IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

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

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 CROSS-APPELLANT'S REPLY BRIEF

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INTRODUCTION

In its Combined Reply Brief and Respondents' Brief on Appeal (ARB/XRB), the San Diego Association of Governments (SANDAG) ascribes to the People of the State of California, ex rel. Kamala D. Harris, Attorney General (the People) a variety of views and arguments that the People do not hold and have not made. SANDAG claims, for example, the People seek to compel SANDAG to adopt a version of the 2050 Regional Transportation Plan and Sustainable Communities Strategy (2050 Plan or Plan) that would "disregard" the region's transportation needs.[1] And, according to SANDAG, the People expect a "project-level analysis" for every one of the hundreds of individual transportation projects "programmed" in the 2050 Plan and the thousands of land use projects that may be affected by the region's transportation infrastructure investments.[2]

In fact, the People's objective in filing this action is not to usurp SANDAG's judgment or discretion. The People appreciate and respect the difficult choices and tradeoffs that SANDAG and every other regional transportation planning agency must make in adopting a Regional Transportation Plan. Neither do the People expect SANDAG to do the impossible in addressing the 2050 Plan's potential effects. What the People have requested, and what CEQA requires, is that SANDAG make a reasonable effort to prepare an Environmental Impact Report (EIR) that adequately discloses and analyzes the Plan's significant climate change and public health impacts and examines feasible design changes, mitigation, and alternatives that could reduce those impacts. The People's objective, grounded squarely in CEQA, is to ensure a transparent public process that leads to a fully informed decision on the 2050 Plan.

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[1] ARB/XRB at pp. 3, 38.
[2] ARB/XRB at pp. 27, 30, 61, 74-75.

As set out in the People's Respondent's Brief and Cross-Appellant's Opening Brief (RB/XAOB), the San Diego region already has a serious particulate matter pollution[3] problem that is causing elevated rates of respiratory illnesses, asthma, and cancer.[4] The EIR discloses that particulate emissions will rise steadily under the 2050 Plan.[5] But the EIR fails to analyze what this rising pollution means for the health of the region's millions of current and future residents, and, in particular, for the health of the many low-income and minority communities located along the region's major highways that already face high pollution burdens. The EIR thus deprives the public – and the decision makers who are charged with acting in the public's interest – of critical information that would drive them to demand design changes, mitigation and alternatives to reduce the Plan's pollution-related impacts.

Further, the EIR summarily disclaims SANDAG's ability to take any substantial action at the 2050 Plan level that could reduce particulate matter-related pollution and its public health impacts. According to the EIR, the discussion of mitigation for particulate matter pollution must wait for future project-specific environmental review (if and when such review occurs).[6] Under the CEQA Guidelines, however, the very purpose of a plan- or program-level document, is to "consider broad policy alternatives and programwide mitigation measures at an early time when the agency has

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[3] SANDAG at times refers generally to "air quality impacts" and "toxic air contaminants." (See, e.g., ARB/XRB at pp. 71-73, 77-81.) This brief addresses only *particulate matter pollution* (which includes the TAC of diesel particulate matter pollution). Particulate matter pollution is the sole subject of the People's cross-appeal.

[4] RB/XAOB at pp. 56-58.

[5] Administrative Record (AR) 8a:2237 [Table 4.3-5], 2238.

[6] See RB/XAOB at p. 43 [setting out circumstances where project-specific review will not be required].

greater flexibility to deal with basic problems or cumulative impacts[.]"[7] SANDAG's failure to assume its obligations as a lead agency with regional planning responsibilities runs directly counter to the purpose of CEQA.

Stripped of extraneous argument, SANDAG advances four main responses to the People's claims. First, SANDAG argues that petitioners waived their non-greenhouse-related claims.[8] Second, SANDAG argues that analyses that could shed light on the 2050 Plan's potential impacts to public health, including impacts to sensitive communities, are impossible at the plan level and can be conducted only at the individual transportation and development project level.[9] Third, SANDAG asserts that effective mitigation for particulate matter pollution impacts can be considered only at the project level[10] and, in any event, it was the public's duty to devise mitigation measures and prove to SANDAG that each measure was feasible.[11] Fourth, SANDAG contends that the programmatic nature of the EIR authorizes SANDAG's almost complete deferral of any analysis of the 2050 Plan's public health impacts and mitigation to future project-specific CEQA documents.[12]

None of these arguments has merit. First, the People have not waived the right to pursue their claims related to particulate matter pollution. Once the trial court made clear that it would base its decision only on the greenhouse gas-related claims and would not reach the People's particulate matter-related claims, the People were not required to re-assert and re-argue those claims to avoid forfeiture. Second, SANDAG's assertion that it is

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[7] Cal. Code Regs., tit. 14, § 15168, subd. (b)(4).
[8] ARB/XRB at pp. 62-71.
[9] ARB/XRB at pp. 75-77, 81-82.
[10] ARB/XRB at pp. 83-87.
[11] ARB/XRB at p. 84.
[12] ARB/XRB at pp. 74-75, 78, 80.

impossible to conduct any type of plan-level analysis of the 2050 Plan's public health impacts caused by particulate matter pollution is not supported by the record. And, at the very least, SANDAG had an obligation to check with relevant experts, including expert agencies (such as the Air Pollution Control District), and make a reasonable effort to educate itself about what risk assessment methodologies are available. Third, SANDAG had an affirmative duty to disclose and analyze plan-level mitigation for the 2050 Plan's projected increases in particulate matter pollution, which the EIR found to be significant,[13] rather than simply deferring formulation to future project-specific review. Again, SANDAG's assertions of impossibility are not supported. Moreover, SANDAG cannot shift to the public a responsibility that, by law, it is required to carry out as a lead agency under CEQA. Finally, the fact that SANDAG deemed its EIR to be a "program EIR" does not excuse it from its legal obligation to adequately analyze the Plan's particulate matter pollution impacts. Where, as in this case, the elements of the program or plan are specific and not overly contingent, plan-level analysis of impacts and mitigation is feasible and reasonable, and plan-level analysis would not be speculative but instead would provide meaningful information to the public and decision makers, the lead agency cannot simply defer such analysis to future project-specific review.

For these reasons, the People respectfully request that this Court 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.

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[13] AR 8a:2010-2011.

ARGUMENT

I. SANDAG'S WAIVER ARGUMENT IS NOT SUPPORTED BY LAW

A. Introduction

In a CEQA matter, the appellate court's role is the same as the trial court's: the appellate court reviews the agency's action for abuse of discretion. (*Save Our Peninsula Com. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 116-17.)[14] "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (*Id.* at p. 117 [quoting Pub. Resources Code, § 21168.5].) Because an appellate court does not rely on or defer to the trial court's decision, the trial court's refusal to reach a claim properly presented to it does not preclude the appellate court from deciding the claim on its merits in the first instance. (See *ibid.*) Stated another way, the question before this Court on the People's cross-appeal is not whether the trial court erred in declining to rule on the People's particulate matter pollution claims, even though the trial court was required to do so,[15] but whether SANDAG's failure to analyze and mitigate the Plan's particulate matter pollution impacts constituted an abuse of discretion. In CEQA cases, "[t]he appellate court reviews the agency's action, not the trial court's decision . . . ."

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[14] In their RB/XAOB, the People cited *Cal. Building Industry Assn. v. Bay Area Air Quality Management District* (2013) 218 Cal.App.4th 1171, 1192 for this accepted legal proposition. Review was granted on a different issue on November 26, 2013, Case No. S213478. *Cal. Building Industry Assn. v. Bay Area Air Quality Management District* (2013) 312 P.3d 1070 [164 Cal.Rptr.3d 552].)

[15] See Pub. Resources Code, § 21005, subd. (c) [providing that "any court" that finds "that a public agency has taken an action without compliance with [CEQA], shall specifically address each of the alleged grounds for noncompliance."]

(*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427.)

In an attempt to prevent this Court from reaching the merits of these claims, SANDAG argues that the People have waived their right to pursue their cross-appeal and acquiesced to a trial court ruling that addressed only their greenhouse gas-related claims because the People "at no time objected to [the tentative] decision or attempted to pursue these issues at the time of the hearing or after." (ARB/XRB at p. 62.) The doctrine of waiver does not, however, require a party in an administrative record case continually to re-assert and re-argue a cause of action that the party has clearly and fully briefed and that the trial court has clearly indicated it does not wish to consider and will not rule upon. The Court should reject SANDAG's attempts to graft objection requirements that apply only to Statement of Decision cases to this matter, where the trial court expressly declined to issue a Statement of Decision. As set out below, the People have done everything legally required to preserve their claims concerning the EIR's inadequate treatment of particulate matter pollution, and this Court should therefore reach the merits of these claims.

B. Procedural background

In its briefs before the trial court, the People argued that the EIR was defective for, among other things, failing adequately to disclose and analyze the serious health impacts on overburdened and sensitive populations caused by the Plan's localized pollution (including cancer-causing diesel particulate matter) and to propose and evaluate feasible mitigation for those impacts, once they were identified. (Joint Appendix (JA) {46} 356-71; JA {64} 783-91.) In its November 16, 2012 tentative ruling, the trial court acknowledged that petitioners had asserted these claims. (JA {70} 991.) The trial court made it patently clear in its tentative ruling, however, that:

- The court had limited resources to deal with this complex case (JA {70} 987);
- In the court's view, the greenhouse gas-related claims were "the real focal point of this controversy" (*id*. at 991); and
- The court would rule only on the greenhouse gas-related claims and no other claims. (*Id.* at 995).

At the November 30, 2012 hearing, the parties focused their legal arguments on the greenhouse gas-related claims. (Reporter's Transcript (RT) Vol. 1 (Nov. 30, 2012).) At the hearing, the People requested a Statement of Decision. (*Id.* at 58:4-7.) In its December 3, 2012 ruling, the trial court declined to issue a Statement of Decision, reasoning that "there was no 'trial' of this matter as contemplated by [Code of Civil Procedure] section 632" but only a "complex motion argument." (JA {75} 1049.) The trial court's ruling mirrored the tentative ruling in all relevant respects. (See JA {75} 1046-48, 1053-58.)

Petitioners objected to the proposed writ and judgment prepared by SANDAG and offered an alternate proposed writ and judgment (see JA {84}, {85}, {86}, {87}), but in doing so, did not attempt to re-open the merits of their non-greenhouse gas-related claims. The court signed SANDAG's proposed writ and proposed judgment. (JA {90} [Minute Order]; JA {89} [Writ]; JA {88} [Judgment].)

C. Analysis

SANDAG cites a number of waiver cases involving non-CEQA causes of action and miscellaneous procedural matters. (See, e.g., ARB/XRB at p. 64 [string cite].) None is analogous to this case. Case law that is on point, discussed below, establishes that the People at every step properly preserved their particulate matter pollution claims for consideration on appeal.

1. The objection process triggered by a "Statement of Decision" does not apply to this case

SANDAG relies primarily on *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885 (see ARB/XRB at pp. 64-65) to argue that the People were required to file an objection to the trial court's tentative ruling. *Porterville* is not on point. In that case, the petitioner filed a petition for writ of mandamus, alleging violations of CEQA and the Subdivision Map Act (Map Act). (*Id.* at 889.) The trial court held in favor of the petitioner on the CEQA claim, but its decision was completely silent concerning the petitioner's Map Act claim. The appellate court found against the petitioner on its CEQA claims and, further, determined that the petitioner "forfeited its [Map Act] claim by failing to file any objections to the tentative *statement of decision* or otherwise alerting the trial court of its failure to expressly rule on this issue." (*Id.* at p. 891 [emphasis added].)

The outcome of *Porterville* is consistent with the requirements of the Statement of Decision process. Under the California Rules of Court, there is formal process to "serve and file objections" to a proposed Statement of Decision, and the court may hold a hearing on the objections. (Cal. Rules of Court, § 3.1590, subds. (g), (k).) Further, under the Code of Civil Procedure and case law, if a party fails to object to an omission or ambiguity in the proposed Statement of Decision, the appellate court will infer on appeal that the trial court decided in favor of the prevailing party as to the relevant facts or issues. (Code Civ. Proc., § 634; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-34.) In *Porterville*, since the trial court was silent in its Statement of Decision about the Map Act claim, the appellate concluded that "the trial court impliedly rejected the [Map Act] claim." (*Porterville, supra*, 157 Cal.App.4th at p. 911.)

Where there is no Statement of Decision but only an order or ruling, there is no "appropriate method" to re-assert legal arguments made in a party's brief. (*See Doers v. Golden Gate Bridge, Highway and Transportation Dist.* (1979) 23 Cal.3d 180, 184, fn. 1). As this Court has held, the procedures and inferences of the Statement of Decision process do not apply to other types of pre-judgment rulings and orders. (*Angelica Textile Services, Inc. v. Park* (2013) 220 Cal.App.4th 495, 503-04 [rejecting waiver argument; holding that pre-judgment "order granting summary adjudication is not a determination of disputed factual issues and does not require that parties object to any defects in a trial court's ruling" or move for reconsideration in order to preserve claims on appeal].)[16] Accordingly, in this case, which did not involve disputed facts or the Statement of Decision process, the People were not required to object to the trial court's decision that it would not reach its localized pollution claims in order to preserve those claims on appeal.

2. Even if the trial court had fashioned its ruling as a "Statement of Decision," the People would not have been required to object to preserve their particulate matter pollution claims

Even if the trial court had followed a Statement of Decision process – which it did not – the People still would not have been required to re-assert their particulate matter pollution claims to preserve them for appeal. In the *Porterville* case, the Statement of Decision was at best ambiguous as to whether that the trial court had failed to reach, or rather had ruled against the petitioner's Map Act claim. (*Porterville, supra*, 157 Cal.App.4th at p. 912.) To avoid an inference that the trial court had ruled against the petitioner and any implied findings necessary to support that ruling, the

[16] Indeed, the People likely would not have had any legal basis for seeking reconsideration. (See Code Civ. Proc., § 1008.)

petitioner was required to seek clarification (e.g., by objecting to the Statement of Decision). (*Ibid.*; see also Code Civ. Proc., § 634.)

As this Court has held, there is no requirement to seek clarification where the Statement of Decision clearly sets out the trial court's reasoning on an issue or claim. (*U.S. Automobile Assn. v. Dalrymple* (1991) 232 Cal.App.3d 182.) In *Dalrymple*, an insurer appealed the award of attorney's fees to its insured. (*Id.* at p. 185.) The Court rejected the argument that the insurer waived its right to appeal because it failed to file specific objections to the Statement of Decision concerning the fee award. (*Ibid.*) This Court reasoned that no objection was required because the statement clearly expressed the trial court's legal conclusion that the insured was entitled to attorney's fees. (*Id.* at p. 186.)

In this case, the trial court expressly stated that it was not reaching the merits of the People's non-greenhouse-related claims, concluding that it was not legally required to do so. (JA {75} 1058.) Accordingly, there is no occasion to imply that, counter to this plain language, the trial court ruled against the People on their particulate matter pollution claims. Thus, even if the Statement of Decision process applied below, the People would not have been required to object to preserve their particulate matter pollution claims.

3. No other action or inaction by the People could have effected waiver

Other than failing to file a formal objection to the tentative ruling, which the People were not required to do, SANDAG has identified no action or inaction by the People that could have effected waiver. SANDAG has cited no case that holds that a legal argument made in a trial court brief that is not reiterated at the subsequent oral argument is waived. On the People's review, there is no such rule, and certainly no requirement that a party must at oral argument revisit every issue in its brief. In practice,

courts affirmatively discourage parties from repeating arguments made in the briefs.

The People acknowledge that a party can take action at a trial court hearing that can result in forfeiture or abandonment of a claim. For example, in *Walter E. Heller Western Inc. v. Tecrim Corp.* (1987) 196 Cal.App.3d 149, the plaintiff waived certain claims by "declar[ing] to the trial court it would abandon its other causes of action if a judgment were entered in its favor on the motion for summary judgment …." (*Id.* at p. 155, fn. 1.) In this case, in contrast, the People did not suggest that if the trial court were to rule in their favor on the on the greenhouse-related claims, the People would abandon their other particulate matter-related pollution claims. Thus, nothing that transpired before the trial court constituted waiver.

II. THE COURT SHOULD REJECT SANDAG'S ASSERTION THAT ANALYSIS OF THE 2050 PLAN'S PUBLIC HEALTH IMPACTS IS IMPOSSIBLE

A. Summary of the CEQA violation

As the People set out in their Opening Brief, SANDAG's EIR contains no reasoned analysis of the public health impacts to the region or to sensitive communities caused by the 2050 Plan's projected increases in particulate matter. (RB/XAOB at pp. 69, 72-75.) Concerning particulate matter generally, a reader would learn only that the region currently has a very serious particulate matter pollution problem and that, under the Plan, the problem will get worse in some unknown, unspecified way. (*Id.* at pp. 58-59.)[17] A reader would not know, for example, whether and to what

[17] The EIR projects that small and fine particulate matter pollution from vehicles will increase steadily throughout the life of the Plan; it contains no separate projections for diesel particulate matter. (See AR 8a:2237, Table 4.3-5.) The EIR excludes diesel particulate matter from its (continued…)

extent the region's particulate matter-related cancer rates have changed since 2000 (see *id.* at p. 57 [citing AR 8a:2218]), and whether and to what extent cancer rates will be higher in future years under the Plan.

Concerning the potential for the Plan to particularly affect communities near the region's major highways, the Final EIR created an "index" that ranked the region's highway segments based on factors (such as percentage of truck traffic) that are likely to adversely affect local air quality. (RB/XAOB at p. 61 [citing 8a:2252-53].) But what the labels of "high," "medium," and "low" mean as a practical matter is not explained. ("High" risk of serious health effects? "High" rates of childhood asthma? "High" levels of cancer-causing emissions? "High" compared to what benchmark?) And how a change from a lower to a higher ranking over time will affect the health of those living in the adjacent communities is not even preliminarily explored. (RB/XAOB at p. 73.) Thus, even with the index, the EIR provides only this information: San Diego's particulate matter pollution will likely get substantially worse on a substantial number of freeway miles for a substantial number of adjacent communities.

As the People noted in their Opening Brief (RB/XAOB at pp. 70-71), the EIR runs afoul of the rule in *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1219-20, which requires a lead agency to correlate a project's adverse air quality impacts to expected adverse health impacts, and the rule in *Keep Berkeley Jets Over the Bay Com. v. Board of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1370-

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(…continued)
statements about historical, downward trends in toxic air contaminant-related cancer risks. (See, e.g., AR 8a:2216.) SANDAG's statement in its brief that the downward "trend" in toxic air contaminant emissions "is expected to continue into the future" (ARB/XRB at p. 77) does not appear to apply to diesel particulate matter.

71, which requires a lead agency to make a conscientious effort to collect data about a project's public health impacts and, in addition, to analyze that data.[18]

The EIR also fails to evaluate the environmental impacts of the Plan in context. (See RB/XAOB at p. 72; Cal. Code Regs., tit. 14, § 15064, subd. (b).) Residents living along the region's major roadways 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; *Kings County Farm Bur. v. City of Hanford* (1990) 221 Cal.App.3d 692, 718.) The particulate matter pollution data in the EIR thus is not "presented in a manner calculated to adequately inform the public and decision makers" of real environmental consequences of approving the Plan, in violation of CEQA. (See *Vineyard Area Citizens, supra,* 40 Cal.4th at p. 442.)

B. SANDAG's assertion that analysis of particulate matter-related public health impacts at the Regional Transportation Plan level is impossible is not supported by any record evidence

In their RB/XAOB, the People suggested a number of examples of analyses that could provide meaningful information about the 2050 Plan's projected public health impacts caused by particulate matter pollution. These included, for example, estimating the number of days the region would be out of compliance with particulate matter air quality standards

[18] While the EIR deems the Plan's particulate matter pollution impacts significant and unavoidable, this does not excuse SANDAG's failure to gather, analyze, and present the relevant information and data in a manner that would foster transparent and informed decision making. (See *Keep Berkeley Jets*, 91 Cal.App.4th at p. 1371.) Rather, the EIR's shortcut renders it fundamentally deficient as an informational document. (*Ibid*.; see also RB/XAOB at p. 71.)

designed to protect public health; projecting how many excess cancer cases the region should expect due to increases in particulate matter; and analyzing how emissions and health effects might change in sample communities near highway segments that are projected to move from "low" to "medium," or from "medium" to "high" in the EIR's index ranking. (RB/XAOB at pp. 71, 74.)

SANDAG in its Respondents' Brief did not respond to any of these specific suggestions. Rather, SANDAG's counter-argument appears to be simply this: "[a] more detailed analysis" of public health impacts "was not feasible at the program level." (ARB/XRB at p. 73; see also *id.* at p. 81.) SANDAG made these same bare assertions of impossibility in its EIR. The EIR repeatedly asserted that SANDAG cannot at the program level conduct *project-specific* air quality analyses. (See RB/XAOB at p. 60 [citing 8a:2236, 2239, 2241]; see also, e.g., AR 8b:4423, 4424, 4425, 4428 [responses to the Attorney General's comments].) In response to the Attorney General's comments on the draft EIR, SANDAG also asserted that "an accurate cancer risk analysis, compared to baseline, can only be prepared on a project level basis[.]" (AR 8b:4424.) Neither of these assertions was followed with any analysis or supporting citations.

In its Respondents' Brief, SANDAG repeats these assertions, stating that "[e]xisting tools for doing this type of [public health] analysis are designed for project-level use" (ARB/XRB at p. 82), implying that no tools or methods are available that could assist at the Regional Transportation Plan level. (See ARB/XRB at pp. 81, 82.) But the pages of the EIR that SANDAG cites (AR 8a:2273, 2215-16) contain no support for SANDAG's assertion of impossibility. The EIR at page AR 8a:2273 states that during project-specific design and CEQA review, "implementing agencies can and should require, where warranted, the completion of health risk assessments using dispersion modeling." The EIR at pages AR 8a:2216 and AR

8a:2215 lists certain air emission models that can be used at the project level. These pages do not, however, support an assertion that there are no available tools to estimate health impacts from air pollution at the Regional Transportation Plan level.

To the extent that SANDAG's contention is that it could not have, at the time of the Draft EIR in June 2011 (AR 7:227) or the Final EIR in October 2011 (AR 8a:1969), conducted any type of meaningful analysis that would have correlated particulate matter emissions under the 2050 Plan with potential public health impacts (ARB/XRB at pp. 75-78), the courts have rejected attempts by lead agencies to rest on summary assertions of impossibility. In *Keep Berkeley Jets, supra*, 91 Cal.App.4th 1344, 1367-71, the court noted that the lead agency Port "has not cited us to any reasonably conscientious effort it took either to collect additional data or to make further inquiries of environmental or regulatory agencies having expertise in the matter." (*Id.* at p. 1370.) The fact that an approach for a health risk analysis from the airport expansion was not patent did not excuse the Port, but instead "require[d] the Port to do the necessary work to educate itself about the different methodologies that *are* available." (*Ibid.* [emphasis in original].)

SANDAG committed the same errors here. SANDAG made numerous generic and conclusory assertions in the EIR and in response to comments that an analysis of health risks could be done only at the individual project level. But there appears to be no indication in the record that SANDAG consulted with expert agencies, such as its own local air district (the San Diego County Air Pollution Control District), the California Air Resources Board, or the U.S. Environmental Protection Agency, or with a retained expert consultant, to learn how it might

undertake a reasonable and meaningful health risk assessment that would help inform decision making about the 2050 Plan.[19] This failure does not work to SANDAG's advantage, because as a lead agency, SANDAG had an affirmative obligation to educate itself about the methods that can be used at the Regional Transportation Plan level to shed light on health impacts. The court's conclusion in *Berkeley Keep Jets* applies equally here: "The conclusory and evasive nature of the response to comments [about the lack of a health risk assessment] is pervasive, with the EIR failing to support its many conclusory statements by scientific or objective data. These violations of CEQA constitute an abuse of discretion." (*Keep Berkeley Jets, supra*, 91 Cal.App.4th at p. 1371.)

C. SANDAG's assertion that analysis of particulate matter-related public health impacts at the Regional Transportation Plan level is impossible is demonstrably false

SANDAG also appears to be arguing that, independent from the evidence in the record, remand to the agency to perform additional health impact analyses for the 2050 Plan would be futile because such analyses are impossible at the Regional Transportation Plan level. (ARB/XRB at pp. 75-78 [containing various assertions about the impossibility of plan-level analysis without citation to the record].) The Court should not consider SANDAG's freestanding assertions of impossibility. (See Cal. Code Regs., tit. 14, § 15384, subd. (a) [excluding "[a]rgument, speculation, unsubstantiated opinion or narrative" from the definition of "substantial

[19] The EIR contains a "References" section (AR 8a:3355-3398) documenting contacts with agencies and experts during the EIR process. (See, e.g., AR 8a:3365 [documenting consultant's phone call with Air Pollution Control District staff on unrelated matter].) On the People's review, there are no references that show an attempt by SANDAG to obtain additional expert advice on how to conduct plan-level analyses of expected public health impacts from the Plan's particulate matter pollution.

evidence"].) If the Court is nevertheless inclined to consider the question of whether a remand would be futile, the People ask the Court to take judicial notice of the fact that other regional transportation planning agencies have in their Regional Transportation Plan EIRs been able to perform analyses of the public health impacts caused by local air pollution, including particulate matter.[20] (See People's Motion for Judicial Notice, Exhibits A-C [excerpts of the EIRs for the Regional Transportation Plans prepared by the Association of Bay Area Governments and the Metropolitan Transportation Commission, and by the Southern California Association of Governments; both of these documents post-date the 2050 Plan EIR].)[21] The People ask the Court to notice the fact that other regional planning entities have completed health risk assessments not to show that their approaches are appropriate for the San Diego region (they may or may not be), but only to show that remanding the matter to SANDAG to make its own a reasonable effort to educate itself about potential health risk assessment methodologies would not be a futile exercise.

In sum, because the 2050 plan EIR contains only particulate matter emissions data unaccompanied by any public health risk analysis of that data, the EIR fails to adequately inform the public and decision makers about the true consequences of the plan in violation of CEQA. On remand,

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[20] To be clear, the People are *not* requesting that the Court consider the health impact analyses of the other regional transportation planning agencies to show that SANDAG failed to proceed in the manner required by law. (See *Western States Petroleum Assoc. v. Air Resources Boar*d (1995) 9 Cal.4th 559, 576.) As noted, SANDAG's abuse of discretion is evident from the face of the record, because its assertions of impossibility are not supported by any evidence in the record.

[21] The Association of Bay Area Governments and the Metropolitan Transportation Commission worked with their local air district to prepare their EIR's health risk analyses. (See People's Motion for Judicial Notice, Ex. C at p. 6 [p. 2.2-22 of the draft EIR].)

SANDAG, consulting with other expert agencies and entities as necessary, must devise methods and approaches that are appropriate to the San Diego region to ensure that the environmental document for the 2050 Plan analyzes whether and how the 2050 Plan's expected increases in particulate matter will impact public health.

III. THE COURT SHOULD REJECT SANDAG'S PROFFERED JUSTIFICATIONS FOR DEFERRING VIRTUALLY ALL MITIGATION FOR PARTICULATE MATTER POLLUTION TO THE INDIVIDUAL PROJECT LEVEL

A. Summary of the CEQA violation

As set out in the People's Cross-Appeal, SANDAG in its EIR defers any substantive discussion of feasible design changes and mitigation measures for the 2050 Plan's operational particulate matter pollution impacts to the individual transportation and development project level. (RB/XAOB at pp. 75-76 [citing AR 8a:2270-73]; see also AR 8a:2010-2012 [mitigation measures AQ-2 to AG-4].) SANDAG, however, had an affirmative duty to formulate feasible plan-level mitigation for the 2050 Plan's significant particulate matter pollution impacts. (See, e.g,, Pub. Resources Code, § 21002.1, subd. (b) [providing that "[e]ach public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so"]; Cal. Code Regs., tit. 14, § 15021, subd. (a) [describing lead agency's "duty" to mitigate]; Cal. Code Regs., tit. 14, § 15126.4, subd. (a)(1).)

The EIR attempts to justify SANDAG's deferral by stating 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 [particulate matter] mitigation measures." (AR 8b:4428.) As discussed at in the People's Opening Brief, however, SANDAG has considerable authority and discretion to fashion

mitigation. SANDAG controls substantial funds (RB/XAOB at p. 44); has broad powers to set the region's transportation priorities (*id.* at p. 45); can amend the transportation expenditure plan (TransNet) (*id.* at pp. 46-49); and has an important leadership role in regional planning (*id.* at pp. 50-53).

SANDAG's summary refusal to make a reasonable, good faith effort to identify mitigation for the 2050 Plan's significant particulate matter pollution renders the EIR fundamentally deficient. (*City of Marina v. Bd. of Trustees of Cal. State Univ.* (2006) 39 Cal.4th 341, 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."]) As discussed below, the Court should reject both SANDAG's unsupported assertion that plan-level mitigation is impossible and SANDAG's attempt to shift to the public SANDAG's responsibility as lead agency to develop mitigation.

B. SANDAG's assertion that mitigation at the Regional Transportation Plan level is impossible is not supported

SANDAG contends that devising mitigation at the plan level is impossible. (See ARB/XRB at p. 84.) It is not. Granted, a program- or plan-level EIR's discussion of mitigation may of necessity be less detailed than that in environmental documents for specific projects. (See Cal. Code Regs., tit. 14, § 15152, subd. (b); see also *Al Larson Boat Shop, Inc. v. Bd. of Harbor Comrs.* (1993) 18 Cal.App.4th 729, 745-46.) A program- or plan-level EIR can, however – as did even the very broad-brush CALFED Program EIR – "include[ ] mitigation strategies that, when applied to an individual project, will serve to avoid, reduce, or mitigate the project's contribution to cumulative impacts." (*In re Bay-Delta Programmatic Environmental Impact Report* (2005) 34 Cal.Rptr.3d 696, 745, overruled by *In re Bay-Delta Programmatic Environmental Impact Coordinated Proceedings* (2008) 43 Cal.4th 1143; see also *id.* at 776-778 [setting out

mitigation measures for agricultural impacts].)[22] For example, a plan-level document might provide that, where feasible, every project with particulate emissions that exceed a certain identified level shall install a buffer of a specified size and construction between the project and any existing or contemplated residential development. The details for constructing and maintaining the buffer and the determination of feasibility may need to wait for future projects, but the plan-level mitigation still serves a purpose: it ensures that every time an individual project of a certain type or with certain impacts proceeds, the mitigation identified at the plan level will be considered and put into place if feasible. (See Cal. Code Regs., tit. 14, § 15168, subd. (c)(3) ["[a]n agency shall incorporate feasible mitigation measures and alternatives developed in the program EIR into subsequent actions in the program"].)

The People acknowledge that SANDAG will not be the lead agency for many of the individual projects listed in the EIR. Where the lead agency for the plan-level project will not be the same as the lead agency for an individual project, the plan level document can still recommend the mitigation that is identified and developed in the program EIR. (See *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 465-66 [holding that transportation agency's mitigation measure providing that local governments "can and should" implement local parking programs to help address rail project's spillover parking was appropriate under CEQA].)[23] Such "can and should"

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[22] The People cite the lower court decision only for its description of the CALFED EIR's mitigation, which was held to be adequate by the Supreme Court. The mitigation set out in the CALFED EIR is not clear from the Supreme Court's decision.

[23] "Under the adopted mitigation measure, [the transportation agency] is required to monitor parking in the potentially affected

(continued…)

mitigation, properly done,[24] makes it more likely that opportunities for mitigation that are clear at the plan level – particularly for cumulative impacts – will not be overlooked in project-by-project review. Indeed, the lead agency at the plan level can make recommended project-level mitigation more likely by committing funding for mitigation identified in the plan-level document, even though the implementation of that mitigation may be outside of its direct control. (*City of Marina, supra,* 39 Cal.4th at pp. 359-360, 367; see also *Smart Rail, supra*, 57 Cal.4th at p. 465.) In short, mitigation at the Regional Transportation Plan level is not impossible.

C. SANDAG cannot shift its lead agency duty to disclose and analyze feasible mitigation to the public

SANDAG asserts that "petitioners have the burden of specifically identifying" the mitigation measures for particulate matter pollution impacts "and demonstrating that they were potentially feasible." (ARB/XRB at p. 83.) In support, SANDAG cites *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 15-16. In *San Diego Citizenry,* this Court rejected the challenger's argument that there were undefined "additional" mitigation measures that the lead agency should have considered in approving a boutique winery permitting

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(…continued)
neighborhoods, to pay for a residential permit parking program where station spillover has resulted in a street parking shortage, and to assist in developing other measures where a residential permit program is inappropriate." (*Id.* at p. 465.)

[24] A bare statement that other agencies can and should mitigate a project's impacts – the approach that SANDAG took in addressing greenhouse gas-related impacts – is not sufficient. (See RB/XAOB at pp. 51-53.) "Can and should" mitigation should be specific and as detailed as is feasible at the first-tier level, and should be accompanied by plan-level commitment and funding that will make it more likely that the mitigation will occur at the individual project level. (*Ibid.*; see also *id.* at p. 76*; Smart Rail, supra*, 57 Cal.4th at p. 465.)

ordinance, where the lead agency disclosed and analyzed a number of specific mitigation measures or alternatives to address the project's identified significant impacts. (*Id.* at pp. 15-16 [noting that petitioner "acknowledges that feasible mitigation measures were incorporated into the proposed Project"; listing specific measures].)[25]

SANDAG misses the point of the People's argument. The People are not on appeal advocating for a specific additional mitigation measure that SANDAG unreasonably failed to consider and that would have been feasible.[26] Rather, the People's point is that SANDAG has the legal responsibility as lead agency to make a good faith effort to devise and analyze feasible mitigation for the 2050 Plan's significant impacts to public health caused the Plan's operational particulate matter pollution. SANDAG abdicated the responsibility by deferring virtually all analysis to future project-specific review. This was SANDAG's fundamental error, since a first-tier EIR "cannot defer all consideration of cumulative impacts to a later time[.]" (*Al Larson, supra*, 18 Cal.App.4th at p. 746.)

SANDAG's attempt to shift the responsibility to the public to devise mitigation in the first instance would be particularly inappropriate in this case, where SANDAG did not provide any meaningful analysis of the Plan's public health impacts – by, for example, seeking expert assistance to

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[25] SANDAG also cites *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, a third district decision that contains a similar analysis and holding concerning the lead agency's need to examine a reasonable range of alternatives.

[26] Contrary to SANDAG's assertions, commenters, including petitioner Cleveland National Forest Foundation (CNFF), presented various mitigation measures to SANDAG in their letters on the draft EIR. (See AR 8b:4299-4302 [CNFF comment letter describing calling for consideration of alternative land use patterns, parking fees, and early phasing of transit projects over highway expansions]). SANDAG's failure to address specific mitigation measures is addressed in CNFF's briefs.

describe any projected changes in cancer rates and identify particular communities that are likely to see increased rates of respiratory and other illnesses. (See Sections II.B. and C., above.) Had SANDAG provided such analysis, the public (and SANDAG staff) would have been in a better position to propose mitigation tailored to the specific types, locations, and causes of the 2050 Plan's particulate-matter related public health impacts. SANDAG's prejudicial failure adequately to analyze the Plan's public health impacts cannot not excuse it from its legal duty to mitigate. (See Pub. Resources Code, § 21002; Cal. Code Regs., tit. 14, § 15021, subd. (a).)

IV. SANDAG CANNOT AVOID ITS OBLIGATION TO ANALYZE THE 2050 PLAN'S PARTICULATE MATTER POLLUTION IMPACTS TO PUBLIC HEALTH AND DEVISE FEASIBLE MITIGATION FOR THOSE IMPACTS SIMPLY BY CHARACTERIZING ITS DOCUMENT AS A "PROGRAM" EIR

A. CEQA contemplates consideration of environmental consequences at the earliest possible stage, even though more detailed environmental review may be necessary later

As required by CEQA, SANDAG prepared an EIR for the 2050 Plan, which it reasonably characterized as a "Program EIR." (AR 8a:1997.)[27] The purpose of this type of EIR is to allow an agency to look at larger impacts that might be slighted on a case-by-case basis and to consider at an early stage generally applicable mitigation measures that, if routinely

[27] According to a prominent treatise, "there is no clear legal authority proscribing use of a program EIR format" for planning projects "so long as the program EIR meets applicable legal requirements." (Remy et al., Guide to CEQA (11th ed. 2007) p. 637.) The People agree that a program EIR format is appropriate for evaluating the environmental impacts of a Regional Transportation Plan and facilitating the tiering of future projects, provided the format is not used to justify deferral of analysis and mitigation that reasonably can and should be done at the plan level.

applied to future projects, could reduce those impacts. But SANDAG cut short its analysis of the effects of and mitigation for particulate matter pollution – a problem that is already causing illness and premature death for the region's residents – and deferred virtually all analysis to whatever CEQA review may occur for individual transportation and development projects. (See RB/XAOB at pp. 69-76.)

In its Respondent's Brief, SANDAG relies heavily on its designation of the EIR as a "program EIR" to justify its deferral. The People agree that "tiering" – "using the analysis of general matters contained in a broader EIR (such as one prepared for a general plan or policy statement) with later EIRs and negative declarations on narrower projects"[28] – is a legitimate function of first-tier EIRs. But "the tiering provisions of CEQA do not exempt a public agency from the . . . requirement that an EIR shall include a detailed statement setting forth "[a]ll significant effects on the environment of the proposed project[.]" (*Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 186 [citing Pub. Resources Code, § 21100; holding EIR for 29,500 acre, phased resort and residential community development project and general plan amendment inadequate where analysis of effects of supplying water were deferred to future EIR].) Tiering "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) [emphasis added].) As the Supreme Court has noted, tiering under "CEQA contemplates consideration of environmental consequences at the *earliest possible stage*, even though more detailed environmental review may be necessary later." (*Environmental Protection Information Center (EPIC) v.*

[28] Cal. Code Regs., tit. 14, § 15152, subd. (a).

California Department of Forestry and Fire Protection (2008) 44 Cal.4th 459, 503 [internal quotation, citation omitted; emphasis added].)

Where, as in this case, the elements of the program or plan are specific and not overly contingent; some plan-level analysis of impacts and mitigation is feasible and reasonable; and plan-level analysis would be non-speculative and provide meaningful information to the public and decision makers, the lead agency cannot simply defer such analysis to future project-specific review.

B. All relevant factors weigh in favor of requiring additional detail about the 2050 Plan's particulate matter pollution impacts and mitigation in the plan-level EIR and against the complete deferral to future project-specific review

There is no bright-line test for the degree of specificity required in a first-tier EIR and whether additional analysis can be deferred consistent with CEQA. Rather, the issue is determined largely by two considerations: (1) the nature of the project and (2) the "rule of reason" that applies to all EIRs. (*Al Larson, supra*, 18 Cal.App.4th at pp. 741-42 [quoting *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 407, footnote omitted]; see also Cal. Code Regs., tit. 14, § 15146.) Further, deferral is never allowed (3) where it would "'prevent adequate identification of significant effects of the planning approval at hand'" (*In re By-Delta, supra,* 43 Cal.4th at 1170 [quoting Cal. Code Regs., tit. 14, § 15152, subd. (c)]) or deprive the public and decision makers of "meaningful information." (See *id.* at p. 1172.) Considering these factors, SANDAG cannot defer all analysis of the 2050 Plan's operational impacts to public health impacts resulting from particulate matter pollution and all consideration of plan-level mitigation to the individual transportation and development project level.

1. Nature of the project: The 2050 Plan is specific and not highly contingent

The nature of the government action at issue in *In re Bay-Delta*, the case on which SANDAG primarily relies, is readily distinguishable. In that case, various state and federal agencies formed a voluntary consortium – CALFED – in order to design a long-term program to restore the 738,000-acre Bay-Delta. (*In re Bay-Delta, supra*, 43 Cal.4th at pp. 1151-53, 1156.) The purpose of the CALFED Program was "to reduce conflicts and provide solutions that competing interests could support." (*Id.* at 1152.) CALFED developed four primary objectives; six "solution principles"; and fifty potential "action" categories," each including hundreds of potential individual actions. (*Id.* at pp. 1157-58.) CALFED then used the "action categories" to build alternatives that were focused on resolving four "critical conflicts" among users of the Bay-Delta. (*Id.* at p. 1158.) The result of this process – the CALFED Program – was "'a *general description* of a range of actions that will be further refined, considered, and analyzed for site-specific environmental impacts as part of second- and third-tier environmental documents prior to making a decision to carry out these later actions.'" (*Id.* at pp. 1156-57 [quoting the EIR; emphasis added].)

Challengers to the CALFED EIR asserted that, among other things, the document failed to adequately analyze the sources of water that would be used to implement the CALFED Program and the impacts of tapping those sources. (*In re Bay-Delta, supra*, 43 Cal.4th at p. 1169.) The CALFED EIR did not ignore the issue, however, but identified specific potential sources of water, addressed the significant impacts of taking water from these sources by resource topic, and then discussed in general terms the resulting impacts for each of the five geographic regions that would be affected. (*Id.* at pp. 1170-71.) In light of the "broad, general, multi-objective, policy-setting, geographically dispersed" nature of the CALFED

Program, and the fact that it consisted of "potential actions[,]" the Supreme Court held this level of analysis to be sufficient. (*Id*. at pp. 1170, 1171, 1173.)

SANDAG's Regional Transportation Plan, in contrast, contains specific development projects, covers a specific geographic region, and consists of contemplated, funded actions. The 2050 Plan by SANDAG's own account is a "blueprint" for the future development of the SANDAG region over the next 40 years. (AR 8a:2071.) Among other things, the Plan identifies, approves, and makes crucial funding commitments to a set of specific transportation projects in specific locations on specific timelines. (See, e.g., AR 190a:13390-418 [2050 Plan]; 190b:13766, 13768, 13775-76, 13782, 13830-37 [2050 Plan Technical Appendices].) The Plan's specificity is illustrated by examining the entries for phased highway projects at AR 190a:13400. Choosing one representative project, the Plan provides that by the year 2018, the stretch of I-15 from State Route 163 to State Route 56 will be improved from its current composition of eight freeway lanes and two reversible managed lanes to ten freeway lanes and four managed lanes with a reversible barrier, at a cost of $419 million dollars. The Plan also accounts for and maps the contemplated land uses in the various sub-regions of the County that will be served and affected by the Plan's transportation projects. (AR190a:13510-13532 [2050 Plan maps]; see also AR 8b:3729-3748 [EIR Technical App. E-2, listing over 100 specific plan developments by location, size, and build-out date].)

Where, as in this case, the project contemplates proposed developments with readily discernible attributes and resource requirements on identified sites, a more detailed and specific analysis of impacts and mitigation is required in the first-tier EIR. (See *Stanislaus, supra*, 48 Cal.App.4th at pp. 195, 199-200 [rejecting county's attempt to defer analysis and mitigation to future phases of large, long-term development

project]; see also *In re Bay-Delta*, 43 Cal.4th at p. 1171 [distinguishing the large-scale development project at issue in *Stanislaus*].) "Calling it a 'program' does not relieve the [lead agency] from having to address the significant environmental effects of [the lead agency's] project." (*Stanislaus, supra*, 48 Cal.App.4th at p. 202.) In short, the nature of the 2050 Plan does not allow SANDAG to escape the requirement for conducting a plan-level analysis of the Plan's impacts.

2. Rule of reason: Additional *plan-level* analysis of particulate matter pollution is feasible

"In all cases, the sufficiency of the information contained in an EIR is reviewed in light of what is reasonably feasible." (*Rio Vista Farm Bur. Center v. County of Solano* (1992) 5 Cal.App.4th 351, 375; see also *EPIC, supra*, 44 Cal.4th at p. 503.) SANDAG in its Respondents' Brief creates the straw argument that it is infeasible in the 2050 Plan EIR to conduct individualized, project-level analyses of the impacts from and mitigation for every one of the hundreds of individual programmed transportation projects. (See ARB/XRB at pp. 27, 30, 61, 88.) But that is not what is at issue in the case. All that the People seek and all that CEQA requires is that SANDAG make a reasonable good faith effort *at the plan level* to analyze the cumulative particulate matter-related public health impacts of the 2050 Plan and discuss feasible mitigation for those impacts.[29]

A plan-level analysis of the 2050 Plan's anticipated public health effects caused by particulate matter pollution and feasible mitigation for that pollution is essential to the purposes of a program EIR, ensuring "consideration of cumulative impacts that might be slighted in a case-by-

[29] SANDAG's arguments that analyzing health impacts and mitigation measures for those impacts is impossible at the plan level (see ARB/XRB at pp. 75-76, 84) are addressed in Sections II.B. and II.C., above.

case basis" and allowing the lead agency "to consider broad policy alternatives and programwide mitigation measures at an early time when the agency has greater flexibility . . . ." (Cal. Code Regs., tit. 14, § 15168, subd. (b)(2), (4).) This is precisely what SANDAG failed to do. In any event, SANDAG's almost complete deferral of the analysis of the public health impacts of particulate matter pollution cannot under any stretch of the precedent be deemed "reasonable" because a first-tier EIR "cannot defer *all* consideration of cumulative impacts to a later time …." (*Al Larson, supra*, 18 Cal.App.4th at p. 746 [emphasis added].)

3. Meaningful information: Additional analysis of the public health impacts of particulate matter pollution would be helpful to the public and decision makers

Where additional analysis at the first-tier stage would not provide "meaningful information" or would serve "no purpose," deferral of further analysis to a future, more project-specific CEQA documents is appropriate. (*EPIC, supra*, 44 Cal.4th at pp. 502, 503; *In re Bay-Delta, supra*, 43 Cal.4th at p. 1172.) In *In re Bay-Delta*, for example, the Court noted that the sources of water that would actually be used over the decades to supply the Program's proposed actions, should they be carried out, were highly contingent. Water supply sources depend on future decisions between willing buyers and sellers and are subject to flexible supply chains that change constantly based on a number of factors, including population, demographics, environmental restrictions, and drought. (*In re Bay-Delta, supra*, 43 Cal.4th at pp. 1172-73.) Requiring CALFED to conduct a more detailed analysis of the Program's impacts related to procuring water sources, where the likelihood of tapping any given source was highly contingent on a number of factors, would "undermine[ ] the purpose of tiering and burden[ ] the program EIR with detail that would be more

feasibly given and *more useful* at the second-tier stage." (*Id.* at p. 1173 [emphasis added].)

Here, in contrast, most if not all the individual transportation projects that comprise the 2050 Plan are reasonably certain and not highly contingent. As noted, the Plan's projects, locations, and timing are clearly listed. Further, "[t]he 2050 RTP/SCS [Regional Transportation Plan/Sustainable Communities Strategy] is based on current and reasonably available financial resources projected through 2050." (AR 8a:2078.)

Including additional information about the 2050 Plan's impacts to public health, including cancer rates and adverse health effects that may be particularly felt by the communities along the region's major highways, would hardly "burden" the document with potentially irrelevant detail. Rather, such information would be particularly useful at the Regional Transportation Plan stage, where it could inform the public discussion about potential plan-level mitigation and alternatives (e.g., establishment of standardized mitigation measures, a regional mitigation program and regional mitigation funding). Such additional information could also put a finer point on any decision to approve the 2050 Plan, notwithstanding its significant public health impacts, as the public and decision makers would better understand what exactly they are trading for the Plan's promised benefits. Stated another way, a reasonable plan-level analysis of the 2050 Plan's particulate matter pollution impacts to public health is required in order to prevent this very serious regional problem from being "swept under the rug" in violation of CEQA. (See *Kings County Farm Bur., supra,* 221 Cal.App.3d at p. 733.)

In sum, the programmatic nature of the 2050 Plan EIR does not excuse SANDAG from analyzing the public health impacts that will be caused by the Plan's particulate matter pollution and devising feasible mitigation for those impacts.

CONCLUSION

For the foregoing reasons, the People request that this Court rule in favor of the People on their 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 the 2050 Plan's 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 Regional Transportation Plan level to mitigate the public health impacts identified.

Dated: January 20, 2014

Respectfully submitted,

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SD2013950127

CERTIFICATE OF COMPLIANCE

I certify that the attached PEOPLE OF THE STATE OF CALIFORNIA'S CROSS-APPELLANT'S REPLY BRIEF uses a 13 point Times New Roman font and contains 9,154 words.

Dated: January 20, 2014

KAMALA D. HARRIS
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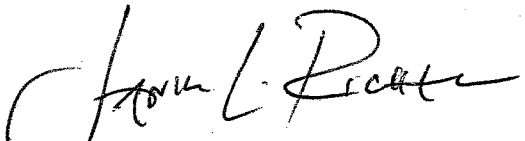

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DECLARATION OF SERVICE BY E-MAIL and U.S. MAIL

Case Name: ***Cleveland National Forest Foundation, et al. v. San Diego Association of Governments, et al.***

Case No.: **California Court of Appeal, Fourth Appellate District, 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 **January 21, 2014**, I served the attached:

PEOPLE OF THE STATE OF CALIFORNIA'S CROSS-APPELLANT'S REPLY 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 **January 21, 2014**, at San Diego, California.

Linda Jean Fraley
Declarant


Signature

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