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; PEOPLE OF THE STATE OF CALIFORNIA, Respondents and Cross-Appellants, **v.** **SAN DIEGO ASSOCIATION OF GOVERNMENTS; SAN DIEGO ASSOCIATION OF GOVERNMENTS BOARD OF DIRECTORS,** Appellants and Cross-Respondents.	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]
The Honorable Timothy B. Taylor, Judge

PEOPLE OF THE STATE OF CALIFORNIA'S COMBINED RESPONDENT'S BRIEF AND CROSS-APPELLANT'S OPENING BRIEF

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Case Name: *CLEVELAND NATIONAL FOREST FOUNDATION; SIERRA CLUB; CENTER FOR BIOLOGICAL DIVERSITY; CREED-21; AFFORDABLE HOUSING COALITION OF SAN DIEGO; PEOPLE OF THE STATE OF CALIFORNIA v. SAN DIEGO ASSOCIATION OF GOVERNMENTS; SAN DIEGO ASSOCIATION OF GOVERNMENTS BOARD OF DIRECTORS*

Court of Appeal No.: D063288

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INTRODUCTION

The People of the State of California, ex rel. Kamala D. Harris, Attorney General (People)[1] submit this combined brief in the People's capacity as a respondent in the appeal filed by the San Diego Association of Governments (SANDAG) and as a cross-appellant. The People participated as both an intervener and petitioner in the consolidated writs of mandate proceeding below, brought under the California Environmental Quality Act (CEQA).[2]

For the reasons set out in Part I, below, the People request that the Court affirm the San Diego Superior Court's ruling as it pertains to greenhouse gas-related impacts. The trial court correctly held that the Final Environmental Impact Report (EIR or Final EIR) for SANDAG's 2050 Regional Transportation Plan and Sustainable Communities Strategy (2050 Plan or Plan) fails as an informational document. Specifically, the EIR fails to analyze and squarely address that, on the one hand, greenhouse gas emissions under the 2050 Plan *increase* after 2020 and through 2050, and on the other, the State's climate stabilization objectives require that we continuously and substantially *reduce* greenhouse gas emissions during that same time period. (Joint Appendix (JA) {75}1056-57.) The trial court also correctly held that SANDAG could not simply "'kick the can down the road' and defer to local jurisdictions" to analyze and attempt to mitigate the climate impacts of the 2050 Plan in future, project-specific environmental review. (JA {75} 1057.) As the trial court ordered, SANDAG's

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[1] The Attorney General is proceeding in her independent capacity and not on behalf of any other state agency, board, department or entity.

[2] This case involves a challenge to an environmental document under CEQA. Petitioners did not, and do not, challenge the legal adequacy of SANDAG's Regional Transportation Plan or the Sustainable Communities Strategy's compliance with the Sustainable Communities Law (Sen. Bill No. 375 (2007-2008 Reg. Sess.)).

certification of the EIR must be set aside and the matter remanded to SANDAG "for a revised EIR or supplement to the EIR that fully cures the deficiencies . . . ." (JA {75} 1058; JA {89} 1136.)

As set out in Part II, however, the trial court erred in holding that it could "resolve the case solely on the inadequate treatment of the greenhouse gas emission issue[.]" (JA {75} 1058.) Because of that error, the trial court declined to reach the People's claim that the EIR failed as an informational document because it failed adequately to disclose and analyze the impacts of, and mitigation for, the 2050 Plan's projected increases in cancer-causing particulate matter (PM) pollution. (JA {75} 1058.) The People request that this Court reach the People's claim of error and rule that SANDAG, in addition to remedying the deficiencies in the EIR's treatment of climate change, must disclose the health risks posed by the projected increase in particulate matter pollution and analyze feasible design changes and mitigation that might reduce those risks.

The merits of SANDAG's appeal are addressed first in this two-part brief.

PART I: PEOPLE OF THE STATE OF CALIFORNIA'S BRIEF AS RESPONDENT IN SAN DIEGO ASSOCIATION OF GOVERNMENT'S APPEAL

PRELIMINARY STATEMENT

The science is undisputed. To preserve our existing climate and avoid the most catastrophic outcomes of climate change – including increases in projected extreme weather, sea level rise, wildfires, heats waves, and drought – we must act now to stabilize atmospheric concentrations of greenhouse gases. Emissions of greenhouse gases have been on the steep rise over the past century due to human activity. Greenhouse gases persist in the atmosphere for decades, and in some case for millennia. Thus, to stabilize existing atmospheric concentrations of greenhouse gases, we must

reduce our contribution to this serious and cumulative problem. The cuts required to our collective annual greenhouse gas emissions are substantial, and they must continue for the next 40 years so that, by 2050, we will have built a low-carbon future and achieved a stable climate. (Administrative Record (AR) 311:25640-41 [Attorney General's comment letter and authorities cited]; see also AR 216:17622-23 [SANDAG's 2010 Climate Action Strategy].)

California's Governor and its Legislature have determined that this State, exercising its leadership role, must do its fair share to put the climate on a path to stabilization. Executive Order S-3-05, issued in 2005, committed the State to reducing its greenhouse gas emissions to 1990 levels by 2020, and to 80 percent below 1990 levels by 2050. Consistent with the objective of the Executive Order, the Legislature followed with the Global Warming Solutions Act of 2006, commonly known as AB 32. (Health & Saf. Code, § 38500, et seq.) AB 32 mandates that by 2020, California must reduce its total statewide annual greenhouse emissions to the level they were in 1990. (Health & Saf. Code, § 38550.) The California Air Resources Board (Air Resources Board) in its AB 32 "Scoping Plan,"[3] acknowledged that AB 32's 2020 limit is an interim step towards the further reductions set out in the Executive Order, which reflect "the level [of emissions] scientists believe is necessary to . . . stabilize climate." (AR 320(5):27864 [AB 32 Scoping Plan].) These executive and legislative actions establish that the State is committed to bending the curve of greenhouse gas emissions downward over the course the next forty years to levels that are consistent with a stable climate.

[3] The "Scoping Plan" is the Air Resources Board's framework strategy describing how the State will meet AB 32's 2020 limit, and place itself on track for further emissions reductions after that date. A complete copy of the Scoping Plan is contained at AR 320(5):27842-27993.

Appellant SANDAG is the Regional Transportation Commission under state law and the Metropolitan Planning Organization under federal law for the 18 cities and the county government in the San Diego County region. (AR 8a:2065-66, 2071 [EIR].) The SANDAG region covers 4,200 square miles, with a current population of 3.2 million people, and a projected 2050 population of nearly 4.4 million. (AR 8a:2101 [Table 2.0-2], 2141.) In October 2011, SANDAG approved the 2050 Plan, a document that will serve as "the blueprint for a regional transportation system, serving existing and projected residents and workers within the San Diego region" for the next 40 years. (AR 8a:2071.) According to SANDAG, the Plan will "guide the San Diego region toward a more sustainable future by integrating land use decisions, housing development, and planned transportation." (AR 8a:2077.)

SANDAG's 2050 Plan is the first Regional Transportation Plan in the State to contain a Sustainable Communities Strategy under the Sustainable Communities and Climate Protection Act of 2008 (Sen. Bill No. 375 (2007-2008 Reg. Sess.)), commonly referred to as SB 375. SB 375 requires the Air Resources Board to provide each regional transportation planning body, including SANDAG, with greenhouse gas emission reduction targets for the automobile and light-duty truck sector for the years 2020 and 2035. (AR 333:29379.) SANDAG, as part of its transportation planning process, must then devise a "Sustainable Communities Strategy" that, if followed by SANDAG and the local governments, would achieve the targets. (AR 333:39380.) In February 2011, the Air Resources Board issued the following targets for the SANDAG region, expressed as a per capita reductions in carbon dioxide emissions from passenger vehicles and light-duty trucks, as compared to emissions in 2005: 7 percent lower than 2005 for 2020, and 13 percent lower than 2005 for 2035. (AR 8a:2076.) According to the EIR, the 2050 Plan exceeds the 2020 SB 375 target,

achieving a 14 percent reduction in relevant per capita emissions by that year. (AR 8a:2104 [Table 2.0-4]; AR 8b:4435 [Table 2].) After 2020, however, SB 375 per capita emissions begin increasing; the Plan just meets the 2035 target. (*Id.*)[4]

In commenting on the Draft EIR, the Attorney General and other commenters noted that from 2020 onward, the Plan commits the region to ever *increasing* annual greenhouse emissions. (AR 311:25641-42.) This result appears to work against the State's longer-term greenhouse gas reduction and climate stabilization objectives set out succinctly in the Executive Order. (*Id.*) In response, rather than addressing the disconnect, SANDAG flatly refused to consider the State's 2050 environmental objective. SANDAG did not examine the evidence and determine the objective to be scientifically questionable or impossible to apply. Instead, SANDAG simply asserted that "because the Executive Order is not an adopted GHG [greenhouse gas] reduction plan[,]" SANDAG had no legal obligation to consider it. (AR 8b:4432 [responses to Attorney General's comment letter].) The Final EIR focused on the 2050 Plan's technical compliance with the discrete, nearer-term targets for cars and light-duty trucks established under SB 375. (See, e.g., AR 8a:2578-81.) The EIR summarily asserted that the Plan would not conflict with AB 32, and summarily dismissed the State's longer-term climate objectives. (AR 8a:2581-2588; 8b:4432.)

In the resulting CEQA challenge, the San Diego County Superior Court ruled against SANDAG, stating that if the EIR is to serve CEQA's purposes as an informational document, the regional planning entity "cannot simply ignore" the objective set out in the Executive Order. (JA

[4] Per capita carbon dioxide emissions for all vehicles classes are higher, but follow this same pattern of increase after 2020. (AR 8b:4435 [Table 2].)

{75} 1056-57.) As discussed in more detail in the Argument, below, each of the trial court's grounds for its ruling is valid.

First, the Executive Order and its long-term target were "[q]uite obviously designed to address an environmental objective that is highly relevant under CEQA (climate stabilization)." (JA {75} 1057.) Meeting the objective of climate stabilization requires bending the curve of greenhouse gas emissions continuously downward through 2050. Contrary to SANDAG's assertions (Appellant's Opening Brief (AOB) at pp. 22-23), the State's 2050 climate objective is grounded in science, as stated in the AB 32 Scoping Plan and SANDAG's own 2010 Climate Action Strategy. (See, e.g., AR 320(5):27848, 27865, 27977; AR 216:17623, 17627.) Pursuant to the CEQA Guidelines,[5] "[t]he determination of whether a project may have a significant effect on the environment calls for careful judgment . . . based to the extent possible on *scientific and factual data*." (Cal. Code Regs., tit. 14, § 15064, subd. (b) [emphasis added].) Without explanation or justification, SANDAG simply refused to consider the science requiring continuous and long-term emissions reductions, impermissibly avoiding its responsibilities as lead agency.

Second, SANDAG could not, consistent with its CEQA obligation, inform the public and decision makers that the 2050 Plan is consistent with AB 32 and the AB 32 Scoping Plan, but at the same time ignore the Plan's apparent conflict with the underlying objective of these same authorities. (See JA {75} 1057 [citing *Assn. of Irritated Residents v. State Air Resources Bd.* (2012) 206 Cal.App.4th 1487, 1492-93].) The Scoping Plan's 2020 greenhouse gas limit "is but a step towards achieving" the "longer-term climate goal" set out in the Executive Order. (*Assn. of*

[5] The CEQA Guidelines appear at Cal. Code Regs., tit. 14, §§ 15000–15387.

Irritated Residents, supra, 206 Cal.App.4th at p. 1496; see also AR 8a:27977 [Scoping Plan].) A lead agency may not focus only on the short term, but must also consider a project's long-term environmental impacts, and whether the project will "disadvantage [ ] long-term environmental goals" (Cal. Code Regs., tit. 14, § 15065, subd. (a)(2); see also *id.* at § 15126.2, subd. (a).) Accordingly, SANDAG cannot claim to apply AB 32 and the Scoping Plan in determining significance, but at the same time refuse to analyze the upward-bending shape of the 2050 Plan's greenhouse emissions trajectory beyond 2020.

Third, "having chosen to develop a plan" that extends to 2050, which is "15 years beyond that which was required by law, SANDAG was obligated to discuss impacts beyond the 2020 horizon." (JA {75} 1057.) The agency's environmental impact analysis under CEQA must be appropriate to the nature and scope of the project. Because the 2050 Plan and its climate change-related impacts extend beyond 2020, it is an abuse of discretion for SANDAG arbitrarily to cut off analysis in 2020.

As discussed below, in its Opening Brief, SANDAG has not refuted the bases of the trial court's determinations of error. Instead, SANDAG notes its discretion as a lead agency to choose appropriate criteria to determine whether a project will have significant impacts. But SANDAG's discretion does not confer authority to issue an EIR that fails to provide a good faith, reasoned analysis of the 2050 Plan's impacts. Nor can the EIR's analysis of the 2050 Plan's compliance with the discrete and shorter-term targets of SB 375 substitute for a full, fair and complete analysis of the Plan's long-term climate impacts under CEQA.

To be clear, the People do not suggest that the declining statewide greenhouse gas emissions trajectory described in the Executive Order should be the only criterion available to SANDAG for determining significance under CEQA for the 2050 Plan. Neither do the People seek a

ruling that any project that fails precisely to track the Executive Order will have significant impacts, or that every lead agency for every project must consider the State's mid-century climate objectives. Rather, the People's point is that the climate stabilization path set out in the Executive Order should inform SANDAG's analysis of the 2050 Plan, given that the 2050 Plan is a regional planning document governing a substantial number of transportation projects and affecting land use over thousands of square miles that will directly and indirectly cause the emission of a large amount of greenhouse gases over a very long time frame.

Had SANDAG taken the longer view of the 2050 Plan's impact on climate as required by CEQA, the EIR would have disclosed to the public and decision makers that in every key respect, the Plan fails to build a system delivering greenhouse gas reductions that are "sustainable" over the longer term. A candid discussion of the Plan's impacts in turn would have triggered an obligation for SANDAG to look at feasible mitigation and alternatives that could stabilize and ultimately "bend the curve" of emissions downward toward mid-century. Notwithstanding SANDAG's assertions to the contrary, there are things that SANDAG – as a regional planning body with substantial spending powers – is uniquely positioned to do at the program level to help achieve sustainable, regional greenhouse gas reductions over the longer term.[6] An EIR satisfying CEQA's informational requirements would have, at the very least, begun the discussion of what

[6] The EIR dismisses certain specific mitigation measures, such as requiring all vehicles driven in the region to be zero-emission vehicles (see AR 8a:2591) and states the SANDAG Board's preference for not disturbing major corridor projects currently in the Plan. (See AR 8b:3911.) But the EIR does not suggest or find that no combination of feasible design changes and mitigation could stabilize or bend downward the region's greenhouse gas curve.

changes in transportation infrastructure and land use may be required to achieve a low-carbon future for the San Diego region.

Accordingly, this Court should affirm the judgment of the superior court as it relates to the EIR's treatment of greenhouse gas emissions and climate change.

STATEMENT OF THE CASE

I. THE PROBLEM OF CLIMATE CHANGE

To preserve our existing climate, we must stabilize atmospheric concentrations of greenhouse gases.

> The United Nations Intergovernmental Panel on Climate Change (IPCC) constructed several emission trajectories of GHGs [greenhouse gases] needed to stabilize global temperatures and climate change impacts. IPCC concluded that a stabilization of GHGs at 400 to 450 parts per million (ppm) CO2 equivalent concentration is required to keep global mean warming below 3.6ºF (2º Celsius), which is assumed to be necessary to avoid dangerous climate change.

(AR 8a:2553-54 [EIR].) As the Attorney General's Office noted in its 2011 comment letter on the Draft EIR, "[t]he concentration of carbon dioxide, the primary GHG, has increased from approximately 280 parts per million (ppm) in pre-industrial times to well over 380 ppm, according to the National Oceanic and Atmospheric Administration's (NOAA) Earth Systems Research Laboratory." (AR 311:25640 [footnote omitted].) The current rate of increase in carbon dioxide concentrations is about 1.9 ppm per year. (*Id.*) Atmospheric concentrations of carbon dioxide, measured as of July 2013, are now at 397.23 ppm.[7]

California is already experiencing the effects of atmospheric greenhouse gas pollution in the form of sea level rise, coastal erosion,

[7] http://www.esrl.noaa.gov/gmd/ccgg/trends/.

increased average temperatures, more extremely hot days and increased heat waves, shifts in the water cycle, and increases in the frequency and intensity of wildfires. (AR 311:25640 [Attorney General's comment letter citing Resources Agency, 2009 Climate Adaptation Strategy]; see also AR 8a:2565.) The harm from climate change will fall especially hard on our most vulnerable residents: the urban poor, the elderly, children, traditional societies, agricultural workers and rural populations. (AR 311:25640 [Attorney General's comment letter citing Office of Environmental Health Hazard Assessment, Indicators of Climate Change in California: Environmental Justice Impacts (Dec. 2010); see also AR 8a:2505.)

II. LEGAL AND REGULATORY BACKGROUND

Given the serious impacts of climate change, California has taken executive, legislative and regulatory action to reduce statewide greenhouse gas emissions, doing its part to stabilize atmospheric greenhouse gas levels, thereby preserving the existing climate and avoiding dangerous climate change. (See AR 8a:2560-65.)

A. Executive Order S-3-05

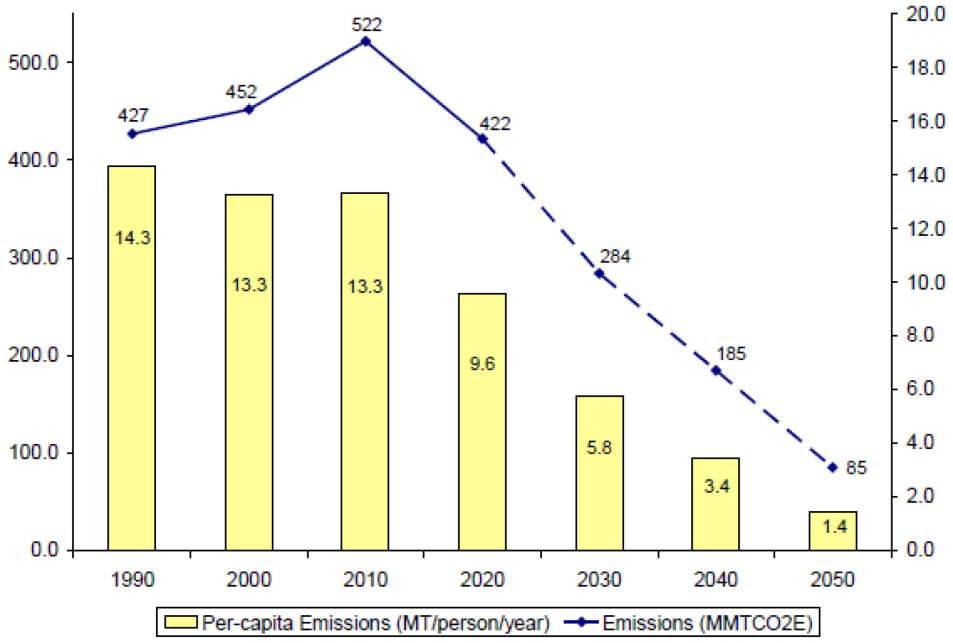
In 2005, then Governor Arnold Schwarzenegger, recognizing California's special vulnerability to climate change and the State's role as a leader in addressing greenhouse gas pollution, issued Executive Order S-3-05. The Executive Order provides an overarching framework to guide California's climate efforts. It provide in relevant part "[t]hat the following greenhouse gas emission reduction targets are hereby established for California: by 2010, reduce GHG emissions to 2000 levels; by 2020, reduce GHG emissions to 1990 levels; [and] by 2050, reduce GHG emissions to 80 percent below 1990 levels . . . ."

B. The Global Warming Solutions Act of 2006 (AB 32) and the AB 32 Scoping Plan

The Legislature followed Executive Order S-03-5 with the Global Warming Solutions Act of 2006, commonly known as AB 32. (Health & Saf. Code, § 38500, et seq.) AB 32 mandates that by 2020, California must reduce its total statewide annual greenhouse gas emissions to the level they were in 1990. (*Id.*, §§ 38550, 38551.) AB 32 requires the Air Resources Board to develop a framework plan – the Scoping Plan – outlining how the State will achieve the required 2020 greenhouse gas limit. (Health & Saf. Code, § 38561.)

The Air Resources Board completed the initial AB 32 Scoping Plan in 2008. (AR 8a:2561.) In the Scoping Plan, the Air Resources Board acknowledges that the 2020 limit is an interim step towards the State's longer-term climate objective. "Getting to the 2020 goal is not the end of the State's effort." (AR 320(5):27848; see also Health & Saf. Code, § 38551, subd. (c) [citing the Executive Order].) "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 climate." (AR 311:25641 [Attorney General's comment letter citing Scoping Plan]; see also 320(5):27864 [Scoping Plan].) The Attorney General's comment letter on the Draft EIR attached a chart from the Scoping Plan that sets out in clear, graphic terms the statewide emission reductions that are necessary to achieve the State's climate stabilization objective.

Figure 6: Emissions Trajectory Toward 2050



(AR 311:25645.)[8]

In the Scoping Plan, the Air Resources Board noted the important role of land use and transportation, and the need to begin action in the near term. Looking 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(5):27858-59.) In the Air Resources Board's words, "[i]mproved planning and the resulting development are essential for meeting the 2050 emissions target." (AR 320(5):27880.)

[8] The Scoping Plan chart does not appear in the body of the EIR, but only in Appendix G, the EIR's responses to comments. (AR 8b:4446.)

C. Senate Bill SB 375 / the Sustainable Communities Strategies Law

SB 375, enacted in September 2008, requires SANDAG and other Metropolitan Planning Organizations throughout California to incorporate a Sustainable Communities Strategy in each region's Regional Transportation Plan (discussed in the following Section). The Sustainable Communities Strategy must demonstrate how the region would achieve greenhouse emissions reductions targets established by the Air Resources Board for the automobile and light-duty truck sector. (Govt. Code, § 65080, subd. (b)(2); AR 8a:2080; see also AR 218:17776 [2010 California Regional Transportation Plan Guidelines].) As noted above, the Air Resources Board established SB 375 greenhouse gas emissions targets for the SANDAG region requiring a 7 percent per capita reduction of carbon dioxide by 2020, and a 13 percent per capita reduction by 2035, measured against emissions in 2005. (AR 8a:2076.)

> The Sustainable Communities Strategy
>
> > set[s] 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 ARB [Air Resources Board].

(AR 218:17776 [2010 Regional Transportation Plan Guidelines].) Its purpose is to "align regional transportation, housing, and land use plans to reduce the amount of vehicle miles traveled to attain the regional GHG [greenhouse gas] reduction target." (AR 8a:2071.) While the Metropolitan Planning Organization cannot require that local governments conform their land use and planning to the regional vision, the Metropolitan Planning Organization can create incentives for local change, by, for example, "[p]rovid[ing] funds and technical assistance to local agencies" to

implement regional planning. (AR 218:17912 [2010 Regional Transportation Guidelines].)

III. SUMMARY OF THE ENVIRONMENTAL IMPACT REPORT FOR THE 2050 PLAN

A. Project Description

SANDAG has extensive powers and responsibilities for transportation planning and funding in the San Diego region. It is responsible for long-term transportation system planning. (Pub. Util. Code, §§ 120300.) In its role as the Regional Transportation Commission (*id.*, §§ 132050, 132051) and the Metropolitan Planning Organization, SANDAG is required to prepare and adopt the Regional Transportation Plan for the greater San Diego region every four years. (Gov. Code, § 65080 et seq.; 23 U.S.C. § 134; see also AR 8a:2065.) "The purpose of the [Regional Transportation Plan] is to establish regional goals, identify present and future needs, deficiencies and constraints, analyze potential solutions, estimate available funding, and propose investments." (AR 218:17690 [2010 Regional Transportation Plan Guidelines].) A Regional Transportation Plan must include the following main components: a policy element (setting out the region's transportation policies); an action element (describing short and long-term activities that address regional transportation issues and needs, investment strategies, alternatives and project priorities); and a financial element (identifying the current and anticipated revenue sources and financing techniques available to fund the action element). (AR 218:17775-77.)

The Regional Transportation Plan is a component of the overall State Transportation Improvement Plan, which lists all transportation projects that California plans to build and all transportation projects for which it will seek federal funding. (AR 218:17703 [2010 Regional Transportation Plan Guidelines]; see *Edna Valley Assn. v. San Luis Obispo County and Cities*

APCC (1977) 67 Cal.App.3d 444, 447-48.) Federal regulations provide that only projects in a federally approved State Implementation Plan are eligible for funds administered by the Federal Highway Administration or the Federal Transit Administration. (23 C.F.R. § 450.220, subd. (a) (2012).) Equally important, state transportation funding is available only for projects that appear in an approved Regional Transportation Plan. (AR 218:17675, 17686-87, 17699 [Regional Transportation Plan Guidelines].) SANDAG's decision to place a transportation project into the Regional Transportation Plan thus determines whether and when that project will be built.

SANDAG's 2050 Plan "is the blueprint for a regional transportation system[.]" (AR 8a:2071.) The 2050 Plan will affect the region's "quality of life" for decades; it "looks 40 years ahead, accommodating another 1.2 million residents, half a million new jobs, and nearly 400,000 new homes." (*Ibid*.) The Plan will govern how new projects are integrated within the existing transportation system, using funding anticipated over the coming decades. (*Ibid.*)

The money at SANDAG's disposal is substantial. Total funds necessary for the 2050 regional transportation improvements are estimated at approximately $213.8 billion, of which local funds comprise 55 percent or approximately $118.6 billion. (AR 190a:13246.) One source of these funds is the local TransNet half-cent sales tax first approved by voters in 1988 and extended in 2004 for another 40 years. (AR 8a:2995.)[9] The stated purpose of the TransNet program was "to establish a local, stable, and predictable source of transportation funding to provide a solid foundation for the region's long-range transportation program." (AR 190b:13656.) According to the EIR, TransNet is expected to raise $32

[9] A complete copy of the TransNet Ordinance is contained in the record at AR 320(30):28689-28738.

billion. (AR 8a:2995.) Projects funded by TransNet must be consistent with the Regional Transportation Plan. (AR 320(30):28700 [TransNet Ordinance, § 5].)

SANDAG 's 2050 Plan, while it includes transit projects, places a significant emphasis on highway widening in its earlier years. For example, "[t]he transportation network improvements that would be implemented between 2010 and 2020 generally include widening and/or installation of HOV [high occupancy vehicle] lanes and Managed Lanes along portions of I-5, I-15, I-805, SR 78, and SR 94; completion of SR 905 and SR 11; and HOV connector projects along I-805." (AR 8a:2583.) Additional highway widening projects are scheduled to be in place by 2035. (AR 8a:2586.) The 2050 Plan plans for the construction of projects that will expand or extend hundreds of miles of freeways in the San Diego region. These projects include expansions of the I-5, I-8, I-15, I-805, SR-52, SR-56, SR-94 and SR-125. (AR 8a:2116-21 [EIR]; see also AR 190b:14214, 14217 [RTP].)

Changes in land use follow these highway expansions. While, according to the EIR, land use patterns, types, and areas of development will be substantially the same in 2020 (AR 8a:2582), "the 2035 land use pattern would generally involve additional residential development in areas that were previously undeveloped open space or at some time in agricultural use . . . ." (AR 8a:2585; see also AR 190a:13156 [Sustainable Communities Strategy].) After 2035, "growth would continue in more eastern locations of the region" which are currently less developed, and "by 2050, spaced rural residential development would have expanded . . . into areas with very minimal development at present." (AR 8a:2587; see also AR 190a:13156 [noting future development patterns will "likely result in an increased demand for driving"].)

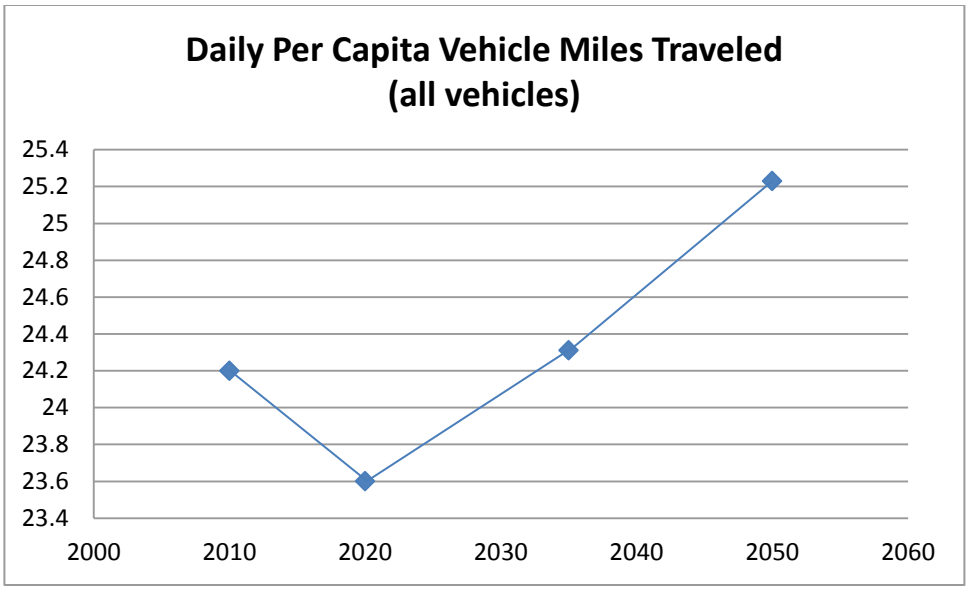
B. The 2050 Plan's Effect on Greenhouse Gas Pollution

Transportation was responsible for about 37 percent of California's emissions of greenhouse gases in 2008. (AR 8a:2555 [EIR at 4.8-3, Table 4.8-3].) In the San Diego region, transportation is responsible for a greater percentage of greenhouse gas emissions than the State as a whole – nearly 50 percent.[10]

The total amount of driving expected under the 2050 Plan, termed "vehicle miles traveled" or VMT, will increase by more than 50 percent over the life of the Plan. (AR 8b:4436 [EIR, response to comments re "absolute VMT"].) The expected increase in driving is not due solely to increases in population in the San Diego area; under the 2050 Plan, people will drive more on a per capita basis in 2050 than they do now (2010). (AR 8b:4435 [Table 3].) In 2010, daily per capita vehicle miles traveled for all vehicle types was 24.2 miles per day. By 2020, the average dips down to 23.6 miles per day, but by 2035, it is above the 2010 baseline, at 24.3 miles, and by 2050, it has risen to 25.2 miles. (AR 8b: 4435 [Table 3]; see also 8b:3753, 3755, 3757.)[11] While *not* illustrated in the EIR, the People have plotted the trend below:

[10] (See AR 8a:2556-57 [Tables 4.8-4 and 4.8-5].)

[11] Per capita vehicle miles traveled for SB 375 vehicles only, consisting of cars and light-duty trucks, follow this same pattern. (AR 8b:4435 [Table 3].)



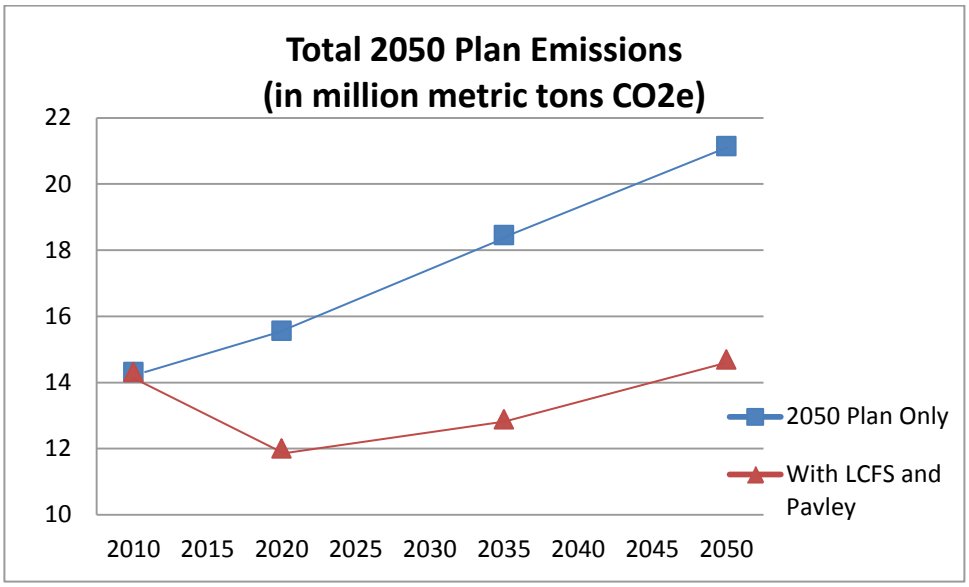
The 2050 Plan's near-term reductions in per capita vehicle miles traveled thus do not appear to be sustainable in the longer term.

Total greenhouse gas emissions under the 2050 Plan reflect these driving patterns. Under the 2050 Plan, keeping carbon and fuel efficiency constant, and considering only the elements of the 2050 Plan, there is a steady climb in transportation greenhouse gas emissions over the life of the project.[12] After taking into account the effect of state laws requiring reductions in the carbon content of fuel and increased fuel efficiency – the Low Carbon Fuel Standards (LCFS) and the Pavley regulations – the emissions dip a bit over existing levels by 2020, but then begin to climb thereafter, exceeding their 2010 starting point by 2050.[13] While the

[12] Total greenhouse gas emissions rise from 14.31 million metric tons (MMT) to 15.56 MMT CO2e by 2020; 18.45 MMT by 2035; and 21.14 by 2050. (AR 8a:2557, 2572, 2575, 2577 [Tables 4.8-5, 4.8-8, 4.8-10, 4.8-12].)

[13] With the Low Carbon Fuel Standards and Pavley regulations, emissions decline from 14.31 MMT to 12.004 MMT by 2020, but then begin to climb to 12.88 MMT in 2035, and to 14.69 in 2050 (exceeding 2010 baseline levels). (AR 8a:2557, 2572, 2575, 2577 [Tables 4.8-5, 4.8-8, 4.8-10, 4.8-12].)

greenhouse gas emissions data are *not* graphed in the EIR, the People have placed them on a graph, below, so that trends can be seen clearly.[14]



C. Significance Determination

SANDAG used three separate "significance criteria" to determine whether the Plan's impacts will be significant, and for each, determined significance at various future points in time. The EIR first considers whether the Plan's total emissions would increase over 2010 levels. The EIR summarily states that the Plan's impact will be less than significant in 2020 because (with the help of the Low Carbon Fuel Standards and the Pavley regulations) annual emissions are below 2010 levels in that year. Without additional analysis, the EIR summarily concludes that impacts are "significant and avoidable" in 2035 and 2050 because annual emissions will be above 2010 levels in these years. (AR 8a:2027, 2567-2578.)

SANDAG's other two significance analyses appear designed to assure the public and decision makers that, even with the rising trend in total emissions, the region would be doing its part to address climate change.

[14] In million metric tons carbon dioxide equivalent.

The EIR next states that the 2050 Plan's impacts will be less than significant in 2020 and 2035 because the Plan will meet the SB 375 targets. (AR 8a:2030, 2578-2581.) The EIR does not highlight that, while the Plan complies with the letter of SB 375 by meeting or exceeding the discrete targets for 2020 and 2035, per capita emissions from cars and light-duty trucks begin *rising* after 2020. (See AR 8a:2578-2581; AR 8b:4435 [Table 2].) Nor does the EIR contain any analysis or determination of significance for any year beyond 2035 under this criterion, on the ground that SB 375 has no post-2035 targets. (AR 8a:2581.)

Finally, the EIR purports to examine whether the 2050 Plan's greenhouse gas impacts are significant in light of the potential for the Plan to conflict with the AB 32 Scoping Plan (examined for year 2020 only) and SANDAG's own Climate Action Strategy (examined for years 2020 and 2035 only). (AR 8a:2030; 2581-2588.) In analyzing the potential for the 2050 Plan to conflict with the Scoping Plan, the EIR concludes that the 2050 Plan's land use and transportation greenhouse gas emissions are less than significant in 2020. The EIR supports this assertion by stating summarily that the Plan "encourages its jurisdictions to align with the Scoping Plan" and that, taking into account the effect of the Low Carbon Fuel Standards and the Pavley regulations, transportation emissions will be 15 percent below 2005 levels in 2020. (AR 8a:2583, 2583-84.) The EIR attempts to justify its refusal to look beyond 2020 by asserting that "[t]he Scoping Plan does not have targets established beyond 2020[.]" (AR 8a:2586.) Thus, EIR does not disclose or analyze the fact that the 2050 Plan's greenhouse gas emissions curve bends upwards after 2020. (*Id.*)

Similarly, in analyzing compliance with SANDAG's own Climate Action Strategy, the EIR makes bare and summary assertions that the 2050 Plan "would not impede" the Strategy because the Plan "encourage[es] compact development" and "promotes reduced VMT[.]" (AR 8a:2585-86.)

In making its determinations, SANDAG pointedly refused to consider the 2050 Plan's apparent inconsistency with the longer-term, downward emissions trajectory set out in the Executive Order and in the Scoping Plan. SANDAG did not find that such an analysis was infeasible or would be misleading under the circumstances.[15] SANDAG noted only that the State's objective of bending the greenhouse gas emissions curve continuously downward through 2050 is set out in an Executive Order, and the Executive Order does not constitute a "plan" for greenhouse gas reduction. (AR 8a:2582; see also AR 8b:4430-4431 [responses to Attorney General's comment letter].)[16]

The EIR does not discuss whether and how the projects to be built in the 2050 Plan's earlier years will or will not make it possible to change the upward slope of the region's land use and transportation-related greenhouse gas emissions trajectory in future years.

D. Alternatives Analysis

The EIR sets out six alternatives to the Plan, in addition to the required "No Project" alternative. (AR 8a:3131-3338). According to the EIR, all of the alternatives, except the "No Project" alternative, meet all articulated project objectives. (AR 8a:3133-35.) The EIR applies the same "significance criteria" to the alternatives that it applies to the 2050 Plan (see AR 8a:3192-93, 3213-14, 3236-37, 3258-59, 3281-82, 3305-06) and concludes that all of the action alternatives yield the same significance determinations in 2020, 2035 and 2050 as the Plan. (AR 8a:3323-24; see also Statement of the Case, Section II.C., above.) The EIR does not discuss

[15] In fact, SANDAG conceded that "the Executive Order target for 2050 can inform CEQA analysis" (AR 8b:4432 [response to Attorney General's comment letter]), but SANDAG excluded any such analysis from the EIR.
[16] The EIR's analysis of the significance of cumulative greenhouse gas impacts is substantially similar. (AR 8a:3091-96.)

whether any of its examined alternatives are consistent with the State's longer-term climate objectives or achieve a declining greenhouse gas emissions trajectory beyond 2020. (*Ibid.*)

E. Mitigation

The only program-level mitigation in the EIR provides, very generally, that SANDAG will take actions in future updates:

> SANDAG shall update future Regional Comprehensive Plans and Regional Transportation Plans/Sustainable Community Plans to incorporate policies and measures that lead to reduced GHG emissions. Such policies and measures may be derived from the General Plans, local jurisdictions' Climate Action Plans, and other adopted policies and plans of its member agencies that include GHG mitigation and adaptation measures or other sources.

(AR 8a:2588.)

The EIR summarily states that the cities and San Diego County "can and should" adopt "Climate Action Plans" that meet the general requirements set out in the CEQA Guidelines (Cal. Code Regs., tit. 14, § 15183.5). (AR 8a:2588-89.) It also provides that such plans should incorporate, "when appropriate," various general measures and policies that have been recognized to reduce greenhouse gas pollution. (*Ibid.*)[17] The EIR states that SANDAG "will assist local governments in preparing CAPS [Climate Action Plans] and other climate strategies . . . ." (AR 8a:2589.) The EIR does not mention financial assistance or incentives for adopting Climate Action Plans that meet particular objectives, for example, that meet

[17] The EIR refers to a reference sheet compiled by the Attorney General's Office, last updated in January 2010, that lists examples of greenhouse gas reduction policies and measures that local governments can consider in updating their general plans. The reference sheet is a starting point for consideration; it is not a template for local climate action planning.

specified greenhouse gas reduction targets, or that change specified existing land uses that work against reductions in vehicle miles traveled.

IV. PROCEDURAL HISTORY AND LEGAL CHALLENGE

On October 28, 2011, SANDAG conducted a public hearing on the proposed 2050 Plan and EIR. (AR 186:12709-13 [Board of Directors minutes].) On that day, the SANDAG Board of Directors adopted Resolution Nos. 2012-08 and 2012-09, certifying the Final EIR and approving the 2050 Plan and adopting a Statement of Overriding Considerations. (AR 186:12713.)[18] One of the stated benefits justifying approval of the Plan in the face of significant impacts is that the Plan "would achieve the Senate Bill 375 . . . targets . . . ." (AR 3:179.) The same day, SANDAG also filed a Notice of Determination for the Final EIR and the 2050 Plan. (AR 1:2-3.)

In November 2011, petitioners Cleveland National Forest Foundation and Center for Biological Diversity filed a Petition for Writ of Mandate and Complaint for Injunctive Relief alleging numerous violations of CEQA (CNFF case). (JA {2} 14-42.) At the same time, CREED-21 and the Affordable Housing Coalition of San Diego County filed a separate action challenging the EIR. (JA {1} 1-13.) In January 2012, the Sierra Club was added as a petitioner in the CNFF case. (JA {25}151-189.)

On January 23, 2012, the People moved to intervene in the CNFF case. (JA {22} 102-137.) The trial court granted the People's application on

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[18] "An agency shall prepare a statement of overriding considerations . . . to reflect the ultimate balancing of competing public objectives when the agency decides to approve a project that will cause one or more significant effects on the environment." (Cal. Code Regs., tit. 14, § 15021, subd. (d).) An override must be supported by substantial evidence. (*Id.*, § 15093, subd. (b).)

January 25, 2012. (JA {29} 198-199.) The cases subsequently were consolidated and briefed. (JA {34} 51; JA {38} 264-274.)

Following oral argument on November 30, 2012, on December 3, 2012, the trial court issued its Ruling (JA {75} 1046-59) and on December 20, 2012, its Judgment and Peremptory Writ of Mandate. (JA {88} 1132-34; JA {89} 1135-37.)

The trial court held that SANDAG's treatment of greenhouse gas pollution was "inadequate." (JA {75} 1056.) The court opined that "the EIR is impermissibly dismissive of Executive Order S-03-05" given that the order's mid-century greenhouse gas goal is official state policy, is integral to the Air Resources Board's AB 32 Scoping Plan, and was "designed to address an environmental objective that is highly relevant under CEQA (climate stabilization)." (*Id.* at 1056-57.) The trial court also noted that the Plan extends to 2050, obligating SANDAG "to discuss impacts beyond the 2020 time horizon." (*Id.* at 1057.) In the court's words, "SANDAG cannot simply ignore" the state's mid-century climate objectives. (*Ibid.*) It concluded that

> the failure of the EIR to cogently address the inconsistency between the dramatic increase in overall GHG emissions after 2020 contemplated by the [2050 Plan] 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 [2050 Plan].

(*Ibid.*)

The trial court also held that the EIR failed adequately to discuss program-level mitigation that could address regional climate pollution. "SANDAG's response has been to 'kick the can down the road' and defer to 'local jurisdictions.'" (JA {75} 1057.) In the court's view, SANDAG's approach "perverts the regional planning function of SANDAG" and

"ignores the purse string control SANDAG has over TransNet funds . . . ." (*Ibid.*) The court concluded that SANDAG "does have the legal power – indeed, the obligation – to see to it that TransNet funds are spent in a manner consistent with the law" and could, for example, "agree to fund local climate action plans." (*Ibid.*)

STANDARD OF REVIEW

Both the trial and appellate courts review an agency's action under CEQA for a prejudicial abuse of discretion. (Pub. Resources Code, § 21168.5.) An abuse of discretion is established if the agency either has not proceeded in a manner required by law or if the agency's determination or decision is not supported by substantial evidence. (*Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 486.) A lead agency commits a prejudicial abuse of discretion "'if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.'" (*Neighbors for Smart Rail v. Exposition Metro Line Construction* (2013) 57 Cal.4th 439, 463 [quoting *Kings County Farm Bur. v. City of Hanford* (1990) 221 Cal.App.3d 692, 712]; see also *Keep Berkeley Jets Over the Bay Com. v. Board of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1355.) A court may find an abuse of discretion to be prejudicial even if the public agency contends that it would have reached the same decision on the project had it fully complied with CEQA. (Pub. Resources Code, § 21005, subd. (a); *Smart Rail, supra,* 57 Cal.4th at p. 463.)

"A regional transportation plan is deemed to be a project for purposes of CEQA, so an EIR is required prior to its adoption." (*Sustainable Transportation Advocates of Santa Barbara v. Santa Barbara* (2009) 179 Cal.App.4th 113, 118 (*Sustainable Transportation Advocates*) [citing *Edna Valley Assn., supra,* 67 Cal.App.3d at pp. 447–449].) The People allege, and the trial court held, that the EIR for the 2050 Plan fails as an

informational document because it fails to disclose and analyze the apparent conflict between the 2050 Plan's increase in greenhouse gas emissions over the longer term, and the State's environmental objective to achieve climate stabilization by mid-century. As this Court noted last year, in reviewing an EIR for CEQA compliance, a court must adjust its scrutiny based on the nature of the alleged defect. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260.) Where the claim is predominately one of improper procedure, the reviewing court gives no deference to the agency, and where the dispute is over the facts, the agency's determination is reviewed under a substantial evidence standard. (*Id.* at p. 275 [citing *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435].) In this case, SANDAG did not conclude in its EIR that including a discussion about the State's mid-century climate objective would be misleading or unnecessary (*c.f. Neighbors for Smart Rail, supra,* 57 Cal.4th at p. 457), but simply refused to consider the longer term objectives because it believed it was not legally required to do so. Since the dispute does not center on fact, this Court may determine error without deference to SANDAG.[19]

As set out below, SANDAG's refusal to acknowledge the State's longer-term climate objectives and to disclose the 40-year Plan's apparent inconsistency with those objectives short-circuited the fundamental public disclosure and informed decision making purposes of CEQA, preventing an informed discussion about impacts, alternatives, mitigation, and the

[19] Even if a "substantial evidence" standard of review applies as SANDAG contends (see AOB at pp. 11-12), the People must still prevail. There is no substantial evidence in the record to support SANDAG's stated justifications for its refusal to consider the Executive Order. (See discussion in Argument, Sections II.A. through II.E., below.)

circumstances relevant to a Statement of Overriding Considerations. The error, therefore, was prejudicial.

ISSUES PRESENTED

I. DOES THE EIR FOR THE 2050 PLAN SERVE ITS PURPOSES AS AN INFORMATIONAL DOCUMENT, WHERE THE EIR REFUSES TO ACKNOWLEDGE OR ANALYZE THE APPARENT CONFLICT BETWEEN THE PLAN'S RISING GREENHOUSE GAS EMISSIONS, AND THE STATE'S 2050 CLIMATE STABILIZATION OBJECTIVES?

II. DOES SANDAG LACK THE ABILITY TO CHANGE OR INFLUENCE THE REGION'S GREENHOUSE GAS EMISSIONS TRAJECTORY SUCH THAT ANY FURTHER DISCUSSION OF PROGRAM-LEVEL MITIGATION WOULD BE FUTILE?

ARGUMENT

I. INTRODUCTION

In the words of the trial court:

> [T]he failure of the EIR to cogently address the inconsistency between the dramatic increase in overall greenhouse gas emissions after 2020 contemplated by the [2050 Plan] 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 [2050 Plan].

(JA {75} 1057.) The People agree. While the EIR is replete with raw data and summary assertions about impacts, neither can substitute for the "good faith reasoned analysis" required by CEQA. (*Vineyard Area Citizens, supra,* 40 Cal.4th 412 at p. 442; *Keep Berkeley Jets, supra*, 91 Cal.App.4th at p. 1371.)

As set out below, this Court should reject all of SANDAG's attempts to justify the EIR's crabbed analysis of the 2050 Plan's climate change impacts. The Executive Order and the State's climate stabilization

objectives are based on science, which SANDAG, as a lead agency, has an affirmative obligation to consider. Moreover, SANDAG cannot purport to rely on AB 32, the Scoping Plan, and SANDAG's own Climate Action Strategy in determining significance, but at the same time ignore that the core objective of each is to put California on a path to greenhouse gas emissions reductions that continue *beyond* 2020, consistent with Executive Order S-3-05. Further, SANDAG is obligated to consider the long-term environmental impacts of its long-term Plan and cannot simply cut off analysis at an arbitrary date. Finally, neither compliance with SB 375 nor the general concept of lead agency discretion excuse SANDAG from its fundamental responsibility under CEQA to conduct a good faith reasoned analysis of the 2050 Plan's climate related impacts.

On remand, once SANDAG assumes its responsibility as lead agency to discuss and analyze the Plan's relationship to the State's longer term climate objectives, it must also consider what additional design changes or mitigation might help to stabilize and bend the region's emissions curve downward over the longer-term. As the trial court noted, it is unacceptable for SANDAG simply to "kick the can down the road" to future Regional Transportation Plan updates and project-specific review. (JA {75} 1057.) While the specific details of certain mitigation must wait for future projects, SANDAG's programmatic EIR allows it the best opportunity "to consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts." (Cal. Code Regs., tit. 14, § 15168, subd. (b)(4).)

SANDAG suggests that there is little utility in remand, contending on appeal that it has little power or discretion in the Regional Transportation Plan process to influence the region's development. SANDAG notes that land use authority is vested in local government and SANDAG cannot "regulate the use of land[.]" (AOB at p. 46.) As discussed below, however,

SANDAG *is* the regional transportation planning authority, and could, for example, recommend and provide incentives for specific changes in local planning (including General Plans and enforceable Climate Action Plans) fostering lower-carbon development. And SANDAG asserts that the TransNet Expenditure Plan is in the nature of a "regional compact" that restricts changes in funded projects and the reallocation of funds to mitigation. (*Id.* at pp. 47-51.) But SANDAG acknowledges that it has the power to change the TransNet Expenditure Plan based on environmental considerations. (See AOB at p. 5.) By avoiding a full and fair discussion of the Plan's long-term greenhouse gas impacts, SANDAG has quashed the public's opportunity to understand and demand of its representatives the changes necessary to meet the challenge of climate change. (See *id.* at p. 48.)

Because the EIR's deficiencies in the treatment of climate pollution are serious and fundamental, this Court should affirm the trial court's Judgment.

II. BECAUSE THE EIR FAILED TO DISCLOSE AND ANALYZE THE 2050 PLAN'S LONG-TERM IMPACTS ON CLIMATE CHANGE, THE EIR FAILS AS AN INFORMATIONAL DOCUMENT

A. SANDAG is Not Free to Ignore the State's Overarching 2050 Climate Objective, Which is Grounded in Science

As the CEQA Guidelines provide, "[t]he determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on *scientific and factual data*." (Cal. Code Regs., tit. 14, § 15064, subd. (b) [emphasis added].)[20] SANDAG must consider the emissions

[20] SANDAG argues at length that it complied with Cal. Code Regs., tit. 14, § 15064.4, entitled "Determining the Significance of Impacts from Greenhouse Gas Emissions." (See AOB at pp. 3, 15-18.) But the factors (continued…)

trajectory described in Executive Order S-3-05 not because it is contained in an Executive Order or because the Executive Order constitutes a binding "plan" (see AOB at pp. 20-21), but because it is scientifically relevant to the overarching environmental objective of climate stabilization. The science tells us that if we are to succeed in stabilizing our existing climate, we must achieve substantial greenhouse gas emissions reductions by mid-century. (AR 8b:4434 [Attorney General's comment letter]; see also AR 8b:4179 [Sierra Club's comment letter]; AR 8b:3857 [Governor's Office of Planning and Research's comment letter]. California has recognized this scientific principle in Executive Order S-3-05, AB 32, and the AB 32 Scoping Plan.[21]

On appeal, SANDAG argues that consideration of the State's mid-century climate objectives in evaluating the Plan's greenhouse gas-related impacts is "not required by 'science[.]" (AOB at p. 22.) This assertion is unsupported. The Scoping Plan emphasizes the Executive Order's scientific basis:

> Climate scientists tell us that the 2050 target represents the level of greenhouse gas emissions that advanced economies must reach if the climate is to be stabilized in the latter half of the 21st century. Full implementation of the Scoping Plan will put California on a path toward these required long-term reductions.

(…continued)
listed in section 15064.4 for lead agencies to consider expressly are not exclusive (*id.* at § 15064.4, subd. (b)), and the provision expressly provides that "[t]he determination of the significance of greenhouse gas emissions calls for a careful judgment by the lead agency consistent with the provisions in section 15064." (*Id.* at 15064.4, subd (a).)

[21] Contrary to SANDAG's assertion (see AOB at p. 21), at least one state agency has considered the Executive Order's greenhouse gas emission's trajectory in determining a long-term project's significance. See Initial Study and Negative Declaration for the Department of Water Resources' greenhouse gas reduction plan at pp. 16-18, available at www.water.ca.gov/climatechange/docs/Final-CAP-IS-ND.pdf.

(AR 320(5):27977.)

Well over a year before approving the 2050 Plan and its related EIR, SANDAG itself recognized the scientific basis of the Executive Order's mid-century climate objective. SANDAG's own Climate Action Strategy, published in March 2010, states: "Although not required by statute, the 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].) It is therefore disingenuous for SANDAG, in its appellate briefing, to challenge the scientific basis for Executive Order S-3-05.

SANDAG's failure to discuss the 2050 Plan's climate change impacts in the larger scientific context of climate stabilization and the State's mid-century greenhouse gas objectives renders the EIR defective as an informational document.

B. The EIR's Assertion that the 2050 Plan Is Consistent with the AB 32 Scoping Plan and SANDAG's Own Climate Action Strategy Is Misleading

The EIR fails as an informational document because it is affirmatively misleading. The EIR states that the 2050 Plan is consistent with the AB 32 Scoping Plan prepared by the Air Resources Board and SANDAG's own Climate Action Strategy and therefore will have no significant impacts (see AR 8a:2581-2582, 2030), but it fails to acknowledge that each of these documents is grounded in the need to *reduce* emissions continuously and aggressively over the longer term to meet the State's mid-century climate objectives.

SANDAG recognizes that an EIR should discuss "any inconsistencies between the proposed project and applicable general plans, specific plans and regional plans," but argues that Executive Order S-3-05 is not a "plan."

(AOB at pp. 20-21 [citing Cal. Code Regs., tit. 14, § 15125, subd. (d)].) In fact, Executive Order S-3-05 is a key principle underlying the Air Resources Board's AB 32 Scoping Plan, which SANDAG acknowledges is relevant to its analysis of the 2050 Plan's climate change impacts. In *Assn. of Irritated Residents, supra,* 206 Cal.App.4th 1487,[22] the court of appeal recognized the importance of the Executive Order in upholding the validity of the Scoping Plan. The purpose of the Scoping Plan is to meet the 2020 greenhouse gas limit and to put "the state on track to meet the goal established by Governor Schwarzenegger in Governor's Executive Order S-3-05 . . . ." (*Id.* at pp. 1492-93.) The court noted that the 2020 limit "is but a step towards achieving a longer term climate goal" and that the Scoping Plan measures are "a step toward [meeting] the ultimate objective by 2050." (*Id.* at p. 1496.)[23] Achieving climate stabilization by 2050 thus is a core objective identified in the Air Resources Board's statewide Scoping Plan as necessary to protect the existing environment of California, resources dependent on a stable climate (e.g., abundant and clean water), climate-dependent industries such as agriculture, and public health.

Consistent with the AB 32 Scoping Plan, SANDAG's own Climate Action Strategy recommends setting continuously *reducing* greenhouse gas targets for the region through 2050. (AR 216:17628 [Fig. 3-1].) As set out in the chart's legend, SANDAG's Climate Action Strategy relies on the Executive Order in recommending greenhouse gas reduction targets beyond 2020. (*Ibid.*)

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[22] Notably, SANDAG's opening brief fails to mention the *Assn. of Irritated Residents* decision, even though the case was cited in the trial court's decision.

[23] The Scoping Plan states at numerous points that the 2020 greenhouse gas limit is not an endpoint, but a target marking progress toward the State's longer-term climate objectives. (See, e.g., AR 320(5):27848, 27864, 27875, 27977-80; see also Health & Saf. Code, § 38551, subd. (c).)

SANDAG also suggests on appeal that it should be excused from considering the State's longer-term climate objectives because the Scoping Plan's estimate of "what may be achieved from local land use changes" through the SB 375 targets accounts for only 3 percent of the State's reductions needed to meet the 2020 target. (AOB at p. 23 [citing Scoping Plan, Table 2]; see AR 320(5):27877.) SANDAG errs in two ways. First, 2020 is not the end point for emissions reductions related to land use and transportation. (See, e.g., AR 320(5):27858-59, 27979; see also Argument, Section II.A., above.) The Scoping Plan itself states that "[i]n 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." (AR 320(5):27858.)

Second, climate change is a quintessentially cumulative impact, caused by a very large number of past and present sources over long periods of time. Thus, the relevant question is not whether the region under SANDAG's jurisdiction is a large or small contributor of greenhouse gases, but whether its non-trivial and long-term contribution is cumulatively considerable given existing atmospheric levels of greenhouse gases and the state of the climate. (See *Kings County Farm Bur., supra*, 221 Cal.App.3d at p. 718 [holding that the "relevant question to be addressed in the EIR is not the relative amount of [pollution] emitted by the project when compared with preexisting emissions, but whether any additional amount of [pollutant] emissions should be considered significant in light of the serious nature of the ozone problems in this air basin."]) Viewed in this context, the 2050 Plan's impacts appear significant.

To justify its refusal to consider the State's post-2020 climate objectives, SANDAG also observes that it has discretion to determine how best to gauge significance, and notes that it used three separate criteria to make its determinations. (AOB at pp. 15, 17-18; see AR 8a:2567-2591.)

SANDAG's arguments miss the point: CEQA requires that a legally adequate EIR, regardless of the significance criteria used by the lead agency, be "'prepared with a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences.'" (*Kings County Farm Bur., supra*, 221 Cal.App.3d 692, 712 [quoting Cal. Code Regs., tit. 14, § 15151].) SANDAG's refusal to look at the 2050 Plan's longer-term emissions curve "swept under the rug" the disconnect between the underlying purpose of AB 32, the Scoping Plan, and SANDAG's own Climate Action Strategy on the one hand, and the longer-term effects of the 2050 Plan on the other, in violation of CEQA. (See *id.* at p. 733 [EIR "must contain sufficient detail to help ensure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug"].)

C. SANDAG Abused Its Discretion in Refusing to Consider the Long-Term Climate Impacts of Its Long-Term Regional Plan

The 2050 Plan establishes the order and funding for numerous transportation projects through 2050 and substantially influences long-range land use policy that is not directly in SANDAG's control. As the trial court noted, SANDAG cannot set a long-term project into motion and then arbitrarily refuse to consider the implications of that project over the long term. (JA {75} 1057.) Moreover, the law is clear that in assessing impacts and determining significance, an agency cannot focus only on short-term impacts, but must also address long-term impacts. (Pub. Resources Code, § 21001, subd. (d); *id.* at § 21083, subd. (b)(1).) CEQA requires that a lead agency must find that a project may have a significant effect on the environment where "[t]he project has the potential to achieve short-term environmental goals to the disadvantage of long-term

environmental goals." (Cal. Code Regs., tit. 14, § 15065, subd. (a)(2).) This requirement is consistent with one of the fundamental purposes of CEQA – to "[e]nsure that the long-term protection of the environment, consistent with the provision of a decent home and suitable living environment for every Californian, shall be the guiding criterion in public decisions." (Pub. Resources Code, § 21001, subd. (d).) SANDAG cannot avoid its responsibilities as lead agency to disclose and analyze the impacts of its 2050 Plan simply by truncating any substantive analysis in 2020.

SANDAG argues that the EIR "provides an extensive and detailed quantitative analysis of GHG impacts though the year 2050 . . . ." (AOB at p. 19.) It is true that the EIR discloses the raw data concerning emissions increases over existing (2010) levels, but the EIR does not assist the public or decision makers to understand what these increases mean. The EIR summarily concludes that because the Plan would cause an increase over existing levels in 2035 and 2050, under its first significance criterion, the impacts would be significant. (AR 8a:2575, 2578.) The EIR states that the general mitigation measures listed in the EIR "would reduce" emissions in some unspecified way and then concludes that significant impacts are unavoidable in 2035 and 2050. (AR 8a:2590-91.) "[S]imply labeling the impact 'significant' without accompanying analysis" however, violates "the environmental assessment requirements of CEQA." (*Keep Berkeley Jets, supra*, 91 Cal.App.4th at p. 1371.) SANDAG cannot simply skip over the required step of explaining *how* and *why* the impacts are significant. It is the "how and why" that informs the analysis of mitigation and alternatives and the hard choices to be made in any decision to approve the Plan notwithstanding significant impacts.

Further, any "alarm"[24] that might have been raised by SANDAG's determination that the 2050 Plan's total greenhouse gas emissions are significant as compared to the 2010 baseline is undercut by the EIR's two other significance findings. As noted, the EIR stated that because the 2050 Plan complies with SB 375, and purports to comply with "applicable GHG reduction plans," the Plan's impacts are less than significant. (AR 8a:2030.) The EIR thus encourages the public and decision makers to discount the fact that emissions under the 2050 Plan will go up post-2020. As noted in Argument, Section II.B., above, the EIR's assurance of compliance with the Scoping Plan and SANDAG's own Climate Action Strategy was, in fact, misleading. And as noted in the next section, compliance with SB 375 cannot substitute for a full analysis of the 2050 Plan's climate impacts.

D. Compliance with SB 375 Does Not Excuse SANDAG from Compliance with CEQA

SANDAG's brief might be read to suggest that because SANDAG has complied with SB 375 – a fact that the People do not dispute – it should be excused from additional analysis of the 2050 Plan's long-term climate change impacts. (See, e.g., AOB at pp. 1-2, 14, 31.) Any such argument must be rejected. As a threshold matter, SB 375 addresses only a subcategory of greenhouse gas emissions from the 2050 Plan – emissions from cars and light-duty trucks – at two discrete points in time, and only to 2035. More fundamentally, while compliance with laws and regulations, including those designed to meet environmental objectives, may be relevant to determining significance (see *Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 112-13), such compliance does not always guarantee that a project will have no

[24] (See *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 392; see also AOB at p. 20.)

significant impacts. (*Id.*, see also, e.g., *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1108-09 [holding that environmental effect may be significant despite compliance with requirement]; *Californians for Alternatives to Toxics v. Dept. of Food & Agriculture* (2005) 136 Cal.App.4th 1, 16 [holding that lead agency's sole reliance on state agency's registration of pesticides and its regulatory program was inadequate to address environmental concerns of CEQA].) Under the circumstances of this case, the 2050 Plan's technical compliance with SB 375's discrete targets should not serve to obscure the Plan's apparent inconsistency with the State's climate objectives, and cannot substitute for the analysis required by CEQA. An EIR that adequately addresses climate change will allow the region's residents and its decision makers the opportunity to rethink land use and transportation strategies before they are locked in.

E. The EIR's Failure to Disclose and Analyze the Project's Longer-Term Impacts on Climate Change Was Prejudicial

The purposes of the EIR – the "heart of CEQA" – and the responsibilities that the EIR's preparation place on a lead agency are well known to this Court, but they bear repeating. "An EIR is 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, supra*, 47 Cal.3d 376 at p. 392 [citation omitted]; see also *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 [EIR's purpose is to inform public and decision makers of consequences before decisions are made].) "Because the EIR must be certified or rejected by public officials, it is a document of accountability." (*Laurel Heights, supra*, 47 Cal.3d at p. 392.) Rather than raising the alarm, the EIR for the 2050 Plan in effect caused the serious

problem of climate change to be "swept under the rug" – contrary to CEQA's public disclosure and informed decision-making purposes. (See *Kings County Farm Bur., supra*, 221 Cal.App.3d at p. 733.)

The People acknowledge that under CEQA, not all informational errors are prejudicial. "Insubstantial or merely technical omissions are not grounds for relief." (*Neighbors for Smart Rail, supra*, 57 Cal.4th at p. 463.) In *Neighbors for Smart Rail*, the lead agency examined the impacts of a light rail project on traffic conditions and air quality only in 2030, but not in the nearer term. (*Ibid.*) The Court held that any error was not prejudicial, because, under the circumstances of that project, the analysis of impacts in the nearer terms would be substantially similar to that in 2030. (*Ibid.*) The EIR's deficiency, therefore, was "an insubstantial, technical error . . . ." (*Id.* at 464.)

Here, in contrast, the EIR's focus on SB 375's discrete 2020 and 2035 greenhouse gas emission targets, without consideration of the *incline* of the region's emission trajectory between those years, and its failure to analyze the longer-term effects of the land use and transportation decisions made in the initial decades of the 2050 Plan, masked the full impact of the Plan on climate. The 40-year Plan puts into motion a number of projects that do not appear to be consistent with stabilizing or reducing regional greenhouse gas emissions, and in fact may lock the region into transportation and development patterns that cannot be reversed in future years. SANDAG's failure to disclose and analyze the 2050 Plan's apparent inconsistency with the State's climate objectives short-circuited an informed discussion of mitigation, alternatives, and the findings relevant to the decision makers' Statement of Overriding Considerations, and was therefore prejudicial.

This Court should therefore reject SANDAG's attempts to justify its failure to disclose and analyze the 2050 Plan's apparent inconsistency with the State's 2050 climate objectives.

III. SANDAG HAS THE ABILITY TO IMPOSE PROGRAM-LEVEL MITIGATION FOR THE 2050 PLAN'S CLIMATE CHANGE IMPACTS

To mitigate greenhouse gas emissions, SANDAG promised to take action in future Regional Transportation Plan updates and relied heavily on general and purely voluntary measures that local governments might choose to take at some future point in time. The trial court rejected this approach as impermissible attempt to "kick the can down the road[.]" (JA {75} 1057.) The trial court held that SANDAG's deferral to local agencies fails to account for SANDAG's power to change its Regional Transportation Plan to address significant impacts, "perverts the regional planning function of SANDAG, [and] ignores the purse string control SANDAG has over TransNet funds . . . ." (*Ibid.*)

SANDAG implies throughout its opening brief that its obligations under CEQA to analyze impacts and impose mitigation are limited because its power and discretion in the Regional Transportation Plan process is limited. (See, e.g., AOB at pp. 5, 14, 24-28, 33-34.) As set out below and made clear in the California Transportation Commission's Regional Transportation Plan Guidelines, these assertions are not supported. As the trial court recognized (JA {75} 1057), SANDAG has the obligation under CEQA, as well as the ability, based on its control of funds and the scheduling of the transportation projects in the region, to do its part on the mitigation front. (See Argument, Section III.C.1. and 2., below; see also Pub. Resources Code, § 21002.1, subd. (b); Cal. Code Regs., tit. 14, § 15126.4, subds. (a), (c).) Moreover, SANDAG, exercising its influence and "power of the purse," could assist local governments in the region with addressing the greenhouse gas emission impacts related to specific projects and general planning, without interfering with the land use authority and decision-making discretion of the local governments. (See Argument,

Section III.C.3., below.) To comply with CEQA, on remand, SANDAG should be required to devise a strategy for its 2050 Plan that is consistent with, or at least *more* consistent with, climate stabilization, or explain why it cannot.[25]

A. The 2050 Plan's Program EIR Is the Appropriate Place to Examine Program-Level Greenhouse Gas Mitigation That Might Be Slighted on Lower-Level Review

Examining impacts and imposing mitigation at the program level, where possible, is required to ensure "consideration of cumulative impacts that might be slighted on a case-by-case basis" and to "[a]llow the lead agency to consider broad policy alternatives and program wide mitigation measures at an early time then the agency has greater flexibility . . . ." (Cal. Code Regs., tit. 14, § 15168, subd. (b)(2), (4).) As noted, SANDAG has flexibility at the 2050 Plan stage that will diminish and ultimately cease to exist as the transportation network and related development are built out.

SANDAG asserts that petitioners' contentions of error "ignore the programmatic nature of the EIR . . . ." (AOB at p. 51.) But "[t]he level of specificity of an EIR is determined by the nature of the project and the 'rule of reason' . . . , rather than any semantic label accorded to the EIR." (*Al*

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[25] The brief of respondents Cleveland National Forest, et al. contains an extensive discussion of the various proposed design changes and mitigation measures that commenters presented to SANDAG during the CEQA review process, which SANDAG summarily rejected. For the sake of efficiency, and because the presentation requirements of Pub. Resources Code section 21177 do not apply to the Attorney General (see *id.*, subd. (d)), the People will not repeat that discussion in this brief. The People note, however, that the comments were sufficient to put SANDAG on notice that there was more that could be done to "bend the curve" of the region's greenhouse gas emissions. The ultimate responsibility rested at all times on SANDAG to reduce the 2050 Plan's significant greenhouse gas-related impacts if it was feasible to do so. (See *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134.)

Larson Boat Shop, Inc. v. Bd. of Harbor Comrs. (1993) 18 Cal.App.4th 729,742-43 [quoting *Laurel Heights, supra*, 47 Cal.3d at p. 407, footnote omitted]; see also Cal. Code Regs., tit. 14, §§ 15146 [specificity], 15152, subd. (b) [tiering], 15168, subd. (b), (d) [program EIR].) The fact that an EIR is programmatic "does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR or negative declaration." (Cal. Code Regs., tit. 14, § 15152, subd. (b).)

SANDAG's reliance on *In Re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143 ("Bay-Delta") to justify deferral of mitigation is misplaced. The CALFED program at issue was designed to set policies for the use of water statewide in California. It was undertaken in three large phases, considered 100 alternatives, (43 Cal.4th at pp. 1151-59), and set general principles, priorities, and timing for the use of "drinking water for two-thirds of California's residents and irrigation water for seven million acres of agricultural land." (*Id.* at p. 1151.) Because the CALFED project was largely a high-level policy document, covering statewide issues and consisting of "multiple possible actions" that may or may not take place, the Court held that many potential environmental issues concerning specific sources of water for future projects were not "ripe" for detailed analysis at the plan-level stage. (*Id.* at p. 1170-1173.)

The CALFED program is in no way comparable to the Regional Transportation Plan at issue here in size, scope, or complexity. The 2050 Plan focuses on identifying and approving a set of specific transportation projects in specific locations on specific timelines, in contrast to CALFED's broad approval principles to guide potential future water transfers not yet known among parties not yet identified. More importantly, unlike the CALFED program, the 2050 Plan approves, and makes crucial

funding commitments to, the construction of specific transportation projects. A Regional Transportation Plan is, in part, a planning document that sets transportation priorities for the region it covers. (AR 218:17690 [Regional Transportation Plan Guidelines].) But it is also a decision document that approves local funding and enables the flow of state and federal funding for a large number of specific transportation projects. SANDAG knew the details of these projects, such as location, size, function (down to use of individual lanes), and cost, when it approved the Plan. (See, e.g., AR 190a:13400-410; 190b:13766, 13768, 13775-76, 13782, 13830-37.)

The 2050 Plan's level of project identification and commitment stands in contrast to the broad policy document in *Bay-Delta*, making the rule in that case inapposite. The general rule expressed by the Supreme Court in *Vineyard, supra*, 40 Cal.4th 412, and *Save Tara v. City of Westwood* (2008) 45 Cal.4th 116, 139, applies in this case. In complex or phased projects, a programmatic document may postpone evaluation of project details to a later phase, but only where those details are not reasonably foreseeable when the agency first approves the project. (*Vineyard, supra*, 40 Cal.4th at p. 431; *Save Tara, supra*, 45 Cal.4th at p. 139) Here, approval of the 2050 Plan addresses specific projects and determines the project characteristics, such as size, location, and timing, that will dictate many of the individual projects' environmental impacts. The EIR foresees the construction of a very detailed transportation network, as approved by SANDAG in its Plan, which will cause a significant upward trajectory of total greenhouse gas emissions after 2020. In light of these known projects and known adverse impacts, it is improper to defer most of the greenhouse gas emissions-related mitigation to future Regional Transportation Plans and to other public agencies at a later date, long after the massive project has been set in motion. As our State Supreme Court has noted: "An EIR that incorrectly disclaims the power 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 Cal. State Univ.* (2006) 39 Cal.4th 341, 356.)

B. SANDAG Cannot Simply Defer Its Responsibility to Consider Program-Level Greenhouse Gas Mitigation

This Court should reject the EIR's attempt to rely largely on the promise of future mitigation for two main reasons. First, much of the promised mitigation, even if it could be done on a project-by-project basis, may never materialize if there is no further CEQA review. The EIR states that SANDAG intends to use the EIR to shortcut the review for future projects. "Where subsequent activities are within the scope of the Program EIR, and SANDAG, as the lead agency, finds no new effects would occur or no new mitigation measures would be required . . . , the subsequent project would be considered to be within the scope of the Program EIR and no further environmental documentation would be required." (AR 8a:2136-37.) In addition, SB 375 allows for streamlined environmental review of certain projects that are consistent with the Sustainable Communities Strategy. (AR 333:27375, 29404-10 [SB 375, § 13].) Ensuring adequate analysis at the program level is thus essential.

Second, "reliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA's goals of full disclosure and informed decisionmaking . . . ." (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92.) SANDAG's promises to update future Regional Comprehensive Plans and Regional Transportation Plans/Sustainable Community Plans "to incorporate policies and measures that lead to reduced GHG emissions" are, at best, extremely tentative. (AR 8a:2588.) SANDAG has identified the greenhouse emissions problem at this time; the problem is reasonably

foreseeable, so SANDAG must analyze (and ultimately adopt) all of the feasible mitigation and relevant design changes at this time.

With the current EIR, SANDAG has abused its discretion and not proceeded in the manner required by CEQA, which is to adopt feasible mitigation measures that would substantially lessen the identified significant environmental effects. (Pub. Resources Code, § 21002.)

C. Contrary to SANDAG's Arguments, Various Program-Level Mitigation Strategies Are Within SANDAG's Power as the Region's Metropolitan Planning Organization and Regional Transportation Commission

1. SANDAG Controls Substantial Funds and Has Broad Powers to Set the Region's Transportation Priorities

SANDAG is a key strategist and decision maker with respect to the financing of the transportation projects selected for inclusion in the 2050 Plan. It has identified itself, along with local agencies, as being responsible for "maximizing opportunities to leverage sales tax revenues to attract additional state and federal funds to the region for transportation and related infrastructure improvements." (AR 190a:13250 [2050 Plan].) SANDAG directly oversees the construction of some of the transportation projects in the Plan itself. With respect to all of the projects built by other agencies, SANDAG's decision to include those projects in the Plan is required for state and/or federal funding. (AR 8a:2065.) SANDAG makes a funding commitment to a project by including it in the Plan. In cases of projects that SANDAG does not build itself, inclusion in the Plan is the point where SANDAG identifies and commits to a project. As noted above, SANDAG controls a combined total of over $218 billion in federal, state and local funds.

A regional planning agency like SANDAG has considerable responsibility and discretion in creating the transportation project list to further the region's objectives. As the state's Regional Transportation Plan Guidelines state, the planning process requires regional agencies to exercise their discretion:

> The planning process is more than merely listing highway and transit capital investments; it requires *developing strategies* for operating, managing, maintaining, and financing the area's transportation system in such a way as to advance the area's long-term goals. . . . While the guidelines include both state and federal requirements, [Metropolitan Planning Organizations and Regional Transportation Planning Agencies] have the *flexibility* to be creative in selecting transportation planning options that best fit their regional needs.

(AR 218:17687, 17685 [emphasis added].)

SANDAG has used this flexibility, and exercised substantial discretion, to compile in its 2050 Plan detailed lists of the included projects by year, location, number of lanes and lane function (both existing lanes and those planned for construction), transit route and type of conveyance (e.g., heavy rail, trolley, bus), criteria for ranking and evaluation, and cost. (See, e.g., AR 190a:13400-410; 190b:13766, 13768, 13775-76, 13782, 13830-37.) While many local and state agencies may propose elements for inclusion in these lists and the Plan, the overall design and prioritization of the 2050 Plan and the projects in it are SANDAG's responsibility. (Govt. Code, § 65080; Pub. Util. Code, § 120300; AR 218:17687-17688 [2010 Regional Transportation Plan Guidelines].) These lists set out scores of specific, identified projects whose locations, timing, functions, and costs are already known to SANDAG in great detail, and that are adopted and endorsed for funding by SANDAG in the 2050 Plan. SANDAG's ability to open or close the gates to substantial state and federal funding through the placement of individual projects in the 2050 Plan, together with its control

of local TransNet funding, gives SANDAG substantial control and approval authority over such projects.

2. SANDAG Can Amend the TransNet Expenditure Plan as Necessary to Reduce Significant Greenhouse Gas Impacts

On appeal, SANDAG contends that the Transnet Expenditure Plan is an inflexible "regional compact" that restricts changes in funded projects and the reallocation of funds to mitigation. (AOB at pp. 47-51.) The trial court disagreed. (JA {75} 1057.) This Court should, similarly reject SANDAG's over-generalization.

The TransNet Ordinance, in section 16, gives SANDAG broad power to amend its TransNet expenditure plan for the estimated $32 billion in local tax revenues by a vote of two-thirds of its members. The SANDAG-controlled amendment process excludes only those specific, early projects identified in the TransNet Ordinance in 2004, designated for funding in 1987 but not completed as of 2004 (such as the completion of State Routes 52 and 76), and certain other limited matters, changes to which must be approved by the county's voters. (AR 320(30):28703, 28696, 28697, 28699, 28701, 28702 [TransNet Ordinance §§ 16, 2(D), 3, 4(E)(1), 8, 9, 11].) Further, the 2004 TransNet Ordinance includes, again in Section 16, an explicit disclosure to the local electorate that SANDAG's members could, at any time and subject to certain exceptions, amend the ordinance "to further its purposes." (AR 320(3):28703.) The TransNet Ordinance also provides: "The Expenditure Plan shall be amended as necessary to maintain consistency with the Regional Transportation Plan." (AR 320(30):28700 [TransNet Ordinance § 5(B)].)

Further, SANDAG's assertion that most of the TransNet money is already designated for expenditure and the agency is essentially powerless to make changes for mitigation purposes (see AOB at pp. 47-51)

contradicts SANDAG's own prior acknowledgment in its brief that it has discretion to change the allocations. (See AOB at pp. 5, 48.) SANDAG's currently-preferred use of TransNet funds is simply a spending plan or schedule, which is not irrevocable. Indeed, the SANDAG Board amended the TransNet spending plan four times between 2006 and 2009, including committing in 2006 to spending $197 million to fund the completion of the SPRINTER rail project between Oceanside and Escondido. (AR 8b:3810-11; 195:16919.)

The "flexibility" of the Regional Transportation Plan is expressly acknowledged in the Regional Transportation Guidelines. (AR 218:17687.) The flexibility of a regional transportation planning agency to amend its spending plan for transportation projects funded with revenues from a local transportation tax measure, notwithstanding voter approval, has also been judicially recognized in a similar context in Santa Barbara County. In *Sustainable Transportation Advocates, supra,* 179 Cal.App.4th 113, the court of appeal was required to determine whether the local transportation authority's approval of Measure A – consisting of a taxing ordinance and "Transportation Investment Plan" – was a project subject to CEQA. The court of appeal determined that because the transportation authority retained power to amend its transportation investment plan for specific projects by a two-thirds majority vote, simple approval of the ballot measure did not constitute a "project" under CEQA. (*Id.* at p. 120-124.) The court held that while transportation projects were described in the ballot initiative, the description served merely to inform the electorate, not irrevocably commit the region to specific projects. (*Id.* at p. 123.) The measure was "a mechanism for funding proposed projects that may be modified or not implemented depending on a number of factors, including CEQA environmental review." (*Ibid.*)

SANDAG's TransNet Ordinance and expenditure plan is similar to the local transportation tax reviewed in *Sustainable Transportation Advocates*. SANDAG's power to amend its spending plan by a vote of two-thirds of its membership puts the agency in the very same position as that of the Santa Barbara County Association of Governments: as SANDAG performs environmental review in the years following the approval of the TransNet extension ordinance in 2004 – including the 2050 Plan at issue – it can amend its expenditure plan to distribute funds to address feasible alternatives and feasible mitigation measures related to the massive greenhouse gas emissions impacts that will occur with the build-out of the 2050 Plan.

SANDAG is required to expend TransNet's projected $32 billion in a manner that is consistent with CEQA's mandates. (See Pub. Resources Code, § 21002.1, subd. (b).) In spending this money, SANDAG cannot freeze its judgment in 2004, the date the TransNet extension was passed, but must consider the State's evolving environmental objectives. (See AOB at p. 5 [acknowledging that revisions to Regional Transportation Plan can be made based on environmental considerations].) With respect to the impacts on climate change of the projects included in the 2050 Plan, an entire new body of law and policy has come into effect since 2004. Executive Order S-3-05 was issued in 2005, AB 32 was enacted in 2006, the ARB Scoping Plan was adopted in 2008 and section 15064.4 of the CEQA Guidelines became operative in early 2010, all well before SANDAG certified the EIR for the 2050 Plan in October 2011. SANDAG must plan the transportation future of the San Diego region, from now until 2050, in accordance with all relevant and emerging environmental considerations.

SANDAG asserts that "CEQA does not generally require public agencies to consider major changes to existing legislatively adopted

policies and plans as feasible alternatives or mitigation measures." (AOB at p. 49 [citing *Citizens of Goleta Valley, supra,* 52 Cal.3d 553, 573].) SANDAG misreads *Goleta*. In *Goleta*, the Supreme Court held that in the *project-specific* CEQA review for a coastal resort hotel, the lead agency was not required to revisit general land use policy decisions made in the general plan and in the region's local coastal program planning document. In the Court's words, "such ad hoc reconsideration of basic planning policy . . . would have been in contravention of the legislative goal of long-term, *comprehensive* planning." (*Id.* at p. 572 [emphasis in original].) Nothing in *Goleta* stands for the proposition that a lead agency that is in fact engaged in comprehensive planning can refuse to look at emerging statewide environmental issues simply because there may be an expectation that certain local or regional land uses or projects inconsistent with those objectives will proceed. Indeed, the design and purpose of comprehensive planning is "to transcend the provincial." (See *id.* at p. 571.) Achieving climate stabilization in certain circumstances requires lead agencies engaged in comprehensive, long-term planning to reconsider their existing policies and plans and to present the public and decision makers with options and alternatives that are consistent with a low-carbon future.[26] The fact that "at this time, the [SANDAG] Board has indicated its desire to maintain the specific major corridor projects that the voters approved in 2004" (AR 8b:3811 [responses to comments]) cannot trump SANDAG's obligation as a lead agency to fully disclose and analyze design changes and mitigation for the 2050 Plan's significant greenhouse gas impacts.

[26] The Supreme Court in *Goleta* expressly recognized that the mere fact that an alternative may require further action (e.g., a legislative enactment or an amendment to the general plan) does not justify its exclusion from an EIR. (*Id.* at p. 573.)

3. SANDAG Has an Important Leadership Role in Influencing the Region's Transportation and Land Use Patterns

The 2050 Plan is a regional planning document that can either encourage or discourage sprawl and substantially affect vehicle miles traveled and greenhouse gas emissions in a number of ways. The Court therefore should reject SANDAG's attempts to deflect responsibility by stating that it has "no legal control" over, and cannot "impose mitigation requirements on" the region's cities and San Diego County. (See AOB at pp. 3, 45.)

SANDAG fails to acknowledge its important leadership role in planning, funding, encouraging, facilitating, and creating incentives for sustainable development. As the State Regional Transportation Guidelines provide, the purpose of Regional Transportation Plans "is to encourage and promote the safe and efficient management, operation and development of a regional intermodal transportation system that, when linked with appropriate land use planning, will serve the mobility needs of goods and people." (AR 218:17685.) While SANDAG cannot dictate changes to local general plans, it can provide "funds and technical assistance" to local agencies to makes changes necessary to meet regional and state climate objectives. (See AR 218:17912 [2010 Regional Transportation Plan Guidelines].)

SANDAG could, for example, create incentives for local governments to move away from planned development patterns that will increase vehicle miles traveled in the Plan's later years, and toward development patterns that will instead reduce VMT. For example, the TransNet Expenditure Plan approved in 2004 includes a "Smart Growth Incentive Program" consisting of an estimated $280 million to fund projects and initiatives designed to integrate transportation and land use. (AR 320(30):28696.) Funded

activities can include "community planning efforts related to smart growth and improved land use/transportation coordination." (*Ibid.*) During oral argument before the trial court, SANDAG's counsel conceded that the estimated $280 million sum was available for smart growth and climate action planning.[27] While SANDAG has made some efforts on funding and technical assistance,[28] there is no suggestion in the record that this approach has reached its limits, or SANDAG has no further ability to refine or enhance this incentive program by, for example, securing additional funds, or creating more specific criteria for which local government actions and projects are eligible for funding. (See AR 216:17647 [Climate Action Strategy recommendation that SANDAG "[i]dentify additional sources of funding for the TransNet Smart Growth Incentive Program"].)

SANDAG could also do more to encourage *effective* local climate action planning. (See Cal. Code Regs., tit. 14, § 15126.4, subd. (c)(5).)[29] While it is appropriate for SANDAG in the EIR to state that local

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[27] In reference to the $280 million, SANDAG's counsel stated, "The specific allocation in the . . . TransNet ordinance is [ ] for smart growth planning, which is a subset of climate action planning." (Reporter's Appeal Transcript (Nov. 30, 2012) 24:8-11.)

[28] There are various general references in the EIR to "[u]sing the Smart Growth Concept Map as a basis for allocating smart growth incentives, prioritizing transit service enhancements and seeking additional smart growth funds." (AR 8a:2102 [Table 2.0-3].) The Smart Growth Concept Map, which SANDAG created in 2006 and updated in 2008, sets out approximately 200 locations of existing, planned, and potential smart growth opportunity areas. (AR 216:17646, 17648 [Climate Action Strategy].)

[29] "In the case of the adoption of a plan, such as a general plan, long range development plan, or plans for the reduction of greenhouse gas emissions, mitigation may include the identification of *specific measures* that may be implemented on a project-by-project basis. Mitigation may also include the incorporation of *specific measures or policies* found in an adopted ordinance or regulation that reduces the cumulative effect of emissions." (Cal. Code Regs., tit. 14, § 15126.4, subd. (c)(5) [emphasis added].)

governments "can and should" adopt Climate Action Plans, (see AR 8a:2588; see also *Neighbors for Smart Rail, supra*, 57 Cal.4th at p. 455-56), without some specific guidance on the content of those plans, it is unlikely that local governments will make the changes to development patterns that are necessary to reduce vehicle miles traveled and regional greenhouse gas emissions. In contrast, a more precise and directed measure providing that, for example, local governments "can and should" adopt Climate Action Plans that achieve specific greenhouse gas performance criteria (such as declining greenhouse gas targets), or can and should amend their general plans to track the region's Smart Growth Concept Map,[30] is more likely to yield tangible environmental results. These measures should be backed up by a specific funding commitment by SANDAG to increase the likelihood that they will in fact be carried out. An analogous situation existed in *City of Marina*, where the California Supreme Court considered whether a university had the obligation to mitigate a campus expansion's off-site impacts that the university could not address directly. The Court held that it was not sufficient for the university simply to state that other entities "can and should" mitigate; the university must also fund such off-site mitigation if feasible. (*City of Marina, supra,* 39 Cal.4th 350, 359-360, 367.) In both *City of Marina* and this case, the lead agency has an "independent obligation under CEQA to protect the physical environment" from the significant adverse effects of its project. (*Id.* at p. 362; see Pub. Resources Code, § 21002.1, subd. (a) and (b).)

Putting SANDAG's power of the purse behind robust mitigation could assist local governments to reduce the greenhouse gas emissions impacts of specific projects without interfering with their land use authority and discretion. As the trial court recognized (JA {75} 1057), SANDAG

[30] See footnote 28.

has the obligation under CEQA, as well as the ability, based on its control of funds and the scheduling of the transportation projects in the region, to do its part on the mitigation front. (See Pub. Resources Code, § 21002.1, subd. (b).) The failure of the EIR to adequately disclose and analyze the scope of the greenhouse gas emissions problem related to the 2050 Plan results in a concomitant failure to identify mitigation at the programmatic EIR stage "whenever it is feasible to do so." (See Pub. Resources Code, § 21002.1, subd. (b); Cal. Code Regs., tit. 14, § 15126.4, subd. (a); see also *id.*, § 15126.4, subd. (c).)

CONCLUSION

Complying with CEQA is an integral part of SANDAG's legal duty to prepare a 40-year long regional transportation plan. By failing to fully disclose and analyze the relationship between the State's long-term climate stabilization objectives, as embodied in Executive Order S-3-05, and the long-term upward trajectory of greenhouse gas emissions resulting from the build-out of the 2050 Plan, the EIR unlawfully avoids the disclosure of the significant adverse greenhouse gas emissions impacts of SANDAG's Regional Transportation Plan. The public and the SANDAG Board deserve, and CEQA requires, full disclosure of the impacts. Because the EIR undermined a full and fair discussion of alternatives, mitigation, and considerations relevant to SANDAG's Statement of Overriding Considerations, the document's informational error is prejudicial. Accordingly, the People respectfully request the Court to affirm the decision of the trial court as it relates to the Plan's greenhouse gas impacts.

PART II: PEOPLE OF THE STATE OF CALIFORNIA'S OPENING BRIEF AS CROSS-APPELLANT

INTRODUCTION

The Final EIR for SANDAG's 2050 Plan is deficient not only in its treatment of the Plan's effect on atmospheric climate pollution, but also in its treatment of localized air pollution and its special effect on communities already overburdened by harmful transportation–related emissions. Particulate matter from car and truck traffic causes serious health impacts – for example, increasing the rate and severity of, and mortality resulting from, respiratory illnesses such as asthma. A subset of this type of pollution – diesel particulate matter – causes cancer. (AR 8a:2218.) Particulate pollution in the San Diego region exacts a human cost. In 2000, ARB estimated that there were 720 excess cancer cases per million people exposed[31] in the San Diego region attributable to particulate matter pollution. (*Ibid.*) SANDAG projects that the 2050 Plan will increase all types of particulate pollution over existing levels throughout the 40-year life of the Plan.

In her comment letter on the Draft EIR, the Attorney General urged SANDAG to meet CEQA's informational requirements by explaining the real-world health effects of the 2050 Plan and how the expected increases in pollution will affect the region and the low-income communities and communities of color along the region's most heavily traveled transportation corridors. In response, SANDAG did not attempt to estimate and disclose how many more cases of cancer the residents of the region should expect in the coming decades because of the Plan, and merely ranked highway segments adjacent to communities as having "low"

[31] An "excess" cancer case is a cancer that would not be expected in the population in the absence of the exposure at issue.

"medium" and "high" potentials for exposure. What these rankings might mean for the residents' health and cancer risk is not explained. SANDAG's summary conclusion that particulate matter-related impacts will be "significant and unavoidable" throughout the life of the 2050 Plan is not a substitute for meaningful analysis and does not cure these deficiencies. In light of the serious nature of the region's existing particulate matter pollution problem and the fact that the 2050 Plan will make the problem continually worse, the EIR's failure to address health risks renders it grossly deficient as an informational document.

Had SANDAG adequately disclosed and analyzed the expected health effects of the increase in particulate matter pollution, the public, stakeholders, experts, and decision makers would have been properly alerted to the Plan's real risks. A clear and plain statement of the health risks presented by the Plan would have afforded the interested parties an opportunity to propose, analyze, and comment on possible programmatic design changes and mitigation that would specifically address the risks identified. The error, therefore, was prejudicial.

The trial court did not reach the issue of the EIR's deficient treatment of particulate matter-related impacts. The People respectfully request this Court to order the trial court to issue a revised judgment and writ requiring SANDAG to provide a meaningful analysis of the expected public health impacts of particulate matter pollution and analyze feasible design changes and mitigation to address the specific impacts identified.

STATEMENT OF THE CASE

I. SUMMARY OF THE ENVIRONMENTAL IMPACT REPORT FOR THE 2050 PLAN

A. The San Diego Region's Serious Air Pollution Problem

Poor air quality results from the release of pollutants in combination with the effects of topographic features (such as hills and ridges) and weather effects (for example, inversions) that prevent dispersion. (AR 8a:2209.) The region's high mesa tops, canyons, and the mountains to the east inhibit dispersal of pollutants. (*Ibid.*) Inversions occur throughout the year. (*Ibid.*)

As the Attorney General noted in her comment letter on SANDAG's Draft EIR, the residents of the San Diego region experience some of the nation's most serious air pollution. (AR 311:25635 [citing American Lung Association, State of the Air 2011, at pp. 11, 13, ranking the San Diego area as having the fifteenth worst particulate matter pollution in the nation].) The problem is caused in substantial part by vehicle emissions. (*Ibid.*) The harm from these pollutants is not necessarily distributed equally throughout the region, but may be more concentrated in communities immediately adjacent to large-scale industrial and commercial development and major transportation corridors, and may specially affect certain segments of the population. (*Ibid.*)

Particulate matter pollution is of special concern in the region. (AR 311:25635.) Particulate matter consists of various types of small particles that can be inhaled into the lungs: particulate matter with a diameter of 10 micrometers or less (PM10), fine particulate matter with a diameter of 2.5 micrometers or less (PM2.5) and particulate matter from the exhaust of diesel-fueled engines (diesel PM). (AR 8a:2211 [Table 4.3-1 (notes)], 2217.) Particulate matter impairs lung function and can exacerbate asthma.

(AR 311:25635; see also 8a:2217, 2218.) "Small particulate matter (2.5 microns in size or less), a component of diesel exhaust, is of particular concern, because it can penetrate deeply into the lungs, bypassing the body's defenses, and can carry carcinogens on the surface of the particles." (AR 311:25635 [Attorney General's comment letter]; see also AR 8a:2217.) Diesel particulate matter is known to the State to causes cancer and has been listed as a "toxic air contaminant" by the Air Resources Board. (AR 311:25638 [Attorney General's comment letter, citing Cal. Code Regs., tit. 27, § 27001 and Cal. Code Regs., tit. 17, § 93000]; see also AR 8a:2218; 8b:4423.)

In response to the Attorney General's comment letter, SANDAG added to the Final EIR some general discussion of the serious health problems that can result from exposure to vehicle emissions, including particulate matter and diesel particulate matter. (AR 8a:2217.) Vehicle emissions can permanently affect children's developing lungs. (AR 8a:2220.) Living near a major road is associated with asthma and other lung problems, especially in children. (AR 8a:2219-20.) As SANDAG disclosed in the Draft and Final EIRs: "Based on receptor modeling techniques, ARB [Air Resources Board] estimated the diesel PM health risk in 2000 to be 720 excess cancer cases per million people in the SDAB [San Diego Air Basin]." (AR 8a:2218.)

The San Diego Air Basin "is designated as a state nonattainment area" for PM10 and PM2.5. (AR 8a:2214.) While this is not clearly explained in the EIR, "state nonattainment" for these pollutants means that (1) the Air Resources Board has established state ambient air quality standards for

PM10[32] and PM2.5;[33] (2) these standards identify outdoor pollutant levels considered safe for the public; (3) the Air Resources Board must designate each region as being in "attainment" or "nonattainment" with these standards, or "unclassified"; and (4) the Air Resources Board has classified the San Diego region as being in nonattainment with these state standards.[34] The region exceeded the state standard for PM10 on 25 days in 2009 and 22 days in 2010, and exceeded the national/state standard for PM2.5 on 4 days in 2009 and 2 days in 2010. (AR 8a:2212 [Table 4.3-2].)

The EIR states that the Air District has been measuring toxic air contaminants at El Cajon and Chula Vista since the mid-1980s, and added three additional monitoring stations (Escondido, Otay Mesa, and downtown San Diego) in 2006. (AR 8a:2215-16.) The EIR does not disclose any site-specific information on particulate matter or diesel particulate matter for these locations. (*Ibid.*)[35]

B. Projected Particulate Matter Pollution Under the 2050 Plan

The "Impacts Analysis" section of the EIR, Section 4.3.4. (AR 8a:2227-76), discloses particulate matter emissions expected under the 2050 Plan. Projected regional on-road emissions of PM10 and PM2.5 are listed in a table, together with projections for carbon monoxide, reactive

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[32] The Air Resources Board has adopted a state-specific standard for PM10 that is more stringent than the federal standard. (See AR 8a:2211 [Table 4.3-1]; see also http://www.arb.ca.gov/research/aaqs/aaqs2.pdf.)

[33] The Air Resources Board has adopted the primary federal standard for PM.2.5. (*Ibid.*)

[34] See Air Resources Board, Air Quality Standards and Area Designations (website), available at http://www.arb.ca.gov/desig/desig.htm.

[35] The EIR states that "*[e]xcluding diesel* particulates . . . , there has been a 72 percent reduction in the ambient environmental cancer risk from air toxics measured in Chula Vista and a 73 percent reduction in El Cajon since 1989 (APCD 2010b)." (AR 8a:2216 [emphasis added]; see also AR 8a:2251.) This reduction does not apparently extend to particulate matter.

organic gases, and nitrous oxides. The levels for particulate matter rise continuously through 2020, 2035, and 2050.

Forecast On-Road Emissions for Particulate Matter (in tons/day)

Year	PM10	PM2.5
2010	4.48	3.11
2020	4.75	3.26
2035	5.69	3.89
2050	6.48	4.42

(AR 8a:2237 [Table 4.3-5].) These projections do not include particulate matter emissions from train operations, port activities, and construction. (AR 8a:2238.) There are no separate projections for diesel particulate matter.

C. SANDAG's Significance Determination

SANDAG used three criteria to evaluate the significance of the 2050 Plan's impacts related to particulate matter.[36] Each is discussed below.

The EIR first asks whether the Plan would "[v]iolate any air quality standard or contribute substantially to an existing or projected air quality violation." (AR 8a:2226; see also AR 8a:2235.) As noted, the Air Resources Board has designed the San Diego region to be in nonattainment of state standards for PM10 and PM2.5. The EIR breaks the discussion into benchmark years – 2020, 2035, and 2050 – and further into the categories of "Regional Growth/Land Use Change" and "Transportation Network Improvements." (See AR 8a:2235-42.) For all years, the EIR states summarily that little can be known at the program level and then jumps to a finding of significance:

[36] The EIR uses other, additional criteria to evaluate impacts to quality impacts. These criteria are not applied to particulate matter emissions. (See AR 8a:2227, 2264.)

> The 2050 [Plan] is a program-level document; detailed, project-specific information is not available to predict either the project-specific air quality impacts of future land use changes, or the effectiveness of existing laws, regulations, and programs in reducing any such project-specific air quality impacts. Given the potential for land use changes in [2020, 2035 and 2050] to cause substantial adverse changes in the significance of air quality impacts, implementation of the 2050 [Plan] would result in air pollutant emission activities related to land use changes that would cause a substantial adverse change in the significance of air quality impacts. This is a significant impact.

(AR 8a:2236, 2239, 2241.)

Concerning transportation network improvements, the EIR notes only that the modeled emissions of PM10 and PM2.5 will be above the 2010 baseline. (AR 8a:2238, 2240, 2242.) For each year, the EIR concludes that "when considered together, the [2020, 2035, and 2050] regional growth/land use changes and transportation network improvements would be a significant impact." (AR 8a:2238, 2240, 2242.) The EIR states that the impacts, further, are "unavoidable." (AR 8a:2010, 2275.)

Next, the EIR asks whether the 2050 Plan would "[r]esult in a cumulatively considerable net increase of emissions of any criteria pollutant for which the project region is in nonattainment under applicable NAAQS [National Ambient Air Quality Standards] or CAAQS [California Ambient Air Quality Standards]." (AR 8a:2226.) As with the previous analysis, the EIR summarily concludes that the impacts are significant in 2020, 2035, and 2050. While the language for each benchmark year varies slightly, the EIR states that for 2020, 2035, and 2050: emissions from regional growth and land use and the significance of those emissions will be determined at the project-level; emission impacts of regional growth and land use change are considered a significant impact at the program level; increases in PM10 and PM2.5 emissions from transportation network improvements would be cumulatively considerable; and considered

together, regional growth, land use changes and transportation network improvements would result in a significant impact. (AR 8a:2245, 2247, 2249.) The EIR summarily deems the significant impacts of the Plan's particulate matter pollution to be "unavoidable" in all years. (AR 8a:2011, 2275.)[37]

Finally, the EIR asks whether the Plan would "[e]xpose sensitive receptors to substantial pollutant concentrations." (AR 8a:2226.) In SANDAG's words, "[l]ocalized concentrations of some criteria pollutants and toxics would result in a significant impact if receptors sensitive to these pollutants (i.e., children and the elderly) are exposed to (i.e., in proximity to) substantial concentrations of these pollutants." (AR 8a:2249.)

As part of the significance determination, the EIR purports to conduct a qualitative analysis to identify the potential for air quality impacts from the planned transportation network to "adjacent low-income and minority communities" (which the EIR refers to as "LIM communities"). (AR 8a:2252.) It assigns each highway segment a relative "air quality index" score of "low," "medium" or "high" based on an additive score that considers average daily traffic, percentage of truck traffic, and traffic levels of service. (See AR 8a:2253 [Tables 4.3-6 and 4.3-7].) Thus, a segment with relatively lower traffic levels, lower percentages of trucks, and more efficient levels of service is assigned a lower score and is ranked "low," while a segment with relatively higher scores in each category would receive a higher score and be ranked "high." (See *ibid*.) The maps provided show that affected communities exist along the region's highway

[37] The EIR makes similar, summary findings concerning cumulative air quality impacts. (AR 8a:3074-76.)

segments throughout the 40-year life of the Plan. (AR 8a:2256, 2257, 2260, 2263 [Figs. 4.3-2, 4.3-3, 4.3-4, 4.3-5].)[38]

According to the EIR, as the 2050 Plan is implemented, the percentage of highway segments that the EIR ranks as "low" and "medium" would decrease, while the percentage it ranks as "high" would increase in each milestone year from 21.70 percent in 2010 to 54.10 percent by 2050. (AR 8a:2255 [Table 4.3-8].) The EIR does not explain what relationship, if any, the "air quality index" scores have to air quality or health effects – for example, cancer rates. According to SANDAG, "[w]hile this analysis generally suggests that both LIM [low-income and minority] and non-LIM communities will potentially be exposed to increases in localized CO [carbon monoxide] and PM [particulate matter] concentrations and concomitant health risks over the horizon years of the plan, health risks to specific communities from specific projects can be determined only through project-specific analysis." (AR 8a:2255.)[39]

The EIR concludes for 2020, 2035, and 2050 that "[t]he level of exposure of sensitive receptors to localized pollutant concentrations, including diesel particulates, can only be determined through project-level analysis once facility designs of individual projects are available. Therefore, at the program level of this EIR, the localized pollutant concentration impact would be considered significant." (AR 8a:2258,

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[38] The EIR contains a section discussing "Environmental Justice" impacts, but the impacts examined do not include particulate matter emissions. (AR 8a:2488, 2499.)

[39] The EIR also attempts to qualify its rankings as they apply to the subcategory of diesel particulate emissions. "Further, the Air Quality Index may overstate future exposure to . . . particulates because CARB [Air Resources Board] regulations . . . are expected to greatly reduce future diesel vehicle emissions." (AR 8a:2255.) The EIR does not attempt to quantify this reduction, however, or clarify whether this means a reduction over existing levels.

2261, 2264; see also 8b:4423 ["CEQA does not require project-level analysis for Program EIRs."] SANDAG again concludes that the significant impacts to sensitive receptors are "unavoidable." (AR 8a:2011, 2276.)

D. Mitigation

Particulate matter-focused mitigation measures in the EIR consist of the following:

- At the *project level*, SANDAG will, and other agencies should, apply appropriate dust control measures;

- At the *project level*, for transportation projects, SANDAG will, and other agencies should, evaluate the possibility of particulate matter hot spots using EPA guidance and consider appropriate mitigation;

- For land use plans and projects, cities in the San Diego region and San Diego County should assess health risks associated with particulate matter during *project-specific* design and CEQA review, and should mitigate them to the extent feasible; and

- During *project specific* design and CEQA review, SANDAG will, and other agencies should, complete health risk assessments for particulate matter using dispersion modeling.

(AR 8a:2270-73].) In response to the Attorney General's comment letter, SANDAG stated that it "does not have legal authority to directly implement additional PM [particulate matter] mitigation measures." (AR 8b:4428.)

II. PROCEDURAL HISTORY AND LEGAL CHALLENGE

A. Nature of the Action and Relief Sought

On January 25, 2012, the People filed their Petition for Writ of Mandate in Intervention. (JA {31} 208-241.) As set out in the petition, the People challenged the EIR's treatment of climate pollution, but their claims were not limited to that issue. Specifically, the People's petition noted that the EIR:

- Does not make clear whether the San Diego Air Basin will comply with the California localized pollution standards, and whether the 2050 Plan will affect the region's ability to meet them and by what date;

- Does not analyze or disclose the magnitude and significance of deterioration in air quality caused by the 2050 Plan, including increases in particulate matter emissions or the risk of cancer regionally or on specially impacted communities; and

- Does not perform an adequate analysis to determine whether the health impacts of exposure to increased particulate matter emissions will be more severe for low-income or minority communities that already suffer from health burdens from existing levels of localized air pollution.

(JA {31} 216-17.) The People sought, among other things, an order "[d]irecting SANDAG and the SANDAG Board of Directors to comply fully with the requirements of CEQA with respect to the 2050 [Plan], and to take any other specific action that may be necessary to bring SANDAG and the SANDAG Board of Directors' determinations, findings, and/or decision into full compliance with CEQA[.]" (JA {31} 224.)

B. Relief Sought in the Trial Court

The People's briefing below was not limited to climate change-related impacts. The People fully briefed the EIR's inadequate treatment of particulate matter pollution. (See, e.g., JA {46} 356-71; JA {64} 783-91.) The People requested that the trial court "invalidate SANDAG's certification of the FEIR and [ ] reverse the decision to adopt the [2050 Plan] that was made based on the FEIR." (JA {64} 796.)

C. Ruling and Statement of Appealability

On December 20, 2012, the trial court entered its Judgment against SANDAG in the consolidated actions for writs of mandate. The Judgment ordered that a writ of mandate shall issue directing SANDAG to set aside its October 28, 2011, certification of the EIR for the 2050 Plan for the

reasons stated in the court's Ruling filed on December 3, 2012. (JA {88} 1132-1134.) Because the Judgment constituted a final judgment, the parties were entitled to appeal. (Code Civ. Proc., § 904.1, subd. (a)(1).) SANDAG filed its notice of appeal on December 26, 2012. (JA {92} 1140-44.) The People filed their cross-appeal on January 23, 2013. (JA {96} 1164-1168.)

The trial court in its Ruling opined that "the real focal point of this controversy is whether the EIR is in conformance with a series of state policies enunciated by the legislative and executive branches since 2005 relating to greenhouse gases." (JA {75} 1053; see also JA {75} 1056.) The trial court concluded that "[b]ecause the court finds it can resolve the case solely on the inadequate treatment in the EIR of the greenhouse gas emission issue, it finds that it need not address the other issues raised by the parties. *Compare Natter v. Palm Desert Rent Review Com*., 190 Cal.App. 3d 994, 1001 (1987); *Young v. Three for One Oil Royalties*, 1 Cal. 2d 639, 647-648 (1934)." (JA {75} 1058.)

The sections of the EIR that evaluate greenhouse gas pollution are, however, separate from the sections that address particulate matter pollution; the errors that SANDAG committed in analyzing these distinct pollutants are different; and the remedy related to each violation must be specific to that violation. Therefore, the trial court erred in declining to reach the People's assertions of additional CEQA violations. As CEQA provides, both a trial court and an appellate court addressing a CEQA petition "shall specifically address each of the alleged grounds for noncompliance." (Pub. Resources Code, § 21005, subd. (c).) This section was added to CEQA in 1994, after the *Natter* and *Young* cases cited by the trial court were decided. (Stats. 1994, c. 1230, § 2, eff. Sept. 30, 1994.)

The People's cross-appeal seeks a remedy for SANDAG's failure adequately to analyze particulate matter-related pollution in the EIR. To

fully adjudicate the People's alleged grounds for noncompliance with CEQA, this Court, as part of its de novo review of SANDAG's certification of the EIR,[40] should affirm that part of the judgment below regarding greenhouse gas emissions issues (see Part I of this brief, above) and, at the same time, revise the judgment to direct the trial court to issue a remedy for SANDAG's additional errors established below.

STANDARD OF REVIEW

The People incorporate the Standard of Review set out in Part I of this brief.

ISSUES PRESENTED

I. DOES THE EIR SERVE CEQA'S INFORMATIONAL PURPOSES WHERE IT CONTAINS NO REASONED ANALYSIS OF THE EFFECT THAT PROJECTED INCREASES IN PARTICULATE MATTER POLLUTION WILL HAVE ON REGIONWIDE PUBLIC HEALTH, INCLUDING THE REGION'S ALREADY ELEVATED CANCER RATES?

II. DOES THE EIR SERVE CEQA'S INFORMATIONAL PURPOSES WHERE IT CONTAINS NO REASONED ANALYSIS OF THE EFFECT THAT PROJECTED INCREASES IN PARTICULATE MATTER POLLUTION WILL HAVE ON ADJACENT COMMUNITIES THAT MAY BE SPECIALLY AFFECTED AND PARTICULARLY SUSCEPTIBLE TO HARM?

III. DOES THE EIR SATISFY CEQA'S REQUIREMENT TO ANALYZE ALL FEASIBLE DESIGN CHANGES AND MITIGATION THAT MIGHT LESSEN THE IMPACT OF PARTICULATE MATTER POLLUTION WHERE THE EIR SIMPLY DEFERS MITIGATION TO THE PROJECT LEVEL?

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[40] (See *Cal. Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2013) 218 Cal.App.4th 1171, 1192 [noting that "because an appellate court's role in a CEQA case is essentially the same as the trial court's . . . it would serve no useful purpose to remand the case" to the trial court; reaching substance of claim not addressed below].)

ARGUMENT

I. INTRODUCTION

As set forth below, the EIR fails as an informational document in its treatment of particulate matter pollution. A careful reader would learn only that particulate matter poses serious health risks and particulate matter pollution will go up as the 2050 Plan is implemented. How the increase might affect the region's cancer rate – which in 2000 already reflected 720 excess cancer cases from exposure to particulate matter pollution – is not analyzed and disclosed. While the EIR discloses that the conditions leading to particulate matter pollution will increase along substantial stretches of the region's freeways, what this means to the communities adjacent to those freeways, and those communities' children, elderly, and asthma suffers, is also unknown. The EIR's summary conclusion that the impacts are significant and unavoidable cannot substitute for a full analysis of these impacts. The EIR also fails to analyze feasible program-level design changes and mitigation that could lessen the particulate matter pollution impacts (had they been properly identified).

To ensure that the EIR serves its purpose to inform the public and decision makers, and to ensure government accountability before the Plan is implemented, the Court should require the trial court to issue an order requiring SANDAG to correct the EIR's deficiencies related to particulate matter pollution at the same time it corrects the document's deficiencies related to climate change.

II. THE EIR FAILS AS AN INFORMATIONAL DOCUMENT IN ITS TREATMENT OF PARTICULATE MATTER POLLUTION

A. An Adequate EIR Ensures Informed Decision Making and Government Accountability

An adequate EIR allows the public and decision makers to fully explore design changes, alternatives, and mitigation that might lessen the proposed project's significant impacts (see Cal. Code Regs., tit. 14, § 15121, subd. (a)), and gives the lead agency sufficient information "to balance, as applicable, the economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits, of a proposed project against its unavoidable environmental risks when determining whether to approve the project." (Cal. Code Regs., tit. 14, § 15093, subd. (a); see also *id.*, § 15043, subd. (b).) It must contain "sufficient detail to help ensure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug." (*Kings County Farm Bur.*, *supra*, 221 Cal.App.3d at p. 733.)

To serve these purposes, an EIR must "be organized and written in a manner that will be *meaningful and useful* to decision makers and to the public." (Pub. Resources Code, § 21003, subd. (b) [emphasis added].) Bare conclusions of the agency cannot substitute for facts and analysis. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1197.) "'An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.'" (*Ibid.* [quoting *Assn. of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1390].)

B. SANDAG's Failure to Engage in a Reasoned Analysis of the Particulate Matter Emissions Data Thwarts CEQA's Purposes and Constitutes a Prejudicial Abuse of Discretion

1. The EIR Contains No Reasoned Analysis of Impacts of the Plan's Regionwide Increases in Cancer-Causing Particulate Matter

SANDAG disclosed that PM10, PM2.5 and perhaps diesel particulate matter[41] would increase over the life of the Plan by a specified number of tons per day. (See AR 8a:2237 [Table 4.3-5].) The EIR states that the region currently is a state nonattainment area for PM10 and PM2.5 and has had a certain number of out-of-compliance days in recent years. (AR 8a:2212 [Table 4.3-2], 2214.) The EIR also discloses that particulate matter can cause serious health effects, such as asthma; that diesel particulate matter causes cancer; and that levels of particulate matter existing in 2000 were already causing 720 excess cancer cases per million people exposed. (See, e.g., AR 8a:2217-18.) A careful reader of the EIR would learn that there is currently a particulate matter pollution problem in the region and that, under the Plan, that problem will get worse in some unknown, unspecified way. But that is roughly *all* the reader of the EIR would know about regionwide particulate matter impacts – other than that SANDAG had found those impacts to be significant and unavoidable. (AR 8a:2010-2012.)

SANDAG's cursory treatment of the impacts of regionwide particulate matter pollution, which fails to put the raw data into any meaningful context, is not sufficient to satisfy CEQA's informational requirements. SANDAG's error is illustrated by analogy to two cases –

[41] (AR 8a:2258, 2261, 2264.)

Bakersfield Citizens, supra, 124 Cal.App.4th 1184, and *Keep Berkeley Jets, supra*, 91 Cal.App.4th 1344.

In *Bakersfield Citizens*, the city's EIRs for two shopping centers each noted that the project examined would contribute to local and regional pollution and summarily concluded that the project's impacts were significant and unavoidable. (*Bakersfield Citizens, supra*, 124 Cal.App.4th at p. 1219.) The court agreed with the petitioners that the documents "omitted relevant information when they failed to correlate the identified adverse air quality impacts to resultant adverse health effects." (*Ibid.*) The court stated that after reading the EIRs, "the public would have no idea of the health consequences that result when more pollutants are added to a nonattainment basin." (*Id*. at p. 1220.) The court ordered the lead agency on remand to identify and analyze "the health impacts resulting from the adverse air quality impacts . . . ." (*Ibid.*)

In *Keep Berkeley Jets*, the Port of Oakland proposed to expand an airport to provide for increased capacity of both cargo and passenger operations. (*Keep Berkeley Jets*, *supra*, 91 Cal.App.4th at p. 1349-50.) The project would increase the number of aircraft, thereby increasing toxic air contaminants from aircraft engines and ground support. (*Id*. at p. 1363-63.) The EIR acknowledged that toxic air contaminants would increase, and that these same contaminants cause adverse health effects, including cancer. (*Id.* at p. 1364.) The EIR estimated the amount of toxic air contaminants that would be emitted by the project, but then concluded that "the environmental effects of TAC increases due to the [airport project] are unknown because there is no approved, standardized protocol for determining the risks . . . ." (*Ibid.*) The EIR simply stated that the "public health impact of the TAC [toxic air contaminant] emissions was 'unknown.'" (*Id*. at p. 1367.) The court held that the Port was required to undertake a "conscientious effort" to "collect additional data or to make

further inquiries of environmental or regulatory agencies having expertise in the matter" – which it failed to do. (*Id.* at 1370.)

The court in *Keep Berkeley Jets* also rejected the Port's argument that the absence of a health risk assessment was excusable because in approving the EIR, the decision makers "found that the effect of TACs [toxic air contaminants] would be significant but that overriding considerations warranted proceeding with the project anyway." (*Keep Berkeley Jets, supra*, 91 Cal.App.4th at p. 1371.) "The EIR's approach of simply labeling the effect 'significant' without accompanying analysis of the project's impact on the health of the Airport's employees and nearby residents is inadequate to meet the environmental assessment requirements of CEQA." (*Ibid.*)

On remand, SANDAG should be required to analyze how the 2050 Plan's expected increases in particulate matter will affect the region's compliance with PM10 and PM2.5 standards. For example, SANDAG should be required to discuss whether and to what extent the Plan will hinder the ability of the region to change its nonattainment designation, and how many days in future years the region would be expected to be out of compliance with particulate matter air quality standards. Further, SANDAG should be required to estimate changes in health impacts that can be expected as particulate matter rises – for example, how many additional excess cancer cases the region's residents should expect to experience in future years as particulate matter pollution increases. If, as the EIR states, the Air Resources Board was able to estimate cancer rates for past years (AR 8a:2216, 2218, 2251), then SANDAG (or the Air Resources Board on SANDAG's request) should be able to do the same for future years based

on projected emissions.[42] Without these types of analyses of the raw data, the document, while full of information, will remain uninformative to the public and decision makers.

2. The EIR Contains No Reasoned Analysis of the Plan's Special Impacts on Sensitive Communities Near Freeways and Highways

CEQA requires that the environmental impacts of a project be evaluated in context. (Cal. Code Regs., tit. 14, § 15064, subd. (b) [noting that the significance of an activity may vary with the setting].) The context of an action or a specific impact may include the sensitivity of the environment or of the persons affected; some affected persons may be more vulnerable than the general population (such as children, the elderly, or persons whose health already is compromised). In addition, some of those affected may already be subject to higher pollution burdens and thus more sensitive to even seemingly small incremental increases in that burden. (See, e.g., *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1025 [holding that noise already present at a school might affect determination of what amount of additional noise should be considered significant]; see also *Kings County Farm Bur*., *supra,* 221 Cal.App.3d 692, 718 [rejecting agency's determination that air pollution was not significant because "ratio" of project's pollution to existing pollution was small; question was whether additional pollution was significant in light of existing air quality problems].)

The EIR identifies "sensitive communities already experiencing high levels of pollution and related diseases" as "sensitive receptors." (AR 8a:2011-12; see also 8a:2252, 2272-73.) The EIR promises to answer the

[42] SANDAG's summary assertion that "an accurate cancer risk analysis, compared to baseline, can only be prepared on a project level basis" (AR 8b:4424) is not supported by any evidence.

question whether the Plan will "expose sensitive receptors to substantial pollutant concentrations" (AR 8a:2249-69), but the document does not deliver any meaningful analysis on this point.

As noted above, the EIR discloses that (1) there are low-income and minority communities adjacent to major roads throughout the region; (2) major roads – sources of particulate matter, including carcinogenic particulate matter – run through and adjacent to these communities; (3) a community's proximity to major roads increases the likelihood of exposure to localized concentrations of vehicle emissions, especially from diesel truck traffic, containing particulate matter; and (4) the factors that lead to increases in particulate matter (traffic, truck percentages, and congestion), when combined into an "index," show that the potential for particulate matter exposures in these communities will increase. While the EIR on its surface might appear detailed due to use of a multi-variable index and numerous color maps (AR 8a:2255 [Table 4.3-5], 2256, 2257, 2260, 2264 [Figures 4.3-2 – 4.3-5]), in fact, the EIR provides only this information: particulate matter pollution will likely get substantially worse on a substantial number of freeway miles for a substantial number of adjacent communities. How the increase might be expected to affect the health of those living in the adjacent communities is not even preliminarily explored.

As with its treatment of regionwide particulate matter, the EIR presents some facts related to the pollution, bypasses an analysis of how particulate matter pollution will affect the communities along the Plan's major roads, and summarily concludes that the impacts are significant and unavoidable. The EIR's lack of meaningful analysis precludes, for example, any discussion of mitigation or alternatives that might lessen impacts to residents that are particularly affected by particulate matter pollution, including diesel particulate matter from projected truck traffic, and sweeps under the rug the question whether the regionwide benefits of

the program outweigh any harms that may focused only on certain communities. Such a shortcut approach is antithetical to CEQA's public disclosure and informed decisionmaking purposes. (See *Keep Berkeley Jets, supra*, 91 Cal.App.4th at p. 1371; see also *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829-30, [noting that if "important ramifications" of project are not disclosed, such omission "frustrates one of the core goals of CEQA"].)

On remand, SANDAG should be required to complete the analysis that it began in the EIR and provide a meaningful analysis of what health impacts should be expected from the 2050 Plan in communities along the region's major transportation corridors from projected increases in particulate matter pollution. SANDAG might, for example, attempt to correlate its index categories of "high," "medium," and "low" potential for emissions with expected future emission levels, e.g., by correlating current emissions levels in sample communities in each of these index categories.[43] It might also discuss current health effects in communities that are projected to move into a higher index category and discuss whether that change in status, unless mitigated, would be expected to adversely affect rates of asthma, other respiratory illnesses or cancer. The level and type of analysis must be sufficient to serve CEQA's informational purposes, but SANDAG will, of course, be subject to a "rule of reason" (*Al Larson Boat Shop, supra,* 18 Cal.App.4th at pp. 741-42]) and will satisfy CEQA when it

[43] As the EIR notes, the local Air Pollution Control District has a number of monitoring stations spread throughout the San Diego region. (See, e.g., AR 8a:2212, 2213 [Fig. 4.3-1]; see also San Diego Air Pollution Control District, Ambient Air Quality Network Plan (2012), Section 9 (PM2.5), Section 10 (PM10), available at www.sdapcd.org/air/reports/2012_network_plan.pdf.)

provides a "good-faith effort at full disclosure." (Cal. Code Regs., tit. 14, § 15003, subd. (i).)

3. The EIR Improperly Defers Mitigation to the Project Level

CEQA provides that "it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects . . . ." (Pub. Resources Code, § 21002.) Thus, "[t]he purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided." (*Id.*, § 21002.1, subd. (a).)

In four pages, the EIR summarily addresses mitigation for regionwide particulate matter pollution and particulate matter pollution's special impacts to sensitive receptors. (AR 8a:2270-73). Except for mandating dust control measures during construction, the EIR provides only that the lead agency should assess and impose project-specific mitigation at the project level. (*Ibid.*) The EIR further states that SANDAG "has no legal authority to modify local general plans or development projects" (AR 8a:2273) and "does not have legal authority to directly implement additional PM mitigation measures." (AR 8b:4428.) The EIR finds that the impacts of particulate matter pollution remain significant post-mitigation. (AR8a:2010-12, 2274-76.)

In fact, as discussed in Part I, Argument, Section III.D., SANDAG has substantial power to influence and create incentives for changes to land use and general plans and to make design changes and impose mitigation relating to transportation projects. SANDAG's summary refusal to explore these options to reduce the impacts of particulate matter pollution renders

the document prejudicially insufficient as an informational document. (See *City of Marina, supra*, 39 Cal.4th 350, 356 [holding that "[a]n 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."]) Depending on what an adequate analysis of impacts might show, available and appropriate mitigation might include creating and contributing to a regional fund to underwrite mitigation projects (for example, planting vegetation or building other barriers that might screen particulate matter pollution, purchasing particulate matter filters for certain residents in highly impacted communities, or subsidizing early truck retrofits). (See *id.* at pp. 359-60 [rejecting university's argument that mitigation of off-site impacts of campus expansion was infeasible; holding that university could voluntarily contribute funds towards mitigation].) Moreover, SANDAG may consider whether certain individual transportation projects in the Plan should be modified, e.g., whether certain transportation corridors that present less potential for harm to neighboring communities should be favored for truck traffic over other corridors that present a higher potential for harm.

SANDAG will likely respond that the 2050 Plan EIR is a program-level document, but, as discussed in Part I, above, this designation is no excuse for failing to explore design changes and mitigation that are feasible at the program level. Indeed, a program EIR "[p]rovide[s] an occasion for a more exhaustive consideration of effects and alternatives than would be practical in an EIR on an individual action" and "[e]nsure[s] consideration of cumulative impacts that might be slighted in a case-by-case analysis." (Cal. Code Regs., tit. 14, § 15168, subd. (b)(1)-(2).) Properly done, a program EIR "[a]llow[s] the Lead Agency to consider broad policy alternatives and programwide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative

impacts . . . ." (*Id.*, subd. (b)(4).) On remand, SANDAG should be required to fully consider alternatives and mitigation that could lessen particulate matter pollution, and the effects of this pollution, before the elements of the Plan are built and flexibility to create healthier communities for the region's current and future residents is lost.

CONCLUSION

In order to prevent the "stubborn problem" of particulate matter pollution from being "swept under the rug" (see *Kings County Farm Bur., supra*, 221 Cal.App.3d at 733), this Court should rule in favor of the People in this cross-appeal and direct the trial court below to issue a revised judgment and writ. The judgment should require SANDAG to (1) fully disclose how projected increases in particulate matter pollution may significantly affect public health; and (2) analyze what feasible design changes or mitigation may be available at the program level to mitigate the public health impacts identified.

Dated: October 2, 2013

Respectfully submitted,

KAMALA D. HARRIS
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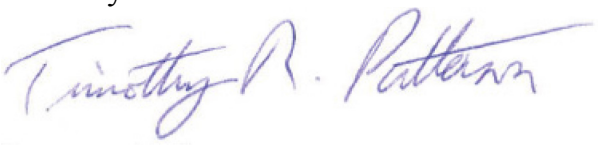

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CERTIFICATE OF COMPLIANCE

I certify that the attached People of the State of California's Combined Respondent's Brief and Cross-Appellant's Opening Brief uses a 13 point Times New Roman font and contains 21,759 words.

Dated: October 2, 2013

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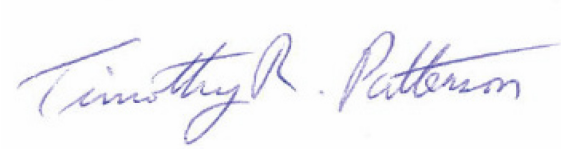

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DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **Cleveland National Forest Foundation v. San Diego Association of Government Board of Directors**

Case No.: **D063288**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On October 3, 2013, I served the attached: **PEOPLE OF THE STATE OF CALIFORNIA'S COMBINED RESPONDENT'S BRIEF AND CROSS-APPELLANT'S OPENING BRIEF** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 3, 2013, at San Diego, California.

L. Fraley
Declarant

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Signature

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