195 ("it would be more efficient for us to resolve the [issue not reached by trial court] in this opinion").

Second, CEQA specifically directs courts of appeal to decide all alleged CEQA violations. § 21005(c) ("any court, which finds, *or, in the process of reviewing a previous court finding*, finds, that a public agency has taken an

action without compliance with this division, shall specifically address *each of the alleged grounds for noncompliance*") (emphasis added). This language is intended to prevent a situation in which a court orders an agency to correct certain violations of CEQA but does not rule on all of petitioners' alleged claims. *Friends of Santa Clara River v. Castaic Lake Water Agency* (2002) 95 Cal.App.4th 1373, 1387 (citing § 21005(c) and Remy et al., Guide to the California Environmental Quality Act (10th ed. 1999), pp. 646-647). In the aftermath of this situation, the "agency often does not know whether to modify its environmental document (or findings) to address concerns raised by the petitioners but ignored by the court." *Friends of Santa Clara River*, 95 Cal.App.4th at 1387 (citation omitted). This Court can prevent such confusion by adjudicating all of Petitioners' claims.

In sum, this Court should address all of Petitioners' CEQA claims in conjunction with this appeal. Petitioners are entitled to appeal the claims on which they did not prevail, and CEQA specifically requires a comprehensive adjudication of all claims to forestall multiple rounds of trial and appellate court review.

ARGUMENT

I. Standard of Review.

As explained in Petitioners' opposition to the SANDAG appeal, there are two standards of review under CEQA. Where an EIR fails to address an issue or omits relevant information, courts will consider, as a matter of law,

whether the agency violated the statute's disclosure requirements. *Ojai,* 176 Cal.App.3d at 428 ("Certification of an EIR which is legally deficient because it fails to adequately address an issue constitutes a prejudicial abuse of discretion."). By contrast, courts use the more deferential "substantial evidence" test to review an agency's "substantive factual conclusions." *Vineyard,* 40 Cal.4th at 435.

In this appeal, Petitioners challenge SANDAG's failure to disclose fundamental information about the Project's effects on public health, and to adequately mitigate such effects. For example, despite Petitioners' specific demand for the information, the EIR omitted all data about the location of sensitive receptors near planned freeways and other infrastructure. Petitioners also challenge the omission of key information from the EIR's analysis of agricultural impacts. Among other deficiencies, the document failed to consider the Project's impacts on thousands of small farms in the region. Because Petitioners thus question "whether the EIR is sufficient as an informational document," the Court must review these challenges de novo, as a matter of law. *Kings County*, 221 Cal.App.3d at 711.

Petitioners' appeal also contests the adequacy of the EIR's analysis of project alternatives. The "substantial evidence" test applies to this claim. *Uphold Our Heritage,* 147 Cal.App.4th at 598-99. Here, SANDAG's EIR excluded project alternatives that could have substantially reduced the Project's most serious impacts. Because no evidence of "ponderable legal

significance" supports SANDAG's refusal to consider such environmentally superior options (*see American Canyons* 145 Cal.App.4th at 1070 (defining "substantial evidence")), the agency prejudicially abused its discretion under CEQA.

II. The EIR Failed to Adequately Analyze and Mitigate the Project's Severe Air Quality Impacts.

A. The EIR Failed to Fully and Accurately Describe Existing Toxic Air Pollution.

SANDAG acknowledges that public exposure to Toxic Air Contaminants ("TACs")[10] is a "significant public health issue in California." AR 8a:2251. The EIR, however, provided virtually no information about existing exposure to TACs in the San Diego region, the starting point for any adequate analysis of TACs. This omission violates CEQA's core requirement that an EIR include an adequate "description of the physical environmental conditions in the vicinity of the project." Guidelines § 15125(a). As the Guidelines instruct, "[k]nowledge of the regional setting is critical to the assessment of environmental impacts." Guidelines § 15125(c). Because the EIR failed to describe the public's existing exposure to TACs, decision-makers and the public could not: (1) understand the scope of the existing TAC problem; (2) measure the Project's new TAC impacts against a baseline of

[10] Petitioners use "TAC" to refer to the various pollutants, including carbon monoxide, diesel particulates and air toxics, that the EIR evaluated together under Threshold AQ-4, related to exposing sensitive receptors to localized pollutant concentrations. *See* AR 8a:2248-52.

current TAC emissions, (3) evaluate mitigation of those impacts, or (4) intelligently decide whether the Project's approval was worth the risk.

The EIR analyzed air quality in a section entitled "Existing Conditions" (AR 8a:2209-23), but this section did not describe actual existing TAC emissions. Instead, it substituted generic information about the sources and dangers of these pollutants. AR 8a:2215-20, 2251-53. For example, it declared that exposure to TACs "can result in cancer, poisoning, and rapid onset of sickness." AR 8a:2251. It noted that because diesel exhaust constitutes the largest TAC risk (*id.*), people living near busy roads are particularly at risk. AR 8a:2219, 2252-53; *see also* AR 304:19812; 305:21385. It also repeated the well-known fact that these pollutants disproportionately affect lower income individuals and minorities. AR 8b:4423; *see also* AR 304:19813.

Such generic information was inadequate under CEQA because it failed to identify actual, current TAC emissions or associated health risk levels in the areas affected by *this* Project. The EIR thus never established a baseline against which to measure the impact of the Project's *additional* TAC emissions. A sufficient description would have: (1) provided qualitative or quantitative information regarding existing levels of TAC pollutants; and (2) described the approximate number and location of people currently exposed to unhealthy TAC levels. *See Cadiz Land Co. v. Rail Cycle L.P.* (2000) 83 Cal.App.4th 74, 92-95 (to provide legally adequate description of existing

conditions, EIR must quantify the amount of water in an aquifer that may be impacted by a project).

SANDAG's failure to even qualitatively—much less quantitatively—describe existing TAC levels is both inexplicable and indefensible. The information was readily obtainable from five TAC monitoring stations in the region. AR 8a:2215-16 (EIR describing monitoring stations but providing no data); *Kings County,* 221 Cal.App.3d at 723 (agency must provide information relevant to air quality analysis when it is "reasonable and practical" to do so). Although Petitioners informed SANDAG that the EIR must include data from these stations (AR 320:27708), the agency refused to do so. AR 185:12605 (responding to comment regarding monitoring stations by simply stating that the EIR adequately described baseline conditions without that data). SANDAG later advanced a new excuse at trial, claiming it was not "apparent[] how data from these five [stations] would be particularly useful" (JA 51:473, fn. 2), but this position is both disingenuous and legally untenable. The stations "are located nearby and downwind of transportation [] and other air pollutant sources." AR 8a:2215-16. Accordingly, the stations' data not only would be useful, they were essential: the data would establish existing air pollution levels near the transportation facilities that will be expanded under the Project.

Alternatively, SANDAG could have obtained current TAC data from either of two other sources: EPA's AirData reports or the TAC predictions in

the National Air Toxic Assessment Model, which are available for every U.S. census tract. AR 320:28081. Clearly, SANDAG simply lacked the will, not the means or a reliable source of data, to supply the needed information.

SANDAG also cannot justify its refusal to identify a second set of indispensable data, the approximate number and location of sensitive receptors near planned transportation projects. Critically, the EIR established its threshold of significance for TAC impacts as whether the Project will "expose sensitive receptors to substantial pollutant concentrations." AR 8a:2249. As Petitioners warned, however, SANDAG could not possibly determine the exposure to sensitive receptors without first knowing the number and location of those receptors in the region. AR 320:27708.

In response to the Attorney General's criticism of its TAC impacts analysis, SANDAG quickly cobbled together what it called a "localized air quality index analysis" for the Final EIR. AR 8a:2252-64. This "analysis" ranked segments of regional freeways as presenting high, medium or low risk levels from TAC pollution to those living within 500 feet. AR 8a:2253. SANDAG based this ranking on data regarding traffic volumes, the percentage of truck traffic, and Level of Service[11] standards for the segments. *Id.*

[11] SANDAG defined Level of Service ("LOS") as "[a] qualitative measure describing operational conditions within a traffic stream and motorists' perceptions of those conditions. LOS ratings typically range from LOS A, which represents free-flow conditions, to LOS F, which is characterized by (footnote continued on next page)

SANDAG's last-minute addition did not supply the required description of existing conditions under CEQA. First, the information was limited only to existing air quality conditions adjacent to a few freeways and highways (AR 8a:2253, 2260). SANDAG admitted that the Project will affect other high-volume roads, warehouse centers, ports, and rail yards, all of which can pose equally significant TAC risks. AR 8a:2219 (pollutant levels are higher near "main city streets, highways, and freeways"); 305:21385 (sensitive populations should not live near freeways, busy urban or rural roads, rail yards, ports, or distribution centers); 190a:13288, 13293-96; 190b:15033-54 (RTP included a "Goods Movement Strategy," which includes expansion of rail, seaport, and associated warehouse distribution centers).

Second, the index did not estimate the number or location of hospitals, schools, residences, and other sensitive receptors that are adjacent to freeways. AR 8a:2252-64. Thus, the analysis provided no information about the effects of existing pollution from the various highway segments on sensitive populations. Nor did the new index disclose what it meant by "high," "medium," or "low" risk levels, or even whether these levels correspond to any actual health-based standard, such as those set by the San Diego Air Pollution Control District. *See* AR 305:20483 (San Diego Air District's "Rule

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(footnote continued from previous page)
heavy congestion, stop-and-go traffic, and long queues forming behind breakdown points." AR 190a:13634.

1200 establishes acceptable [TAC] risk levels"). Finally, because the EIR did not provide any of the data underlying, or methodology used to prepare, the new "localized air quality index" (*see* AR 8a:2253), the public could not determine whether the index was correct, much less evaluate the accuracy of the incomplete conclusions drawn from it. *See San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 728-29 (EIR inadequate where agency failed to describe investigations it undertook to establish baseline conditions).

The existing TAC emissions unquestionably constitute part of the environmental background for the Project. Where, as here, an EIR contains an "inadequate description of the environmental setting for the project, a proper analysis of project impacts [i]s impossible." *Galante Vineyards*, 60 Cal.App.4th at 1122. In an analogous situation, the Court of Appeal invalidated a county's certification of an EIR for a landfill. *Cadiz,* 83 Cal.App.4th at 92-95. There, a nearby property owner was concerned about the landfill's contamination of an underlying aquifer. He argued that the EIR failed to describe the aquifer in enough detail so that the project's impacts could be measured. *Id.* at 91-92. The county responded that contamination of the aquifer was unlikely and that, because the aquifer was nearly depleted, any possible future contamination would not constitute a significant impact. *Id.* at 92-93.

The court emphatically rejected the county's approach. It noted that, although the EIR discussed the risk of contamination generally, it never described the aquifer's condition in enough detail so that the public and decision-makers could understand the project's potential impacts on potable water, "a valuable and relatively scarce resource in the region." *Id.* at 92. Specifically, the court emphasized that "[a]n estimate of the volume of groundwater in the aquifer is critical to a well-informed determination of whether the risk of groundwater contamination is worth taking." *Id.* at 94

Similarly here, SANDAG failed to gather the information necessary to evaluate the Project's TAC impacts on sensitive populations. Clean air is a valuable and relatively scarce resource in the San Diego region, just like water in *Cadiz*. *See, e.g.*, AR 311:25635 ("The SANDAG region has some of the most serious local air quality problems in the State and the nation . . . "). Accordingly, just as an estimate of groundwater was essential in *Cadiz*, an estimate of existing, regional TAC exposure was essential to evaluating the additional risks posed by the Project. Absent a full and accurate description of existing toxic exposures, neither the public nor decision-makers could understand the significance of *additional* toxic emissions from the Project. *See* Guidelines § 15064(b) (the significance of a project's impacts depends in part on its setting); *Communities for a Better Env't v. California Resources Agency* (2002) 103 Cal.App.4th 98, 120 (if existing conditions are poor, even

a slight new impact may be significant). The EIR thus failed to fulfill CEQA's informational purpose.

In sum, the EIR first warned the public that it should be very concerned about exposure to TACs, but then the EIR never supplied the information needed to evaluate the risk from that exposure. The failure to describe existing conditions "thwarted the goals of the EIR process by not disclosing . . . critical information necessary to evaluate the significance of the [project's] impact on a valuable resource." *Cadiz*, 83 Cal.App.4th at 95. Accordingly, the EIR cannot stand. *Id.* (lack of adequate baseline data is a prejudicial error requiring court to set aside EIR).

B. The EIR Failed to Analyze and Mitigate the Health Impacts Resulting from the Project's Emission of Toxic Air Contaminants.

Commenters objected to the EIR's failure to analyze how TAC emissions from the Project would impact public health. SANDAG responded that CEQA did not require detailed analysis in a "program" EIR, that the EIR's discussion of TAC impacts was sufficient, and that SANDAG could do no more. None of SANDAG's justifications has merit.

1. SANDAG's Use of a "Program" EIR Did Not Excuse It from Fully Analyzing the Project's Emissions-Related Health Impacts.

Petitioners and others criticized the EIR's failure to include any detail regarding the Project's TAC-related health impacts. For example, Petitioners noted that although the Project's transportation projects "have the potential to

result in a substantial increase in toxic air contaminants . . . and therefore may pose a significant health risk to sensitive receptors, the DEIR failed to provide an analysis of these impacts." AR 320:27708. Likewise, the Attorney General stated that "[t]he principal omission of the DEIR is the lack of any discussion of the impacts of the increased air pollution that will result from carrying out the [Project] on communities already severely impacted by air pollution." AR 311:25637.

In response, SANDAG accused these commenters of "misunderstand[ing] the purpose of and legal requirements for the Program EIR prepared for the [Project]." AR 8b:3765. Due to the Project's "geographic scope and complexity," the agency suggested, "not all impacts can feasibly or meaningfully be analyzed quantitatively" at this point. *Id.* Instead, according to SANDAG, "assessment and mitigation of TAC impacts is uniquely a subject that requires individualized project-level analysis." JA 51:472. *See also* AR 8b:3765, 4423. The agency therefore asserted that it could defer useful, detailed analysis of TAC impacts until much later when it, or other agencies, actually approved individual transportation projects. JA 51:472.

SANDAG's approach violated CEQA, which does not permit an agency to defer analysis simply by labeling its EIR a "program EIR." *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511, 533 ("Designating an EIR as a program EIR [] does not by

itself decrease the level of analysis otherwise required in the EIR."). Rather, as explained above with respect to SANDAG's similar excuse that it may defer mitigation for greenhouse gas impacts, agencies approving a programmatic activity must produce an EIR that considers the program's reasonably foreseeable impacts "as specifically and comprehensively as possible." Guidelines § 15168(c)(5). "The degree of specificity required in an EIR will correspond to the degree of specificity involved in the underlying activity which is described in the EIR." Guidelines § 15146.

Here, SANDAG approved an extraordinarily detailed plan for funding, building, and connecting specific roadway and transit segments at specific locations. JA 51:475; AR 8a:2115-2129; 190a:13384-13451. Because the Project was so detailed, the EIR's analysis of TAC impacts must be correspondingly detailed. In addition, SANDAG must fully analyze the Project's TAC impacts *now*, because they will largely be determined by the "first-tier" approval of the Plan itself, not by later approvals of the Plan's individual transportation components. *Vineyard,* 40 Cal. 4th at 431 (agencies may defer environmental analysis only "when the impacts or mitigation measures are not determined by the first-tier approval decision but are specific to the later phases" of a project).

SANDAG's EIR thus failed to meet the legal standard that applies to all EIRs, whether project-specific or programmatic: environmental documents must "provide[] decisionmakers with sufficient analysis to intelligently

consider the environmental consequences of [the] project." *Bay Delta*, 43 Cal.4th at 1175.

2. The EIR Never Actually Evaluated Health Risks from Toxic Air Contaminants.

The EIR failed to provide any meaningful analysis of TACs. As explained, the "localized air quality index analysis" in the Final EIR measured the number of freeway miles that will produce "high," "medium," or "low" levels of TAC emissions. *See* AR 8a:2252-64; 8b:4422. However, the EIR never described what "high," "medium," or "low" risk levels meant in terms of actual health consequences. AR 8a:2252-64.

Equally troubling, the study did not estimate the number of sensitive receptors who live near those freeways, and will therefore be exposed to the risks. *Id.*; AR 8a:2219-20 (health risk correlates with the distance that people live from roads, with highest risk levels occurring for those living within 500 feet from highways or other high-traffic roads). While the analysis assumed that people—and sensitive receptors particularly—are evenly distributed adjacent to all of the freeways, there is no evidence to support this conclusion. AR8a:2873 (showing population densities for the region).

Because the study omitted the location of sensitive receptors and their distance from road segments, it could not validly assess whether each segment of freeway would "expose sensitive receptors to substantial pollutant concentrations," as the document promised. AR 8a:2249 (EIR stating its

threshold of significance for TACs). SANDAG's belated analysis thus cannot satisfy CEQA's requirement that it provide the public with relevant information regarding the Project's significant impacts.

3. SANDAG Could Have Conducted a Useful Health Impact Analysis.

SANDAG also claimed that no methods exist for it to conduct detailed analysis at the program level. AR 8b:3815, 4423; 326:29342-43. It urged that "health risk assessments are feasible only at the project level, when project-specific designs, meteorological condition[s], and sensitive receptors have been defined." AR 326:29342; *see also* AR 8a:2264 (same). But SANDAG ignored that it already had gathered, or readily could gather, the very information it identified as necessary to conduct a meaningful health risk assessment.

First, the record includes an exhaustive description of the locations and specifications for every transportation project in SANDAG's Plan. AR 8a:2106-29; 190a:13384-13451. This information shows: (1) "[d]etailed highway and transit listings, cost estimates, and phasing" for each project; and (2) data regarding Level of Service and average daily traffic for each project. AR 190a:13385. Furthermore, SANDAG had already estimated the volume of future traffic on regional roads, including the percentage of truck traffic. AR 8a:2255. It also already possessed precise design information for some projects that will be implemented in the Project's early stages. AR 320:28485-

91 (design of I-5 North Coast Corridor and SR-11 projects). SANDAG offers no reason why it needed more detailed, project-specific design information to conduct a credible health risk analysis.

Likewise, SANDAG could readily have identified the residential uses and other sensitive receptors currently located adjacent to each planned project. *See* AR 8a:2735 (map of existing land uses). Because its Project detailed future housing locations and density, SANDAG could easily have calculated the approximate number of sensitive receptors that would be located adjacent to each project. *See* AR 190a:13098-13102, 13120-24, 13510-32 (showing location and density of housing in future years), 13096-97 (describing SANDAG's methodology for creating maps). Finally, while SANDAG protests that it lacks definitive data about future meteorological conditions, it did not need precise information on that subject to analyze the Project's public health impacts. SANDAG already knew or could determine prevailing wind patterns, which heavily influence the direction in which the pollution will travel from a roadway. *See* AR 8a:2219 ("The prevailing wind direction strongly affects exposure to air pollution from nearby traffic.").

Furthermore, even if SANDAG had been unable to prepare a precise health risk assessment covering each transportation improvement in its Project, the lack of a "precise, or 'universally accepted,' quantification of the human health risk from TAC exposure does not excuse the preparation of any health risk assessment." *Berkeley Jets*, 91 Cal.App.4th at 1368-70. As the

Berkeley Jets court explained, "[d]rafting an EIR . . . involves some degree of forecasting' [and the lead agency must] educate itself about the different methodologies" available to assess health risks. *Id.* at 1370 (quoting Guidelines § 15144). Here, SANDAG had available at least two viable options for analyzing health risks.

First, SANDAG could have turned its localized air quality index into a useful tool by: (1) analyzing risks from each category of TAC sources, instead of just freeways; (2) correlating the risk levels calculated in that analysis with accepted health-based standards; and (3) identifying the location and number of sensitive receptors within five hundred feet of the sources. SANDAG could have readily accomplished the third step by overlaying 500-foot or larger buffers around busy roadways, ports and other facilities on an aerial photograph or detailed map that identified the sensitive receptors, thereby showing whom the "high risk" TAC areas would impact. *See* AR 305:20523 (Air Resources Board recommends not siting sensitive receptors within 500 feet from busy roads, 1,000 feet from railyards, and immediately downwind of ports). Indeed, SANDAG used exactly this type of map/overlay analysis to assess the Project's impacts to wildlife (AR 7:550), but then it abandoned that approach when analyzing impacts to human health.

Second, SANDAG could have conducted health risk assessments for a representative selection of roadway, port, and other projects that are already designed. Like the first option set forth above, such a study would have been

less exhaustive than studies for individual infrastructure projects. Nevertheless, it would have allowed the public to understand the relative health risks for different types of transportation projects included in the Plan.

The record here amply demonstrates the usefulness of a health risk assessment, or other qualitative analysis, even at a lesser level of detail and certainty. Experts explained that "[a] large uncertainty range in M[obile] S[ource] A[ir] T[oxics] results does not automatically invalidate their use in comparing alternatives. Relative (not absolute) differences among alternatives, when calculated by consistent methodology, are generally valid for purposes of ranking alternatives." AR 320:28087. Thus, even an imperfect health risk analysis would have greatly assisted the public in understanding the differences between SANDAG's alternatives. Here, because SANDAG provided *no* such analysis for its Project alternatives, the public never learned whether SANDAG could have reduced the Project's enormous increase in high-risk TAC areas by selecting an alternative scenario. *See* AR 8a:2255 (EIR asserts the Project will cause 250 percent increase in high-risk TAC areas), 2253-64 (EIR does not include same TAC analysis for alternatives and therefore does not determine whether alternatives could reduce the Plan's increase in high-risk TAC areas).

In short, SANDAG erred in claiming that it was completely unable to analyze the Project's health impacts on sensitive resources in a meaningful way. Its "all or nothing" approach left the public with no understanding of this

critical issue. Because SANDAG failed to "find out and disclose all that it reasonably can" regarding its Project's effect on public health, it violated CEQA. *Berkeley Jets*, 91 Cal.App.4th at 1370 (quoting Guidelines § 15144).

4. SANDAG's Conclusion that TAC-Related Health Impacts Were "Significant" Did Not Excuse Its Lack of Analysis.

Finally, SANDAG cannot justify its failure to properly analyze TAC-related health impacts by claiming that it "conservatively recognized that the impacts of transportation project operations on air toxics would be significant and unavoidable." AR 8b:3815; *see also* AR 8a:2264 (SANDAG statement of inability to analyze followed by generic conclusion that TAC impacts are significant). Numerous courts have held that an agency cannot cure its failure to analyze an impact by rotely acknowledging the impact's significance. The court in *Galante Vineyards* expressly rejected this tactic, stating bluntly, "[T]his acknowledgment is inadequate. 'An EIR should be prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences.'" 60 Cal.App.4th at 1123 (quoting Guidelines § 15151); *see also Mira Monte*, 165 Cal.App.3d at 365 (EIR protects "the right of the public to be informed in such a way that it can intelligently weigh the environmental consequences of a[] contemplated action").

Thus, SANDAG may not "travel the legally impermissible easy road to CEQA compliance . . . [by] simply labeling the effect 'significant' without

accompanying analysis." *Berkeley Jets*, 91 Cal.App.4th at 1371. Rather, "a more detailed analysis of how adverse the impact will be is required." *Galante Vineyards*, 60 Cal.App.4th at 1123. To evaluate the Project, both decision-makers and the public must know whether the TAC pollution from the Project will merely cause minor effects or will lead to major health consequences. SANDAG's refusal to provide this information is a prejudicial error under CEQA.

5. SANDAG Improperly Deferred and Rejected Mitigation Measures that Would Have Addressed the Project's Significant Air Quality Impacts.

Just as the EIR violated CEQA by deferring critical, program-wide mitigation of the Project's significant climate-related impacts, it also unlawfully deferred mitigation for the Project's significant air quality and health impacts. The EIR ostensibly included four air quality mitigation measures. AR 8a:2269-73. However, this mitigation consisted merely of recommendations for studies and measures that SANDAG and other agencies might implement in the future. *Id.* For example, the EIR stated that local jurisdictions: (1) "can and should assess increases in ozone precursors during project-specific design and CEQA review" for future transportation projects; and (2) "mitigate significant increases to the extent feasible" by incorporating policies from a menu of non-exclusive options. AR 8a:2269. Similarly, the EIR recommended that SANDAG and other agencies: (1) evaluate the potential for local concentrations of dangerous pollutants during project-

specific review for future transportation projects; and (2) "consider" a handful of "potential mitigation measures" at that time. AR 8a:2272.

Critically, none of the EIR's mitigation measures included any performance standards by which to evaluate the success of the recommended but deferred mitigation. AR 8a:2269-73 This approach flatly violates CEQA, which requires that agencies providing a "menu" of future mitigation options must identify enforceable and effective performance standards. *CBE*, 184 Cal.App.4th at 94, 95.

Performance criteria are critical to ensure that mitigation actually achieves its goal of reducing or offsetting a project's impacts. The *CBE* court ruled that the City of Richmond's menu of possible mitigation options was deficient because, *inter alia,* "[n]o effort is made to calculate what, if any, reductions in the Project's anticipated . . . emissions would result from each of these vaguely described future mitigation measures. Indeed, the perfunctory listing of possible mitigation measures . . . are nonexclusive, undefined, untested and of unknown efficacy." 184 Cal.App.4th at 93. The EIR here committed the same error. It failed to describe the effectiveness of its possible future mitigation measures, which, like Richmond's, were nonexclusive and untested. Without performance criteria to judge the efficacy of these measures, SANDAG cannot defend the EIR's conclusion that "[i]mplementation of these measures would reduce contributions of . . . [air]

pollutants . . . and reduce the severity of project impacts." AR 8a:2269; *Federation*, 83 Cal.App.4th at 1260-62.

Contrary to its claims below (JA 51:505), SANDAG could have adopted useful performance standards. For example, the Metropolitan Transportation Commission adopted a standard specifying the minimum number of housing units that must be built near transit stations. AR 320:28503. SANDAG could have adopted a similar standard here to ensure that regional vehicle trips, and resulting emissions, are reduced over the life of the RTP/SCS. Likewise, it could have adopted standards requiring percentage-reductions in the number of roadway segments that expose nearby residents to dangerous levels of air pollutants. *See* AR 8a:2263-64 (EIR stating that the Plan will increase the number of roadway segments exposing sensitive receptors to unhealthy local air quality). Finally, as described above, SANDAG could have adopted feasible measures to reduce greenhouse gas emissions, which would also mitigate impacts related to other air pollutants. *See supra*, Respondents' Brief Part III.C.3. Because these measures would reduce driving in the region, they would have reduced TAC emissions and associated health risks. *See* AR 8a:2259 (TAC health risks increase as traffic volumes increase).

SANDAG's leadership in crafting regional air pollution policies was essential at the programmatic level, when SANDAG approved its 40-year RTP/SCS. Local agencies will never be able, individually, to carry out the

types of broad policies that are necessary to reduce vehicle- and development-related emissions throughout the region. Only SANDAG has that regional power. By refusing to analyze in the EIR—and if feasible, adopt—programmatic mitigation that is essential to reduce significant air quality and health impacts, SANDAG violated CEQA.

III. The EIR Understated the Project's Impacts on Agricultural Land.

A. The EIR's Analysis of Impacts on Agricultural Land Was Illogical and Flatly Conflicted with the County's EIR Analyzing Its General Plan.

The Project covers all of San Diego County, the nation's 16th largest agricultural county. AR 8a:2175. It includes at least 75 specific road construction projects (AR 8a:2120-28) and a forecasted development pattern for 388,000 new homes. AR 8a:2082. Despite the Project's massive scale, however, the EIR estimated that the Project's transportation improvements would convert only 17 acres of existing farmland to non-agricultural uses. AR 8a:2194, 2199. Likewise, it claimed that construction of the 388,000 new homes will convert only 10,508 acres of farmland. AR 8a: 2194 (3,485.09 acres of Prime Farmland, Farmland of Statewide Importance, and Unique Farmland), 2199 (7,023.07 acres of land with agricultural uses and conservation easements).

As Petitioners and others told SANDAG, the EIR dramatically understated the Project's agricultural impacts. *E.g.*, AR 320:27724-25 (letter

from Cleveland National Forest Foundation, Sierra Club, and Center for Biological Diversity criticizing EIR's estimate of farmland impacts); 279:19462-65 (American Farmland Trust estimating that the Project will actually convert 51,000 acres of farmland). SANDAG's agricultural impacts analysis also flatly contradicted the analysis in the County's EIR for its recent General Plan update. In that EIR, the County found that residential and commercial development in unincorporated portions of the County alone would convert 55,963 acres of farmland by 2030. AR 305:20441; *see also id.* at 19865-66 (General Plan analysis relates only to unincorporated lands). Even though both SANDAG's EIR and the County's EIR relied on the same growth projections (AR 8a:2075), SANDAG's EIR somehow concluded that development occurring through 2050, in *both* incorporated *and* unincorporated portions of the County, would convert only 10,500 acres of farmland. AR 8a:2194, 2199.

In other words, SANDAG's EIR found that development over a greater geographic area and over a much longer timeframe will affect 80 percent less farmland. It similarly concluded that the annual rate of farmland loss will be *an order of magnitude lower* than the County predicts. The General Plan EIR found that development would convert 55,963 acres of farmland over a twenty-year period, or an average conversion rate of 2,798 acres per year. AR 305:20441. SANDAG's EIR, however, found that development would convert 10,525 acres of farmland over a forty-year period (AR 8a:2194,

2199), and thus would convert only 263 acres per year. SANDAG's estimate of the rate of farmland loss was not only far lower than the County's estimates, but also nearly seven times lower than historic rates of loss. AR 279:19464 (between 1984 and 2008, the County lost farmland at an average rate of 1,800 acres per year).

SANDAG cannot explain this vast discrepancy between its analysis and the County's analysis. It only suggests vaguely that it used a different "method[]" than the County to measure agricultural impacts, and that both methods are valid. AR 326:29343-44. SANDAG's attempt to distance itself from the County's calculations is entirely situational. In defending other parts of its EIR, SANDAG explained that it possessed no land use authority and therefore must defer to information from "the 19 county and city governments . . . that actually regulate land use through their own . . . general plans." JA 51:468. With agricultural land, however, when the figures from the County's General Plan prove inconvenient, SANDAG's deference to the County's land use jurisdiction and superior expertise promptly vanishes.

Regardless, the evidence shows that SANDAG did *not* use an analysis to measure impacts to farmland that differed from the County's but was equally valid. Rather, as Petitioners show, SANDAG based its analysis on incomplete data and unsupported assumptions. SANDAG's use of inferior data and methods was particularly inappropriate here because state law expressly requires transportation agencies to "consider the *best practically*

available scientific information regarding . . . farmland" when adopting SCS's. Gov. Code § 65080(b)(2)(B)(v) (emphasis added); *see* AR 218:17814 (RTP guidelines discussing this requirement). *See also Masonite Corp. v. County of Mendocino* (2013) 218 Cal.App.4th 230, 240-41 ("our Legislature has repeatedly stated the preservation of agricultural land is an important public policy . . . [and] that CEQA is intended to effectuate this public policy.")

B. The EIR Erroneously Assumed that All Farmland Designated for Rural Residential Use Would Remain in Agricultural Use.

The Project EIR acknowledged that 73,253 acres of County land would be converted from agricultural land use classifications to "rural residential" classifications over the next forty years. AR 8a:2198. *See also id.* at 2188 (62 percent of the County's current 118,741 acres of agricultural land will be reclassified to rural residential zones); 336:29418-19 (chart showing conversion of agricultural land over time).[12] Incredibly, though, the EIR then stated that this massive rezoning of agricultural land for residential development would not convert *any farmland*. No conversion would occur, reasoned the EIR, because "rural residential land[s] . . . are zoned at densities

[12] This chart shows that by 2020, 10,183 acres of current agricultural land will be converted to "spaced rural residential" land use/zoning classifications, and by 2050, 73,252 acres will be converted. Conversely, the amount of agricultural land that lies within agricultural classifications declines from 105,444 acres in 2020 to a mere 38,475 acres in 2050.

that allow and often encourage continued farming." 8a:AR 2188; *see also id.* at 2194 (same, and stating that the EIR considers farmland to be impacted only if it is converted to a use other than agriculture *or rural residential* use).

The record contradicts the EIR's assumption that rezoning agricultural land for residential development would not convert any farmland. Indeed, the EIR itself admitted that rural residential land typically becomes partially developed. AR 8a:2327. The American Farmland Trust, a group with undoubted expertise in this field, confirmed that the "historic trend in much of California suggests that zoning land for rural residential development is more likely to result in the conversion of land to [] non-agricultural use." AR 279:19465.

SANDAG's assumption also conflicts with the County's General Plan EIR. After conducting a detailed historical study of farmland conversion in that EIR, the County found that: (1) conversion of farmland to rural residential zoning "increases the potential for an agricultural resource to be converted to a non-agricultural use;" and (2) subdividing such lands generally causes a percentage of each subdivided lot to be converted to non-farm uses. AR 305:20437. Accordingly, the County estimated that development on agricultural land designated for rural residential uses would cause up to 55,963 acres of farmland to be lost over the life of the General Plan. AR 305:20441.

SANDAG thus lacked any basis on which to assume that rural residential zoning would not impact a single acre of agricultural land. In the

trial court, SANDAG acknowledged that the County's approach might be "more correct," but then asked the Court to find that its approach was also valid. JA 51:490 (citing AR 336:29418-19; 190a:13139). But the two record cites offered by SANDAG do not justify the agency's misleading approach.

The first document merely consists of a chart showing the amount of agricultural land that the Project will convert to rural residential classifications. AR 336:29418-19. The chart provides no rationale for how such conversion would preserve farmland. *Id.* The second document concluded, with no supporting evidence, that farmlands "are not threatened because of low-density zoning" because "rural residential land [] allows and often encourages agricultural use." 190a:13139. Even if true, this statement acknowledges that agricultural use will not *always* be encouraged on rural residential lands; thus it does not support the EIR's assumption that rezoning would not cause *any* impact on farmland. Accordingly, the EIR's failure to accurately measure the Project's large impacts on farmland violates CEQA.

C. The EIR Failed to Disclose or Analyze Impacts on Small Farms.

Because of the area's fertile land and unique microclimates, County agricultural land has the highest dollar value per acre of any county in the state. AR 279:19462-63. And because the farmland is so valuable, the County has a high proportion of small farms; approximately two-thirds of the County's 6,687 farms are less than ten acres in size. AR 8a:2175; 305:20422.

The County recognized these facts when it analyzed the effects that its General Plan update would have on County farmland. In particular, it knew that it could not rely exclusively on maps from the state Farmland Mapping and Monitoring Program ("FMMP") to analyze agricultural impacts. As the County explained, the "FMMP uses a 10 acre minimum mapping unit to determine farmland resources," yet "[s]ixty-eight percent of San Diego County's farms are between one and nine acres, with an average farm size of four acres." AR 305:20422. Thus, "[w]hile this [FMMP] standard would be appropriate in other areas of the State with larger farms, it does not account for the numerous smaller farms located through San Diego County." *Id.* For these reasons, the County used aerial mapping as well as FMMP maps to accurately determine the extent of farmland impacts. AR 305:20422; 326:29344.

In contrast, there is no evidence that SANDAG's EIR evaluated the Project's impacts on the region's thousands of small farms. SANDAG acknowledged that it used only FMMP maps to analyze impacts on farmland under its first "threshold of significance" (AG-1). JA 51:487; AR 8a:2188. Thus, the EIR's analysis under this threshold admittedly ignored all impacts on the region's small farms. SANDAG claims that its second threshold of significance (AG-2) considered impacts to small farms among other lands "in

current agricultural use" and under Williamson Act contracts.[13] JA 51:487-88; *see also* AR 8a:2194-99. The record, however, does not support this claim.

The EIR states that 118,741.5 acres of land in the region are "in current agricultural use." AR 8a:2194. However, the EIR failed to: (1) provide the source of this data (*id.*); (2) show the location of this farmland; or (3) disclose the size of the parcels. AR 8a:2177. Without this information, the public cannot tell whether this land includes only FMMP-mapped land or whether it also includes small farms.

Recognizing the weakness of its position, SANDAG introduced new evidence below to support its claim that the EIR relied not only on FMMP data, but also on aerial mapping that accounted for small farms. JA 51:487; SAR 346:30229. However, the record citation SANDAG offered for this claim provides no support. The cited document states only that the EIR's data came from a farmland "inventory" created in the mid-1990's; it does not establish that the initial inventory was compiled using aerial data. SAR 345:30229 (stating that farmland is *removed* from the inventory based on aerial surveys, but not stating how the original survey was accomplished). Moreover, even if the survey had been based on aerial photographs, this fact does not prove that the survey included smaller farms. The FMMP database is

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[13] The threshold also recognized impacts to land designated under the California Farmland Conservancy Act. However, these lands were analyzed as a subset of lands "in current agricultural use." AR 8a:2195.

also based on aerial photographs, yet that database utilizes a ten-acre minimum mapping unit. AR 305:20431.

In short, the EIR nowhere analyzed the Project's impacts to the 68 percent of the County's agricultural operations composed of small farms. SANDAG's claim that it performed the analysis finds no support in the record. Accordingly, because the EIR prejudicially failed to apprise decision-makers and the public of the Project's true agricultural impacts, it failed as an informational document. *See Vineyard,* 40 Cal.4th at 442 (EIR data "must be presented in a manner calculated to adequately inform the public and decision makers"); *Kings County,* 221 Cal.App.3d at 734-35 (failure to include data necessary for informed decision-making is a prejudicial error).

IV. The EIR Failed to Analyze a Reasonable Range of Alternatives that Could Have Reduced the Project's Significant Impacts.

Every EIR must analyze a reasonable range of project alternatives. *See* § 21100(b)(4); Guidelines § 15126.6(a). To be "reasonable," these alternatives must provide enough variation from the proposed project "to allow informed decisionmaking" regarding options that would reduce environmental impacts. *Laurel Heights I,* 47 Cal.3d. at 404-05. "[T]he purpose of an alternatives analysis is to allow the decisionmaker to determine whether there is an environmentally superior alternative that will meet most of the project's objectives." *Watsonville Pilots Assn. v. City of Watsonville*

(2010) 183 Cal.App.4th 1059, 1089; *see also* Guidelines § 15126.6(a) & (b). Here, the EIR's analysis of alternatives failed to satisfy these requirements.

In each alternative, SANDAG remained wedded to a highway-centric approach to transportation. The EIR analyzed six alternatives (other than the required "no project" alternative), but all of them varied only slightly in substance from the proposed Project and thus do not constitute a "reasonable range" of alternatives. *See* Guidelines § 15126.6(b) (EIR must evaluate reasonable range of alternatives even if some "would impede to some degree the attainment of the project objectives, or would be more costly"); AR 296:19688-91; 320:27735-37. Notably, all six alternatives would construct most or all of the Plan's highway projects; they simply used slightly different timeframes. *Compare* AR 8a:2109-22 *with id.* at 3140-62. Although Alternatives 2a and 2b would eliminate some highway projects planned for 2035 and 2050 and advance some transit projects (AR 8a:3140, 3153), a comparison of performance measures shows that these alternatives produced almost the same percentage of trips easily accessible by transit as the RTP/SCS. *See* AR 8b:3753, 3755. Because these alternatives did not demonstrate how the Project's impacts could be reduced by increasing the amount of public transit, they did not add meaningfully to the range of alternatives considered.

Even the two so-called "Transit Emphasis" alternatives (Alternatives 3a and 3b) "implement[ed] the majority of highway projects in the 2050

RTP/SCS." AR 8a:3153; *see also id.* at 3160. While these alternatives advanced some transit projects, they still would defer at least half of them to the Plan's middle or latter phases AR 8a:3158-60. Moreover, neither alternative proposed *any* new transit project not already included in the adopted Plan. AR 8a:3153, 3158-60. Given that SANDAG's Plan will lock in regional transportation and growth patterns for decades, it was crucial that SANDAG analyze a range of alternatives that could substantially reduce the Project's significant impacts. Here, the planned transportation components were not sufficiently different from the Project to substantially reduce impacts.

Indeed, no alternative analyzed would avoid or substantially lessen the Project's significant environmental impacts. *See* AR 8a:3320-29. The Project would cause significant environmental impacts in 17 "issue areas" over the life of the Plan. All six alternatives, including the alternative designated by SANDAG as "environmentally superior," would cause significant environmental impacts in those same 17 issue areas. *Id.*[14] Of particular concern, five of the six alternatives resulted in the same or increased impacts

[14] Two alternatives, 3a and 3b, would reduce a significant Project impact in one subcategory of transportation impacts (non-work trips accessible within 15 minutes) to a less than significant level in 2050. However, they would also increase another impact (emergency response times based on congestion) from less-than-significant to significant in the same time period. AR 3a:3319, 3329.

related to the Plan's significant greenhouse gas emissions.[15] AR 8a:3323-24 (chart comparing greenhouse gas impacts of alternatives), 3330 (explaining chart).

Given that the fundamental goal of the SCS—and one of the primary goals of the overall Plan—was to reduce vehicle-related greenhouse gas emissions in the region (AR 8a:2081), SANDAG's refusal to analyze alternatives that substantially reduce the Project's significant greenhouse gas-related impacts is a serious deficiency. Courts have repeatedly invalidated EIRs where, as here, they fail to analyze feasible alternatives that could reduce a project's primary, significant impacts. *Watsonville Pilots Assn.,* 183 Cal.App.4th at 1089-90 (EIR was deficient for failing to include reduced development alternative that would avoid or lessen the project's primary growth-related significant impacts); *Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1285, 1305 (invalidating EIR that failed to discuss any feasible alternative that would lessen the project's primary water supply impact).

[15] While the EIR asserted that one of the alternatives—the Slow Growth alternative— would have slightly lower greenhouse gas impacts than the Project (AR 8a:3323-24), SANDAG admitted that this alternative "would result in additional growth and associated impacts in surrounding counties." AR 3:148. As such, the alternative did not actually reduce the Plan's greenhouse gas or other impacts, but simply displaced those impacts to other locations.

SANDAG's failures here were avoidable. From the beginning of the administrative process, members of the public implored the agency to design an alternative that would increase transit service significantly in the Plan's early years and jettison highway projects that discourage "smart growth." AR 250:19107-10; 258:19150; 282:19476. Early on, leading environmental groups presented SANDAG with two such comprehensive alternatives designed by expert consultants: (1) the "50-10 Transit Plan;" and (2) the "FAST Plan." The 50-10 Plan was developed by Smart Mobility Inc. at Petitioner Cleveland National Forest Foundation's request, and it differed substantially from both the Project and the alternatives in the EIR by accelerating the Plan's transit projects to the Plan's first ten years. AR 296:19690-91, 19749-68. The 50-10 Plan also would halt new highway or tollway construction until the urban core transit system is functional. *Id.* Similarly, Move San Diego's FAST Plan was a transit-focused alternative providing for more rapid transit connections and maximizing transit ridership. AR 258:19158-59. Both would be true alternatives, but SANDAG failed to include either alternative plan in its EIR.

SANDAG's justifications for restricting its range of alternatives do not withstand scrutiny. SANDAG claimed the 50-10 Plan and FAST Plan were infeasible, unnecessary, or not environmentally superior (AR 8b:3805-11), but the agency's excuses were either plainly incorrect or unsupported by substantial evidence. AR 320:27737-42. In any event, even if SANDAG

could refuse to analyze the particular options presented by the public, the agency was still required to develop *some* option that substantially lessened the Project's impacts while achieving most of its objectives.

SANDAG's unwillingness to design an alternative that allows the region to meet the state's long-term greenhouse gas reduction goals was particularly ironic, given the agency's own Climate Action Strategy. This document warns that "[c]limate change is a serious global challenge . . . requiring all levels of government, including SANDAG and its member agencies, to engage in immediate and sustained actions to reduce greenhouse gas emissions." AR 216:17625. The Strategy also emphasizes that "the long-term goal of reducing statewide greenhouse gas emissions to 80 percent below the 1990 level by the year 2050 will require fundamental changes in policy, technology, and behavior." AR 216:17628.

Despite SANDAG's adopted policy pronouncements, the EIR failed to analyze *any* alternative that implements the fundamental changes necessary to meaningfully reduce greenhouse gas emissions. Rather, the chosen options involved only minor shifts in course, with correspondingly minor shifts in outcomes. Being presented with no other option, the SANDAG Board approved a Project that not only fails to help the state achieve its long-term greenhouse gas reduction goals, but actually allows emissions to *increase*. AR 8a:2575, 2577-78; 8b:3821, 4435; 190a:13091.

The EIR's omission of any alternative that could put the region on track to achieving California's long-term goals for climate stabilization violated CEQA's core mandate. Guidelines § 15126.6(a) & (b); *Goleta*, 52 Cal.3d at 564 (alternatives analysis is "[t]he core of an EIR"). Because this error deprived the public and decision-makers of vital information relevant to approval of the Project, it was prejudicial under CEQA. *See Watsonville Pilots Assn.,* 183 Cal.App.4th at 1089-90.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant their cross-appeal. Specifically, Petitioners request the Court to direct the court below to issue a revised judgment and writ in light of the EIR's failure to adequately analyze or mitigate the Project's air quality and agricultural impacts, and its failure to discuss a reasonable range of project alternatives.

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CERTIFICATE OF WORD COUNT
(California Rules of Court 8.204(c))

The text of this Respondents' Brief And Cross-Appellants' Opening Brief consists of 30,510 words, not including tables of contents and authorities, signature block, and this certificate of word count as counted by Microsoft Word, the computer program used to prepare this brief.

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Cleveland National Forest Foundation, et al. v.
San Diego Association of Governments, et al.
California Court of Appeal Fourth District, Division One
Case No. D063288

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CROSS-APPELLANTS' OPENING BRIEF

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Executed on October 3, 2013, at San Francisco, California.

_____

Sean P. Mulligan

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California Court of Appeal Fourth District, Division One
Case No. D063288
San Diego County Superior Court
Case No. 37-2011-00101593-CU-TT-CTL
Consolidated with Case No. 37-2011-00101660-CU-TT-CTL

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