[See fee exemption, Gov. Code § 6103]

Appellate Court Case No. D063288

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

DIVISION ONE

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

Cross-Appellants and Respondents,

v.

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

Appellants and Cross-Respondents.

SANDAG APPELLANTS' COMBINED REPLY BRIEF AND RESPONDENTS' BRIEF ON CROSS-APPEAL

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

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PART 1: SANDAG'S APPELLANTS' REPLY BRIEF

I. INTRODUCTION

Perhaps the best word for the briefs filed by the Attorney General and by Cleveland National Forest Foundation, et al. ("CNFF Petitioners"), is "disappointing." No party in this case, least of all SANDAG, is unaware of the seriousness of climate change. But the problem is far too serious to be addressed with idle rhetoric, finger-pointing, hopelessly vague demands for action, and baseless assumptions about what can legally, technically and practically be done. Petitioners appear to be under the illusion that SANDAG has both the power and legal responsibility to single-handedly solve the problem of greenhouse gas emissions in San Diego County, either directly or through its "power of the purse," but is simply unwilling to act. These contentions are misguided in the extreme.

SANDAG certainly has a duty to prepare a regional transportation plan and included a sustainable communities strategy that meets the objectives of SB 375. No responsible person, however, can seriously contend that the mandates of SB 375 are intended to provide a comprehensive solution for climate change impacts. Under the Scoping Plan, which constitutes California's official state strategy for reducing greenhouse gas emissions ("GHG"), local and regional planning measures are mandated to achieve less than 3% of the total statewide GHG emission reductions necessary to meet state goals for the year 2020. (AR 319:26155.) The Scoping Plan does not even begin to prescribe targets for reductions necessary to meet the goals set in Executive Order S-03-05 (EO S-03-05) for year 2050. It can be surmised, however, that continued refinement of local land use and transportation planning can play only a limited role. Petitioners' sense of extreme urgency does not change these facts.

Of course, none of this means that the problem of climate change has been solved or that there is nothing more to be done. Petitioners, however, cordially ignore virtually everything that SANDAG and the region's local governments have been doing and are doing to reduce GHG emissions both in the context of regional transportation planning and beyond. Despite their stated sense of urgency, however, there is a curious disconnect between petitioners' demands for more stringent actions or "mitigation" of GHG impacts and their actual recommendations for action. When it comes to specific measures, petitioners call for increases in parking fees and SANDAG subsidies for local climate action plans that might or might not be adopted by the remaining local governments that have not already adopted such plans. These are not the kinds of things that are going to halt global climate change in its tracks.

Although petitioners are sure that there is far, far more that SANDAG could be doing, they are completely unable or unwilling to say precisely what is to be done. The reasons for this may be tactical, or may simply reflect a certain lack of courage to bluntly state just how extreme the measures are that would need to be taken by all persons and sectors to achieve the aspirational goals of EO S-03-05. To achieve the long-term goals of EO S-03-05 will take far more than fine-tuning local land use and transportation planning or increasing transit ridership. The record indicates that approximately 56% of existing GHG emissions in the San Diego region come from transportation activity, and the remaining from other sources, i.e., industry, residential energy consumption, and so forth. (AR 190a:13157.) To meet the EO S-03-05 target of reducing GHG emissions to 80% below 1990 levels by 2050, the region would have to eliminate all existing

transportation emissions, and reduce remaining emissions by more than one half. Absent major and currently unforeseen technological solutions, this will mean an end to such things as private automobiles and luxuries such as air conditioning.

The simple fact is that there are constraints – major constraints – on what SANDAG or any other local or regional agency can do to address climate change. Funds are limited, staff is limited and legal powers are limited. In a democratic society, they always will be. SANDAG is more than willing to work with anyone, including the petitioners, to address climate change. But SANDAG is also governed by laws that do not permit the type of single-purpose focus that petitioners demand on greenhouse gas reductions. Unless and until the Legislature determines that automobiles must be outlawed and other draconian measures imposed, SANDAG is not free to disregard the transportation needs of all sectors of the public, dictate land use policy to local governments, or spend public funds for different purposes than authorized by law.

It is particularly disappointing that in the face of these realities, petitioners can propose no truly viable concrete solutions, but only accuse SANDAG of making "excuses." It is understood that advocacy has its place in climate change debate, and that petitioners are entitled to their views. But informed advocacy and reasoned discussion are better suited to produce solutions than baseless accusations. In the final analysis, it is difficult to view this lawsuit as anything more than platform for petitioners' policy views, as opposed to a genuine attempt to enforce CEQA. But in any event, petitioners' claims have no legal merit. Petitioners' disagreements with SANDAG over factual and policy issues are not a basis for judicial relief.

II. STANDARD OF REVIEW – THE ISSUES ARE GOVERNED BY THE SUBSTANTIAL EVIDENCE TEST

Petitioners contend the issues addressed in SANDAG's appeal are issues of law which this Court reviews under an independent judgment standard. Relying primarily on cases that predate *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435, petitioners contend that failure to analyze a subject in the manner they deem correct constitutes an "omission" of information from the EIR, which in turn constitutes a failure to proceed in the manner required by law. Of course, if this were the test, virtually every dispute over the adequacy of an EIR would be reviewed as a question of law since virtually every dispute involves a claim that information that the challengers believed to be important, more accurate, or otherwise necessary was omitted from the EIR.

The correct standard is that recently stated by this Court in *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1. Where an agency completely fails to address a mandatory subject in an EIR, the error may be one of procedure. "However, where the agency includes the relevant information, but the *adequacy* of the information is disputed, the question is one of substantial evidence." (*Id*. at 12, emphasis in original.) This is consistent with the long line of cases that have held that challenges concerning the scope or methods of analysis of a topic in an EIR are reviewed under the substantial evidence test. (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 898; *City of Long Beach v. Los Angeles Unified School Dist*. (2009) 176 Cal.App.4th 889, 898.)

In its most recent decision on the subject, the California Supreme Court has also held that an agency's choice of baselines for measuring impacts – which is essentially the first major issue in dispute in this case – is

reviewed under the substantial evidence test. (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 445, 462.)

Petitioners concede that issues concerning the feasibility of mitigation measures, other than legal feasibility, are reviewed under the substantial evidence test. (CNFF RB/XOB, p. 22.) They nevertheless contend that failure to *discuss* a particular mitigation measure in the EIR constitutes a failure to proceed in the manner required by law. This is simply incorrect. The Court reviews the adequacy of an EIR's discussion of mitigation measures as a whole. Petitioners must "demonstrate there is no substantial evidence supporting the FEIR's discussion of mitigation measures." (*San Diego Citizenry*, 219 Cal.App.4th 1, 16.) Petitioners cannot, in the guise of challenging the legal sufficiency of an EIR, bypass the question of whether there was substantial evidence supporting exclusion of a mitigation measure (or other information) from the EIR.

While petitioners occasionally pay lip service to the substantial evidence test, they completely ignore this standard in practice. Petitioners consistently ask the Court to find, or even just assume, that mitigation measures they advocate are feasible and would provide substantial mitigation based on nothing more than petitioners' own suppositions. In the process, petitioners also cordially ignore another basic principle of judicial review. An EIR is presumed adequate, and petitioners bear the burden of proving otherwise. (*San Diego Citizenry*, 219 Cal.App.4th 1, 13.) Consequently, "As with all substantial evidence challenges, an appellant challenging an EIR for insufficient evidence must lay out the evidence favorable to the other side and show why it is lacking. Failure to do so is fatal. A reviewing court will

not independently review the record to make up for appellant's failure to carry his [or her] burden. [Citation omitted.]" (*Id*. at 17.) Petitioners cannot satisfy their burden with mere argument, and without, in most cases, even telling the Court precisely what additional mitigation measures the EIR should have included.

III. THE IMPACT ANALYSIS IN THE EIR WAS NOT DEFICIENT FOR FAILURE TO UTILIZE EXECUTIVE ORDER S-03-05 AS A STANDARD FOR ANALYSIS

A. SANDAG was Not Required by Law to Use Executive Order S-03-05 as a Standard for Evaluating Greenhouse Gas Impacts

Although the issues here are governed by the substantial evidence test, it is tempting to take petitioners at their word and pose the question as whether use of EO S-03-05 as an analytical standard is required as a matter of law. There clearly is no such legal requirement. As discussed in SANDAG's opening brief, use of an EO S-03-05 baseline or significance standard is not mandated by Guidelines § 15064.4. Neither is it mandated by case law. This Court and other courts have emphasized that the appropriate standard for assessing GHG impacts is a matter of sound discretion. (See, e.g., *North Coast Rivers Alliance v. Marin Municipal Water District Board of Directors* (2013) 216 Cal.App.4th 614, 650-653; *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 335-336 ("*CREED*").

Guidelines § 15064.4(b)(3) allows (but does not require) lead agencies to measure impacts against "regulations or requirements adopted to implement a statewide, regional or local plan for reduction or mitigation of greenhouse gas emissions." EO S-03-05, however, is clearly not a "plan" within the meaning of Guidelines § 15064.4(b)(3). Neither is EO S-03-05 an

applicable general plan, specific plan or regional plan for purposes of the consistency analysis required by Guidelines § 15125(d).) (SANDAG AOB, pp. 20-21.)

The AG now essentially concedes that EO S-03-05 is not a "plan" which must be given mandatory consideration under the foregoing Guidelines. (AG RB/XOB, p. 30.) The CNFF petitioners are less candid, but do not cite any authority requiring an EIR to undertake a consistency analysis (or any other analysis) based on EO S-03-05, or, for that matter on any other executive order in any context. Their argument boils down to the bootstrapping proposition that CEQA requires an EIR to contain information on the environmental impacts of proposed projects, and petitioners consider an analysis based on EO S-03-05 to be legally essential information. No existing legal authority, however, supports this result.

B. Use of Executive Order S-03-05 as a CEQA Baseline or Significance Standard is Not Compelled by "Science"

Being unable to identify any legal mandate for use of EO S-03-05 as a CEQA baseline or significance standard, petitioners double down on arguments advanced below that use of such a standard is needed to ensure full disclosure, and is compelled by science.

Most of us have learned to be a bit skeptical of arguments advanced by laypersons that purport to be based on "science." Even the tiny and ever-decreasing number of real scientists who dispute the reality of global climate change assert that their dissenting views are based on science. So do the far larger number of politically or economically motivated persons who deny this reality. Very few of us uncritically accept the assurances of models or actors costumed in lab coats that the products they are promoting truly represent the peak of scientific achievement in the field of cosmetics, dental

hygiene or household cleansers. Petitioners here nevertheless don their lab coats to assure the Court that use of EO S-03-05 is not only supported, but *compelled* by science, so much so that a public agency such as SANDAG that uses the alternate analytical criteria specified in Guidelines § 15064.4 has committed a prejudicial abuse of discretion. This is not science.

1. *There is No Basis for Petitioners' Claiming the Mantle of Science*

As was pointed out in SANDAG's opening brief, the first problem with petitioners "science" argument is that no scientist supports it. (SANDAG AOB, pp. 22.) The Guidelines § 15064.4 and the Air Resources Board's ("ARB") draft guidelines were developed with scientific input by agencies of former Governor Schwarzenegger's own designated Climate Action Team. These guidelines do not support petitioners' views.

Petitioners answer that the ARB at least acknowledged the EO S-03-05 targets in its draft guidelines, and recognized that different significance standards may be appropriate for different types of projects. The more telling point, however, is that the ARB did not recommend use of EO S-03-05 as a significance threshold or baseline for any type of project in any context, either in its draft guidelines or anywhere else. (AR 320(3):27792-27793, 27801-27804.)

Petitioners also offer no explanation at all as to why the State Resources Agency, with its unique mix of scientific expertise and experience in statewide implementation of CEQA, has not endorsed use of EO S-03-05 as a CEQA measuring standard. This is not because the concept has never been broached in regulatory circles. The record shows that the AG's own advisory documents have floated the concept of using EO S-03-05 as a baseline, although they have stopped well short of suggesting this approach

is mandatory. (AR 320:(2)27778.) The AG and advocacy groups who support use of EO S-03-05 as a baseline, however, have never gained support from the broader scientific or regulatory communities. It very much appears that the AG and private petitioners here are attempting to persuade the Court to take sides in a technical debate they have lost with qualified experts. As the Supreme Court has said, taking sides in such a debate is not a proper function for the Court. (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 407, 409.)

2. *Applicable Principles of CEQA Do Not Support Petitioners' Position*

The reasons that the members of the Governor's own action team – and apparently every other public agency in California – have disagreed with the AG and petitioners on this issue is not difficult to comprehend. The issue is not a dispute about scientific facts or methodologies, but about measuring scales. Scientists studying climate change measure the retreat of individual glaciers in feet. Shrinkage of the polar ice caps, however, is measured in square miles. Similarly, the targets established by EO S-03-05 may be a valid measuring stick for progress toward statewide, long-term GHG reduction goals, but they do not provide a particularly useful tool for assessing the relative significance of GHG emissions from individual projects. As the agencies with greatest scientific expertise have concluded, sharper, better focused tools are required for that.

The range of environmental concerns that may be addressed through CEQA is unquestionably broad. The analytical approach mandated by CEQA, however, focuses on individual projects. An EIR, thus, is not intended to serve as a general textbook on environmental issues of current concern, however urgent they may be. The EIR is intended to serve as a

vehicle for analyzing the environmental impacts of specific projects, and for identifying practicable means of reducing or avoiding these impacts. To this end, certain basic principles have evolved. First, the EIR must focus on and account for only the impacts caused by the project itself. (PRC §§ 21002, 21100(b)(1); *Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1295 [EIR not required to consider impacts of meeting water demands not caused by the proposed project]; *Citizens for East Shore Parks v. California State Lands Com.* (2011) 202 Cal.App.4th 549, 564, 567; *City of Long Beach*, 176 Cal.App.4th 889, 905 [purpose of EIR is to identify project's effects on environment, not environment's effects on the project]; *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 875-876 [EIR not required to assess impacts of previously approved water diversion projects].) Second, and perhaps most fundamental for this discussion, project impacts must, absent extraordinary circumstances, be measured against physical environmental conditions as they exist when environmental review, or the project itself, is commenced. (*Citizens for East Shore Parks*, 202 Cal.App.4th 549, 557-560.) A lead agency may not use a baseline that is based on theoretically permissible conditions, e.g., those that might exist if an existing facility were operating at its maximum legally permitted capacity, or that should exist if a project proponent or previous property owner had not violated various regulatory restrictions. (*Id*. at 559-560; *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (*"CBE v. SCAQMD")* (2010) 48 Cal.4th 310, 320-321.)

Petitioners cite no case which has held that a lead agency may – let alone must – use a baseline that is premised on long-term regulatory goals or

other idealistic standards rather than based on actual existing or expected physical conditions. Petitioners cite the Supreme Court's recent decision in *Neighbors for Smart Rail*, 57 Cal.4th 439, 449, for the proposition that a lead agency "must select an approach 'that will give the public and decision makers the most accurate picture practically possible of the project's likely impacts.'" *Neighbors for Smart Rail*, however, decisively reaffirms the rule that CEQA analysis must normally be based on baseline physical conditions as they exist before or at the time a project will begin. (*Neighbors for Smart Rail*, 57 Cal.4th 439, 452-456.) *Neighbors for Smart Rail* provides no support for the proposition that GHG or other impacts must be measured against goals or hypothetical baselines established by regulations. The Supreme Court has expressly rejected such analytical approaches in other contexts. (*CBE v. SCAQMD*, 48 Cal.4th 310, 320-321.)

Neighbors for Smart Rail also establishes that an agency has discretion to substitute predicted *future* physical conditions as the measuring baseline in limited situations. An agency may do this, however, only if it (not petitioners) concludes, based on substantial evidence, that use of an existing conditions baseline would be "misleading or without informational value." (*Neighbors for Smart Rail*, 57 Cal.4th 439, 457.) Even then, however, the future baseline must be based on anticipated *physical* environmental conditions, not hypothetical numbers derived from regulatory goals or policies. (*Id*.)

CEQA's insistence on using existing or reasonably predicted physical conditions rests in part on practical considerations. The fundamental purpose of impact analysis is to identify and evaluate environmental impacts *caused* by a project. Consequently, existing physical conditions normally

constitute the appropriate baseline. A project cannot be deemed to cause changes that occurred, or began occurring, before it was proposed, or to cause impacts that will occur whether or not the project is approved.

Identification of changes actually *caused* by the project is also necessary to formulate mitigate measures. Mitigation measures must have a "nexus" with project impacts, i.e., must be justified by impacts actually caused by the project, and must be roughly proportional to the impact. (Guidelines § 15126.4(a)(4); *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 361-362.) These principles are based in part on logic and fairness considerations, but also on the legal impracticality of requiring project proponents to offset or pay for impacts they have not actually caused.

In advocating that EO S-03-05 be used as a CEQA baseline or significance standard, petitioners are essentially asking that the foregoing principles be thrown in the trash can. The practical implications are drastic. First and most obviously, virtually every conceivable project, including projects which would themselves produce no new GHG emissions, would be deemed to have a significant effect on GHG emissions, since these projects could not be reasonably expected to *reduce* existing GHG emissions in an amount commensurate with EO S-03-05's long term goals. Indeed, even projects that would result in net *decreases* of GHG emissions would still be deemed to have significant climate change impacts, since few could likely claim to result in a decrease of existing emissions to 80% below 1990 levels. Were, for example, the region's public agencies to band together to somehow fund a massive carbon sequestration program, or subsidize a program for purchases of zero-emission vehicles or replacement of energy-

inefficient air conditioners with solar-powered units, the program would still purportedly have a significant adverse effect because such measures alone are unlikely to reduce GHG emissions at a level commensurate with EO S-03-05 goals.

Artificially defining project impacts in such a manner is simply illogical and serves no useful purpose. Mitigation measures cannot be justified or legally imposed upon the basis of such analysis. While petitioners contend this approach may nevertheless result in more accurate "disclosure" of GHG impacts, the opposite would actually seem to be the case. Routinely categorizing GHG impacts for every conceivable project as significant is not likely to deepen the public's or decisionmakers' awareness or understanding of the dangers of climate change. Indeed, it can be strongly argued that an analysis that concludes that projects that produce no net increases in GHG emissions or even reduce GHG emission are causing climate change is itself misleading.

There is no question that scientific knowledge and investigation play an important role in analyzing environmental impacts and in establishing relevant significance criteria. But merely invoking the name of "science" is hardly a sufficient basis for rejecting the principles that have so far successfully driven CEQA analysis for over 40 years.

3. *There is No Valid Basis for Disregarding or Changing Existing Rules Governing CEQA Project Review*

Petitioners may believe that existing CEQA principles are obsolete when applied to the subject of climate change and GHG emissions, or even "misleading" because these principles fail to draw sufficient attention to the larger underlying problem of global climate change. The Legislature,

however, has not so far concluded that CEQA needs to be changed for this purpose. As the discussion above indicates, there are good reasons for this.

The AG appears to argue that even if the EO S-03-05 reduction targets are not an appropriate measuring tool for impacts from most projects, these targets are uniquely appropriate for assessing the GHG impacts of a RTP/SCS. Again, however, the Legislature has not agreed. Although SB 375 established new and extremely detailed requirements for adopting sustainable communities strategies, neither SB 375 nor any other legislation has altered CEQA requirements for review of an RTP/SCS. There are also no good reasons for such changes. The flaws in petitioners' theory apply equally to CEQA review of RTP/SCS.[1] The AG argues in particular that the long term nature of the RTP/SCS makes it a strong candidate for analysis against the long-term goals of EO S-03-05. However, the 40-year planning horizon of SANDAG's RTP/SCS is no longer than the lifespan of the typical housing tract, new industrial facility or other type of development project commonly reviewed under CEQA. Moreover, unlike a typical development project, the RTP/SCS must be updated every four years, and, therefore, may be altered to keep pace with technological, regulatory or other changes

[1] To the extent an RTP/SCS succeeds in reducing existing GHG emission levels, it is not causing or contributing to ongoing climate change, but ameliorating the problem. That the reductions may not be sufficient to eliminate the problem does not mean the RTP/SCS is causing climate change. Further, in reality most impacts analyzed in the EIR in this case and in RTP/SCS EIRs generally are not impacts caused by the RTP/SCS, but impacts caused by population growth and development that would occur in any event. Sound transportation planning may reduce these impacts, and bad planning may aggravate them. But in any event, the GHG emissions that can fairly be deemed caused by the transportation projects planned in the RTP/SCS are a small portion of GHG emissions caused by future development as a whole.

affecting GHG reduction goals and strategies. The case for applying a long-term EO S-03-05 baseline analysis to an RTP/SCS is thus actually weaker than for other types of projects.

None of the foregoing means that the Legislature or responsible local and regional governments are ignoring the problem of climate change. As the state Scoping Plan indicates, however, regulatory efforts to limit GHG emissions and reverse existing trends must be and are being undertaken on many fronts. (AR 319:26131-26132, 26153-26162, 26478-26484.) Collectively, these measures are intended to reduce statewide GHG emissions in accordance with the goals of EO S-03-05. It is by these means that the goals of EO S-03-05 will be met, if they can be met, and not by reinterpreting CEQA to require fruitless statistical comparisons between the GHG emissions of individual projects and the long-term statewide emission reduction goals of EO S-03-05.

C. Comparison With the Long-Term Goals of Executive Order S-03-05 is Not Required to Determine Consistency with Applicable Regulatory Goals or Assess a Project's Ultimate Impacts on Climate

SANDAG recognizes that Guidelines § 15064.4 endorses the use of significance criteria that depart from normal CEQA baseline principles to a degree. Specifically, Guidelines § 15064.4(b)(3) authorizes agencies to consider the extent to which a project complies with plans or regulations designed to reduce GHG emissions. If not, strictly speaking, consistent with conventional baseline principles, this approach has some practical informational value. Specifically, it provides useful analysis in an EIR of consistency requirements that may be relevant to an agency's decision to approve or reject a project, and thereby helps monitor progress toward

applicable, achievable GHG reduction goals that may be relevant to the project.

Petitioners apparently believe the same virtues would apply to a comparison between project emissions and the year 2050 goals of EO S-03-05. This, however, is a policy argument, not a scientific one. It is also a policy argument that has already been lost. Guidelines § 15064.4(a)(3) expressly requires a comparison to regulatory goals or standards developed through an open public process, not with generalized goals in brief gubernatorial policy statement. (SANDAG AOB, p. 21.)

While comparing project emissions to long-term statewide goals may provide one more piece of information, such information is not, in reality, of great added value in assessing the impacts of individual projects under CEQA. Such information does not help craft feasible project mitigation measures, nor measure performance against directly relevant standards. In adopting Guidelines § 15064.4, the state Resources Agency did not abuse its discretion by mandating that public agencies take a more focused and practical approach to assessing GHG impacts. In this case, the most relevant performance standards were those mandated by SB 375, i.e., the performance standard addressed in the EIR analysis under GHG significance criterion GHG-2. (AR 8a:2578-2581.) The EIR also went further, however, and measured both projected land use and projected transportation-related GHG impacts to the overall goals of the state Scoping Plan. (AR 8a:2581-2588.) Significantly, the GHG reduction goals set for regional land use and transportation planning efforts in the Scoping Plan are a *statewide* total of 5-million metric tons ("MMT"), or less than 3% of the total statewide goal of 174 MMT by 2020. (AR 319:26155, 26185-26189.) Perhaps comparing

regional emissions against the year 2050 goals of EO S-03-05 would have provided bigger numbers, but it would be of little real help in addressing the problems of climate change through the RTP/SCS planning process.

Petitioners' personal beliefs that there are scientific, moral or other good reasons to use an alternate approach based on EO S-03-05's long-term statewide goals are not a basis for finding a violation of CEQA.

D. The Consistency Analyses Performed in the EIR are Not Misleading

On appeal the CNFF petitioners offer entirely new arguments that the impact analyses conducted under criteria GHG-2 and GHG-3 in the EIR are "misleading." (CNFF RB/XOB, pp. 34-39.) Petitioners contend these analyses are "misleading" because they do not alert readers to the significance of GHG emissions *after* the cutoff dates addressed in these analyses, i.e., 2035 for SB 375 consistency and 2020 for Scoping Plan consistency. (AR 8a:2578-2588.)

If these arguments are intended merely to augment petitioners' claim that the long-term goals of EO S-03-05 should have been used as an analytical baseline, they add nothing of substance to the debate. If these arguments are intended to state independent grounds for attacking the EIR, they are not properly before the Court. No contention that the analyses under GHG-2 or GHG-3 was inadequate or misleading was ever made during the administrative proceedings, nor in the trial court. It is too late to raise these issues now. (PRC § 21177; *Association for Protection of etc. Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, 737.)

These arguments are also without any substantive merit. The EIR objectively states the facts relevant to each consistency analyses. Petitioners do not claim that the EIR is factually incorrect, misstates the standards

established by SB 375 or the Scoping Plan, or misrepresents impacts during the stated time periods. While petitioners contend that these analyses ignore GHG impacts after the cutoff years, they do not claim (or cite evidence) that the EIR misstates facts or makes false claims about the course of GHG emissions in later years. In short, there is nothing false or misleading about the analysis.

Nevertheless, relying on their own unique gloss on SB 375 and the Scoping Plan, petitioners contend that these plans *impliedly* require ongoing GHG emission reductions beyond their stated target years, and the EIR is therefore misleading for failure to disclose the RTP/SCS' inability to guarantee that these implied goals will be met on a regional basis. The simple fact is, however, that SB 375 and the Scoping Plan do not establish any quantitative or even qualitative standards for GHG reductions after, respectively, 2035 or 2020. (AR 8a:2578, 2581; 319:26139, 26153-26162.) Analyzing consistency with these plans after their target years is not only not required, it is impossible. The EIR was not "misleading" because it failed to imagine such standards. If the EIR was actually required to address long-term GHG emissions after 2035 – itself a questionable proposition – that analysis is presented under criterion GHG-1. (AR 8a:2567-2578.) In addition, both the EIR and RTP/SCS do contain a quantitative and qualitative discussion of vehicle-related GHG emission trends through 2050. (AR 8a:3784-3785, 3820-3823; 190a:13155-13156.) Per capita GHG emissions will actually be 10% below 2005 levels in 2050. (Id.)

Petitioners apparently recognize that the case law is entirely against them on these issues. In *CREED*, 197 Cal.App.4th 327, 336-337, this Court expressly approved an analysis that was based on the year 2020 targets

established in the Scoping Plan. In *North Coast,* 216 Cal.App.4th 614, 652, the respondent also utilized a standard based on the year 2020 Scoping Plan goals. None of these cases suggest that a lead agency need go further and analyze consistency with supposed qualitative, longer term goals of the Scoping Plan. What these cases do establish is that SANDAG was well within its discretion in basing its analyses of GHG emissions on the specific guidance of Guidelines § 15064.4, and not the alternate standard proposed by petitioners.

IV. THE EIR ADEQUATELY CONSIDERED MITIGATION MEASURES FOR GREENHOUSE GAS IMPACTS

A. Background Principles

1. *An EIR is Only Required to Consider a Reasonable Range of Mitigation Measures, Not Every Conceivable Mitigation Measure*

The CNFF petitioners, relying on Guidelines § 15126.4(a)(1)(A), contend that an EIR must include *all* putative mitigation measures that "could reasonably be expected to reduce adverse impacts." Purportedly, Guidelines § 15126.4 nowhere limits an agency's obligation to considering merely a "reasonable range" of mitigation measures. Petitioners spend most of the rest of their opposition brief arguing, in effect, that failure to consider even one arguably feasible mitigation measure in the EIR renders it legally insufficient. This, of course, is not the law.

It can be intuited that, given CEQA's overall goals of reducing significant environmental effects where feasible, it can be assumed that discussion of more than one mitigation measure for an impact may often be necessary and appropriate in an EIR. (See Guidelines § 15126.4(a)(1)(B).) Guidelines § 15126.4, however, nowhere declares that an EIR must evaluate "all" potentially available mitigation measures. Case law makes it clear that

this requirement is not to be construed to require consideration of "*every conceivable mitigation measure*," nor endless evaluation of token "nickel and dime" measures or measures that amount to mere variations on substantive mitigations already considered and adopted by the lead agency. (*Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 935.) As petitioners admit, these rules have been explicitly summed up by other courts as a requirement that an EIR consider a "reasonable range" of mitigation measures. (*Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 348; *Concerned Citizens of South Central L.A. v. Los Angeles Unified School Dist.* (1994) 24 Cal.App.4th 826, 843.) Petitioners contend the term "reasonable range" in these cases is intended to distinguish only mitigation measures that are feasible from those that are infeasible. Petitioners, however, cite no other authority that has interpreted these cases in that manner, or otherwise disapproved of the many cases suggesting that a reasonableness limitation applies to an EIR's scope of analysis of mitigation measures.

2. *The Burden is on Petitioners to Identify Additional Specific Mitigation Measures that Should Have Been Considered and to Show that These Measures Were Feasible and Would Substantially Reduce GHG Emissions*

The CNFF petitioners also deny that they bear any burden of proof that mitigation measures they contend were improperly excluded from the EIR were actually feasible and necessary to permit a reasoned choice of mitigation measures. (CNFF RB/XOB, pp. 79-81.) This argument is partly answered above. To the extent a lead agency bears the initial burden of identifying mitigation measures for a project, it does so by identifying a reasonable range of mitigation measures for the relevant impact(s). Once

this is done, however, a public agency is entitled to a presumption that the EIR is adequate and that its duties were regularly performed. (*San Diego Citizenry*, 219 Cal.App.4th 1, 11, 13.) The burden thus falls on petitioners to demonstrate otherwise. While petitioners contend that the trial court found that they had met their burden, this is of no consequence. This Court independently reviews the record, to say nothing of independently reviewing questions of law. (*Vineyard*, 40 Cal.4th 412, 427.)

Petitioners contend that the principles discussed in *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, are inapplicable here because *Mount Shasta* deals with alternatives rather than mitigation measures. The distinction, however, is one without a difference. In either case, the petitioner bears the burden of showing a prejudicial abuse of discretion. In either case, the Court can hardly conclude that failure to discuss a purported alternative or mitigation measure was prejudicial error unless the Court is informed precisely what the mitigation measure or alternative is, and is provided with evidence that it was feasible, capable of significantly reducing project impacts, and not merely duplicative of measures already considered or already included in the project. (*Mount Shasta*, 210 Cal.App.4th 184, 199.)

Contrary to petitioners' representations, the challenger in *Mount Shasta* did belatedly identify one potential alternative that had allegedly been overlooked by the respondent during the EIR process. (*Id.*) The challenger, however, failed to make any showing that this purported alternative was consistent with project objectives, at least potentially feasible, and would have actually reduced environmental impacts. (Id.) Those are precisely the problems presented in this case, with the additional factor that petitioners

seldom even concretely describe the specific additional mitigation measures SANDAG allegedly could have included in the EIR.

These foregoing principles are borne out in this Court's recent decision in *San Diego Citizenry*, 219 Cal.App.4th 1, 15-17. There, the petitioners also argued that unspecified "additional" mitigation measures should have been considered. Quoting *Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (*"SCOPE")* (2011) 197 Cal.App.4th 1042, 1055-1056, the Court held that "appellant's position, that the [respondent] was required 'to explore in writing further [nonspecific] mitigation measures … regardless of their feasibility, is simply not supportable under the law." (*San Diego Citizenry*, 219 Cal.App.4th 1, 15 (Internal quotes and citation omitted).) The Court then flatly rejected the argument that where additional feasible mitigation measures might possibly exist, "'it was the decisionmaker's role [sic] to come up with them in the first instance, and then to determine whether to adopt them or to reject them as infeasible.'" (*Id*. at 17.)

In this case, the EIR proposed a broad range of mitigation measures for GHG emissions. (AR 8a:2588-2590.) SANDAG also fully responded to all suggestions concerning possible additional mitigation measures received in comments on the Draft EIR, both in the FEIR and in written findings. (AR 3:157-173; 8b:2773-3775, 3778-3779, 3786-3787, 3800-3801, 3824-3829, 4154, 4173, 4402, 4439-4442; .) The burden is on petitioners to show that significant, *specific* additional feasible mitigation measures were improperly rejected in the process.

B. SANDAG Did Not Unlawfully Defer or Delegate Responsibility for Mitigating Greenhouse Gas Emissions

1. *The EIR Properly Analyzed Impacts and Mitigation Measures at the Programmatic Level*

While petitioners concede that use of a program EIR was appropriate for the Project, they completely ignore the principles that govern program EIRs in practice.

The CNFF petitioners take a new tack on appeal and deny that they "have ever asked SANDAG to mitigate the climate impacts of individual roadway projects listed in the Plan," and contend they are demanding only that SANDAG consider additional "program-level measures." (CNFF RB/XOB, pp. 64-65.) If this concession is true, the case becomes simpler. The Court would merely have to ascertain what specific "program-level measures" petitioners are talking about (if that is possible), and determine whether these program-level measures were improperly refused consideration in the EIR. In practice, however, many of the CNFF Petitioners' complaints, and some of their few specific suggestions, such as conditioning individual project funding on reductions of vehicle miles traveled, involve mitigation measures that could only be imposed on a project-by-project basis, and whose feasibility could only be determined in practice on a project-by-project basis. If petitioners are conceding that these types of measures are no longer at issue, then virtually all of their complaints about improper deferral, lack of specificity or abdication of responsibility to other public agencies evaporate.

As discussed in SANDAG's opening brief, the RTP/SCS itself incorporates a broad range of planning measures and policies intended to reduce regional GHG emissions. (SANDAG AOB, pp, 29-30.) Most

additional measures potentially available to reduce GHG emissions will have to be evaluated and implemented on a project-by-project basis, or will involve voluntary initiatives by local land use and other regulatory authorities that cannot be controlled by SANDAG. SANDAG does not have the regulatory authority to enforceably impose broad regional mitigation measures, such as restrictions on energy use or carbon taxes. While a program EIR can, as the RTP/SCS EIR does, identify various types of measures that can be pursued on a project-by-project basis, it cannot reasonably undertake to evaluate – or dictate – precisely when, where and to what degree these potential mitigation measures may be successfully applied by the appropriate lead agency.

To the extent that petitioners' claims are truly directed at "program-level" mitigation measures, their contentions are answered in subsequent sections. To all appearances, however, petitioners real complaints are not about mitigation measures that could have been attached to the RTP/SCS, but dissatisfaction with the contents of the RTP/SCS itself. Petitioners' stated suggestions for "programmatic mitigation" consist of reducing driving, "demand management" and increasing transit funding. These are all issues, however, that were addressed in formulating the RTP/SCS itself. (See SANDAG AOB, pp. 29-33; AR 8a:2104-2115; 8b:3778, 3786-3789, 190:13089-13094, 13150-13157, 13257-13278, 13356-13370.)

Petitioners' real complaints are thus about the balancing of project objectives, fiscal, technical and legal constraints, and competing environmental and social considerations reflected in the RTP/SCS. These types of decisions are manifestly policy decisions entrusted to the sound discretion of SANDAG, and subject to extremely limited review by the

courts. (*San Diego Citizenry*, 219 Cal.App.4th 1, 18; *California Native Plant Soc. ("CNPS") v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 1001-1002.) Petitioners cannot change the nature of review simply by re-labeling options expressly or impliedly rejected during the RTP/SCS as "mitigation measures." If they attempt to do so, they bear the burden of identifying what specific additional "programmatic" mitigation measures they are proposing, and of demonstrating by reference to evidence in the record that such measures were feasible and necessary to provide SANDAG with a "reasoned choice" of mitigation measures.

2. *The Availability of Project-Specific Information for Individual Future Projects Programmed in the RTP/SCS Did Not Require SANDAG to Conduct a Project-Level Analysis of All Such Projects*

The AG argues that the level of analysis in a program EIR is governed entirely by the level of detail available on future projects that may be included in the program. From this, the AG reasons that the EIR in this case should have been, in effect, a project-level EIR for every individual transportation project programmed in the RTP/SCS. This type of reasoning was flatly rejected in *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 741-743, where the master plan under review anticipated six individual projects whose proposed locations and general characteristics were also well defined. The court concluded that project level review of the six anticipated projects was not required. More fundamentally, petitioners' argument ignores the underlying purposes and stated principles governing program-level EIRs. As discussed in *In re Bay-Delta [Programmatic Environmental Impact Report Coordinated Proceedings* (2008)] 43 Cal.4th 1143,

> Under CEQA's tiering principles, it is proper for a lead agency to use its discretion to focus a first-tier EIR on only the general plan or program, leaving project-level details to subsequent EIR's (sic) when specific projects are being considered. This type of tiering permits a lead agency to use a first-tier EIR to adequately identify 'significant effects of the planning approval at hand' while deferring the less feasible development of detailed, site-specific information to future environmental documents. (*Id*. at 1174-1175, citations omitted.)

Thus, "[T]iering is properly used to defer analysis of environmental impacts and mitigation measures to later phases when the impacts or mitigation measures are not determined by the first-tier approval but are specific to the later phases." (*Id*., at 1170, quoting *Vineyard,* 40 Cal.4th 412, 431; SANDAG AOB, pp. 51-55.) In short, a program EIR should focus on overall impacts of the program at issue, and is *not* required to conduct a detailed assessment of impacts or mitigation measures for each of its constituent parts.

Petitioners argue that the Court should essentially disregard the Supreme Court's statements of the law as essentially mere dictum because the programs at issue in *In Re Bay-Delta* and *Vineyard* were different than the RTP/SCS. The Supreme Court's statement of applicable background legal principles, however, cannot be dismissed as mere dicta. In any event, even dicta from the Supreme Court must generally be followed by lower courts. (*People v. Godwin* (1996) 50 Cal.App.4th 1562, 1571.)

Petitioners do not show that that these principles are inapplicable here. Approval of the RTP/SCS is not, as petitioners seem to believe, tantamount to formal approval of every individual project included in the RTP/SCS. While inclusion of an individual projects in the RTP/SCS is generally necessary to qualify for eventual state, federal or SANDAG funding, inclusion in the RTP/SCS does not guarantee that the projects will actually

be built by the agencies charged with responsibility for construction and operation. Individual project-level environmental review can and will occur before any final decision is made. Moreover, the RTP/SCS itself must be updated every four years. (Gov. Code § 65080(d).) Petitioners are thus essentially asking that many projects undergo project-level review every four years in the RTP/SCS EIR, despite the fact that they may not actually be funded for decades, or may ultimately never be built due to future changes in federal, state or local funding priorities or other circumstances.

Petitioners also ignore the sheer impossibility of adopting generically applicable mitigation measures for the vast range and number of future projects programmed in the RTP/SCS. As this Court recently reaffirmed, "the sufficiency of an EIR is to be reviewed in light of what is reasonably feasible." (*San Diego Citizenry*, 219 Cal.App.4th 1, 21, quoting Guidelines § 15151.) "The degree of specificity required in an EIR will correspond to the degree of specificity involved in the underlying activity which is described in the EIR. (*Id*., quoting Guidelines § 15146.) "An EIR for a project such as the ... amendment of a comprehensive zoning ordinance … should focus on the secondary effects that can be expected to follow from the … amendment, but the EIR need not be as detailed as an EIR on the specific construction projects that might follow." (*Id*.; *Al Larson*, 18 Cal.App.4th 729, 746.)

As discussed in SANDAG's opening brief, the RTP/SCS includes literally hundreds of individual projects. (AR 8a:2104-2128.) The project-level analysis demanded by the AG would convert the 1,000+ page EIR focused on regional effects of the RTP/SCS to a 10,000 page document mired in such details as the mitigation measures for the aesthetic impacts of

individual new transit stations and discussion of traffic levels at every major intersection or road segment which may be improved in the next 40 years. Much of this information would also ultimately be useless or even deceptive. Since CEQA generally requires project-level analysis to be based on existing baseline conditions, the impact analysis demanded by the AG would often be based on conditions that ceased to exist years or decades before individual projects in question were built. Petitioners may contend that this problem could be resolved by reasonable forecasting of future baseline conditions, but this "solution" merely compounds the difficulty (while also undermining the reliability) of assessing actual project-level impacts for individual future projects. CEQA does not require what is not realistically possible given time constraints and funds reasonably available. (Guidelines § 15151; *National Parks & Conservation Ass'n. v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1364.) The principles articulated by the Supreme Court in *In re Bay-Delta,* 43 Cal.4th 1143, 1170-1177 were crafted precisely to address this dilemma.

It may be added that program-level review rather than project-level review is particularly appropriate with respect to GHG impacts and mitigation measures. GHG emissions are by their nature a regional (actually global) problem. A program EIR addressing GHG impacts should focus on big-picture, programmatic mitigation measures. While opportunities to incrementally reduce or offset GHG emissions may occur at the individual project level, these opportunities necessarily must be explored at the time of project-level review. The AG is simply wrong in contending otherwise. All of the petitioners are incorrect in contending that project-specific mitigation measures can or should reasonably be addressed in a program EIR.

Decisions on the applicability, feasibility and potential effectiveness of project-level mitigation measures simply cannot be made on a regional basis.

3. *The EIR Does Not Undermine Future Mitigation Efforts*

The petitioners also express the fear that failure to adopt adequate mitigation measures at the program level may allow local governments to avoid responsibility for mitigating GHG emissions at the time of individual project approvals, particularly if the project qualifies for a statutory exemption under Public Resources Code § 21155 et seq. or another exemption. Any agency seeking to utilize the RTP/SCS EIR, however, would be bound by CEQA's tiering principles to fully evaluate project impacts and mitigation measures at a project-specific level. This would include consideration of potentially applicable mitigation measures identified in the EIR and any additional mitigation measures determined to be feasible and necessary to mitigate impacts.[2] (PRC § 21094; Guidelines §§ 15152(d)-(f), 15168(c) .)

Petitioners' concern that some future individual projects may be statutorily exempt from further review is an issue for the Legislature, not the Court. But in any event, the statutory exemptions at issue are so narrowly circumscribed that they cannot realistically be considered a likely source of significant, unmitigated GHG emissions. (PRC § 21155, 21155.1, 21159.28.) Indeed, to qualify for an exemption, the project at issue must be of a type expected to minimize GHG emissions, must be consistent with the

[2] To the extent that the lead agency might choose *not* to tier off the RTP/SCS EIR, it is of course required to independently consider and adopt feasible mitigation measures. In practice, local planning jurisdictions and Caltrans have historically conducted their own independent environmental review of individual transportation projects, and used regional documents such as the current RTP/SCS EIR as simply a source of information.

RTP/SCS and other applicable plans, and must incorporate all applicable mitigation measures prescribed in applicable prior EIRs. (PRC §§ 21155(a), 21155.2(a), 21159.28(a).)

4. *SANDAG Has Not Unlawfully "Deferred" Mitigation*

Although the petitioners renew arguments that SANDAG has illegally "deferred" mitigation, they do not attempt to explain how SANDAG could have crafted more specific measures or performance standards for mitigation measures that will have to be applied on a case-by-case basis to literally hundreds (thousands, if land use projects are counted) of individual future project conducted or approved by twenty or more different public agencies over the next 40 years. As discussed in SANDAG's opening brief, the principles stated in case law concerning approvals of individual projects cannot be mechanically applied in the program EIR context, where further individualized review and development of project specific mitigation measures is specifically contemplated. (SANDAG AOB, pp. 51-55.) In such cases, development and adoption of specific mitigation measures and applicable performance standards necessarily must occur at the time individual projects *are approved*, not when a program EIR is certified. Petitioners apparently have no answer to this other than to continue to cite inapplicable case law and fall back on sloganeering about kicking cans down proverbial roadways.

To the extent that petitioners are complaining that formulation of any "programmatic" mitigation measure applicable to the RTP/SCS at large was unlawfully "deferred," such contentions are addressed below.

5. *SANDAG Has Not Disregarded Its Substantive Duty to Adopt and Enforce Mitigation Measures Within Its Powers*

Petitioners also continue to misunderstand or misrepresent the nature of CEQA's substantive duty to mitigate and the corollary requirement that mitigation measures be enforceable. As discussed in SANDAG's opening brief, CEQA recognizes situations where the legal authority or practical ability to actually implement mitigation measures lies in the hands of agencies other than the lead agency that prepared the EIR. (SANDAG AOB, pp. 27-28.) In such cases, the lead agency may make findings to that effect under Public Resources Code § 21081(a)(2). The petitioners fail to even mention this principle or explain why it does not apply to the mitigation measures at issue in this case.

This omission is even more puzzling in light of the recent discussion of this precise issue in *Neighbors for Smart Rail*, 57 Cal.4th 439, 465-466. In *Neighbors for Smart Rail*, the respondent, a regional transportation agency, was required to address potential spill-over parking effects that might result from development of new transit facilities. Since the respondent lacked legal authority to regulate parking in affected areas, the EIR proposed (and the agency adopted) mitigation measures that contemplated that local municipal governments would, with assistance from the respondent, develop and implement parking control measures if monitoring proved that there was a problem. Project opponents objected that this mitigation was not legally enforceable. The Supreme Court responded that "CEQA, however, allows an agency to approve or carry out a project with potential adverse impacts if binding mitigation measures have been 'required in, or incorporated into' the project, *or* if '[t]hose changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be,

adopted by that other agency." (*Id*. at 465, emphasis in original, internal citations omitted.) The question is thus not whether the lead agency will mitigate impacts, but whether reasonable means for mitigating impacts are identified in the EIR.

The CNFF petitioners suggest late in their brief that *Neighbors for Smart Rail* also stands for the proposition that a lead agency may find that another public agency is responsible for mitigation only if the lead agency also is willing to *pay* the other agency to implement the relevant mitigation measures. In *Neighbors for Smart Rail*, the mitigation measures did indeed call for the lead agency to reimburse surrounding jurisdictions for expenses incurred in mitigating parking impacts caused by the lead agency's transit project. (*Neighbors for Smart Rail*, 57 Cal.4th 439, 465.) This hardly establishes a general proposition that a lead agency must be responsible for the funding of all mitigation measures for projects it reviews, particularly when the EIR is a program EIR and many of the projects will be constructed and operated by other entities.

In this case, the long-term increases in GHG emissions forecast in the EIR will not be caused by the RTP/SCS. They will be caused by population growth and related development and transportation activities that would occur if the RTP/SCS, or even SANDAG itself, ceased to exist tomorrow. The RTP/SCS is part of the solution, not the problem. Almost all of the GHG increases will result from land use and development activities carried out by the private sector and regulated by local governments, not SANDAG. (AR 8a:2569, 2572-2577.) Transportation-related GHG emissions are projected to remain *below* existing levels through the year 2035, and increase only slightly above existing levels by 2050 under the RTP/SCS. (AR

8a:2572, 2575, 2577.) *Per capita* GHG emissions will actually decrease to approximately 10% below 2005 levels by 2050, further confirming that population growth, not the RTP/SCS, is the driver of GHG emission increases. (AR 8b:3821-3822.)

All of the road and highway improvement projects in the RTP/SCS will actually be carried out by Caltrans or local governments, not directly by SANDAG. SANDAG will have direct control primarily over transit projects, which are not the major source of GHG emissions. Indeed, the majority of expenditures planned in the RTP/SCS are either directly for transit projects and operations, or for managed highway lanes planned to facilitate transit. (AR 8a:3782, 3786-3787, 190:13248-13249.) Under these circumstances, it is absurd to suggest that CEQA requires SANDAG to assume direct responsibility, financial or otherwise, for implementation of every possible measure that might be utilized to reduce regional GHG emissions.

It is true that in this case, SANDAG does not have the power to legally compel other public agencies to implement the mitigation measures recommended in the EIR for future projects subject to their independent purview. This does not mean that the EIR was deficient for identifying mitigation measures to be implemented on a voluntary basis. As this Court recently observed, an EIR is not legally *required* to discuss mitigation measures that "cannot be legally imposed or enforced." (*San Diego Citizenry*, 219 Cal.App.4th 1, 16.) That an EIR contains *more* information than is legally required is not grounds for finding an abuse of discretion. The EIR here fulfills its informational function by informing the public and decisionmakers of the extent of the GHG emission problem and the means

by which the region's public agencies may attempt to reduce the problem. The mere fact that SANDAG prepared the EIR does not mean that SANDAG has either the duty or the ability to mitigate all of the region's GHG emissions. To suggest otherwise in the EIR would itself have been misleading.

C. SANDAG Did Not Improperly Reject Any Mitigation Measures on Grounds of Legal Infeasibility

Petitioners continue to argue on appeal that SANDAG improperly relied on "legal infeasibility" as an "excuse" for failure to adopt mitigation measures. These arguments fail at the threshold level for two reasons. Petitioners first fail to identify any specific mitigation measure that SANDAG declined to adopt on the grounds of legal infeasibility. Second, petitioners also fail to identify any specific source of legal authority that SANDAG allegedly ignored or misapplied in making its decisions. Mere rhetorical claims that SANDAG has broad authority to mitigate are hardly sufficient to show that SANDAG abused its discretion by refusing to evaluate or adopt some specific, otherwise-feasible mitigation measure on mistaken legal grounds.

1. *Petitioners Have Not Identified Any Specific Mitigation Measure that Was Rejected on Grounds of Legal Infeasibility*

Petitioners' legal infeasibility arguments rest on the uncontroversial proposition that, "[a]n EIR that incorrectly disclaims the power and duty to mitigate based on erroneous legal assumptions is not sufficient as an informative document." (*City of Marina*, 39 Cal.4th 341, 356.) In *City of Marina*, the California Supreme Court found that the respondent state university erred in concluding that provisions of Government Code § 54999,

et seq., precluded it from paying fair-share mitigation funds for traffic improvements that were identified as necessary to mitigate the traffic impacts caused by expansion of an existing campus. Petitioners also rely on *County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86, 101-104, in which this Court rejected claims that the respondent college district lacked legal authority under the Education Code to fund certain off-site traffic mitigation measures. The Court concluded that contrary to the district's claims, expenditures for such mitigation *were* authorized by the governing statutes. (*Id*. at 103-104.)

In both *City of Marina* and *County of San Diego,* the respondents refused to adopt mitigation measures that were specifically identified in the respective EIRs, and that were deemed infeasible by the respondents on purely legal grounds. Here, in contrast, petitioners would like to have the Court declare the EIR insufficient even though they cannot identify any specific mitigation measures that SANDAG allegedly declined to adopt for legal reasons. The Court, however, cannot determine if a lead agency has wrongfully disclaimed power to mitigate unless it is informed as to precisely what mitigation measures were rejected, why they were rejected, and whether the measures were actually feasible in light of other considerations.

While there unquestionably are numerous legal as well as other constraints on SANDAG's ability to mitigate, SANDAG has not categorically denied legal authority to mitigate GHG emissions. Instead, SANDAG has clearly indicated its commitment to impose feasible GHG mitigation requirements on future projects it actually controls or are subject to discretionary funding authority. (AR 3:87-90, 182, 204-207; 8a:2588, 2590; 8b:3774.) If SANDAG has legal authority to impose additional types

of mitigation measures, or to impose mitigation measures on additional classes of projects, it is incumbent upon petitioners to identify what the relevant mitigation measures are.

2. *Petitioners Have Not Identified Any Specific Legal Authority that SANDAG Has Wrongfully Failed to Utilize*

If petitioners are vague in identifying specific additional mitigation measures that SANDAG might have legal authority to adopt, they are even vaguer as to the source of this alleged legal authority.

Petitioners now appear to concede that SANDAG has no legal authority to withhold or condition allocations of pass-through *TransNet* funds for local roadway projects upon compliance with SANDAG-imposed mitigation measures. (AR 8b:3830.) They do not challenge the analysis of this subject in SANDAG's opening brief. (SANDAG AOB, p. 51.)

Although the constraints on use of other state, federal and local transportation funding sources are extensively disclosed in the record, petitioners do not contend that SANDAG has misread the limitations imposed by any of the statutes, regulations or customary grant terms that govern use of these funds. (AR 145:9908-9923; 190a:13237-13247; 190b:13655-13666.)

Petitioners also do not claim that SANDAG has some hitherto unutilized land use regulatory authority that would allow it to impose mitigation requirements in the manner of a municipal government, e.g., through adopted development standards, permit conditions or exactions.

In lieu of identifying specific instances in which SANDAG has allegedly underestimated its legal authority, petitioners fall back on meaningless generalities about SANDAG's supposed "broad statutory authority" under the Public Utilities Code and the CEQA "duty to mitigate."

As discussed in SANDAG's opening brief, the "duty to mitigate" does not vest public agencies with authority they do not already possess, much less authorize them to disregard express statutory, constitutional or other limitations on their lawful discretion. (SANDAG AOB, pp. 27-28; PRC § 21004; Guidelines § 15040(b); *Concerned Citizens of South Central L.A.*, 24 Cal.App.4th 826, 842.) Even the authorities relied on by petitioners affirm that "an agency's authority to impose mitigation measures must be based on legal authority other than CEQA. [Citations omitted.]" (*County of San Diego*, 141 Cal.App.4th 86, 102.)

The supposedly "broad statutory authority" conferred by sections of the Public Utilities Code also does not give SANDAG the power to disregard other legal constraints on its actions, such as, for example, by spending restricted federal highway funds on a light rail project, or unilaterally imposing mitigation requirements on Caltrans.

3. *State Highways*

Petitioners come closest – but still not very close – to articulating a specific example of wrongful disclaimer in the matter of state highway projects which receive *TransNet* funding through SANDAG. But even here, petitioners do not offer a single example of a feasible highway project mitigation measure that might not be adopted or recommended by SANDAG for legal reasons, or, for that matter, for any other reasons. Neither do petitioners cite any statutory authority allowing SANDAG to enforceably impose mitigation requirements on Caltrans, which by law is an agency which controls state highways and highway projects. (AR 8b:3774-3775.) Petitioners merely argue that by virtue of its administrative control over *TransNet* funds allocated for state highway projects, SANDAG plays a

"partnership" role in highway planning and construction. A partnership role, however, is not the same thing as veto power. But in any event, petitioners offer no evidence that SANDAG has or ever will utilize its partnership role to obstruct adoption of otherwise feasible GHG mitigation measures.

If petitioners are suggesting that SANDAG can be required to reconsider its basic funding commitments to state highway projects in the name of "mitigation," or jeopardize major projects by threatening to withhold funds as leverage, they are wrong for reasons discussed below. SANDAG is not required to rewrite the *TransNet* Expenditure Plan or jeopardize tens of millions of dollars in federal and state matching funds for needed regional projects to possibly achieve some small level of GHG reductions. The EIR provides that Caltrans can and should adopt appropriate mitigation measures at the project level. (AR 8a:2590; 8b:3773-3775.) The evidence is that Caltrans can reasonably be expected to adopt feasible mitigation measures as it has in the past. (AR 8b:3774.) While petitioners may fear that a state highway project may some time, somehow, go forward without fully satisfactory GHG mitigation measures, such sheer speculative possibilities are not grounds for invalidating the EIR.

D. SANDAG Did Not Erroneously Rely on Falsely Claimed Fiscal Constraints to Reject Otherwise Feasible Mitigation Measures

Petitioners also contend that SANDAG has wrongfully relied on "fiscal constraints" to eschew mitigation opportunities. Again, however, petitioners fail to identify any specific mitigation measure that could and should have been adopted but for falsely imagined fiscal constraints. And again, although the record discloses in detail the sources of funds that the RTP/SCS will rely on, petitioners identify only one possible source of funds

– *TransNet* funds – that allegedly could have been reallocated to fund additional mitigation measures. (AR 190a:13237-13247; 190b:13655-13666.)

Idle rhetoric about SANDAG's "power of the purse" does not absolve petitioners of showing that some specific mitigation measures have been erroneously foregone in the name of fiscal realities. As far as SANDAG's "purse strings," a far more apt analogy would be to compare SANDAG to a bank. A bank has fiduciary responsibilities towards its depositors that cannot be ignored. Even in discretionary activities, banks are regulated. SANDAG is equally accountable to the sources of funds allocated in the RTP/SCS, and may not freely reallocate them or jeopardize their intended use in the name of mitigation.

As discussed in Part 2, Section V (pp. 107-108, 110-115, infra), SANDAG did comprehensively evaluate options and alternatives for allocation of available funds, within the legal and practical constraints that govern their use. The limited flexibility that exists was fully taken into account during the lengthy process of developing the RTP/SCS. The result was that the 2050 RTP/SCS is the most transit-intensive RTP ever adopted by SANDAG. (AR 8a:3782, 3786-3787.)

Petitioners' arguments really boil down to the claim that SANDAG could and should have reallocated *TransNet* funds to somehow provide for greater GHG reductions. Even here, however, petitioners do not identify what specific projects in the *TransNet* Expenditure Plan should have been sacrificed and what alternate projects or programs funded in their place to better mitigate GHG impacts. Absent such information, the Court is hardly in a position to determine whether – wholly aside from funding issues – the

hypothetically possible mitigation measures advocated by petitioners would, in fact, provide significant GHG emission reductions and would be feasible in practice. As discussed later, there are no sound reasons to believe that substantial GHG reductions could be achieved by relocating available funds. Alternatives to the RTP/SCS that would increase or accelerate transit investment at the expense of congestion relief were found to actually slightly increase rather than decrease GHG emissions. (See Part 2, Section V.C.3, pp. 114-115, infra.)

E. SANDAG is Entitled to Rely on Policy Considerations in Determining the Feasibility of Mitigation Measures

The CNFF petitioners' last general argument is that SANDAG may not rely on "policy reasons" as grounds for rejecting mitigation measures, or, in particular, for rejecting reallocation of *TransNet* funds as a form of "mitigation." (CNFF RB, XOB pp. 75-78.) This argument is truly remarkable in light of this Court's recent decision in *San Diego Citizenry*, 219 Cal.App.4th 1, 17-18, decided almost three months before petitioners' briefs were filed in this case. As the Court stated there, "[F]easibility under CEQA encompasses 'desirability' to the extent that desirability is based on a reasonable balancing of relevant economic, environmental, social, and technological factors." (219 Cal.App.4th 1, 17, quoting *CNPS v. Santa Cruz*, 177 Cal.App.4th 957, 1001.) A lead agency, for example, is not required to consider or adopt mitigation measures that would defeat basic policy objectives of the project at hand. (*Id*. at 18.) A lead agency, therefore, manifestly may rely on policy considerations in rejecting mitigation measures or project alternatives as infeasible.

That infeasibility determinations may be based on policy considerations is not exactly news. (See, e.g., *Citizens of Goleta Valley v.*

Board of Supervisors (1990) 52 Cal.3d 553, 571-573; *CNPS. v. Santa Cruz*, 177 Cal.App.4th 957, 1001.)

The CNFF petitioners cite *Goleta Valley* for the proposition that "an agency cannot 'disregard an otherwise reasonable alternative which requires some form of implementing legislation.'" (CNFF RB/XOB, p. 76.) The AG claims that *Goleta Valley* has no application here because the project at issue in *Goleta Valley* was a specific development project and not, as in this case, the updating of an existing comprehensive plan. The project approvals at issue in *Goleta Valley*, however, did involve amendments to the county's existing zoning and local coastal plan. (*Goleta Valley*, 52 Cal.3d 553, 560.) But more fundamentally, petitioners' arguments miss the point. *Goleta Valley* and subsequent case law clearly establish that agencies have discretion to *not* adopt purported mitigation measures or alternatives that would require major reversals or revisions to past policy decisions. (*Goleta Valley*, 52 Cal.3d 553, 571.) It is not the province of project opponents or the courts to substitute their judgment on such matters for that of duly empowered public officials. (*Id*. at 564.)

With respect to *TransNet*, petitioners first fail to acknowledge that the SANDAG Board's authority to amend the expenditure plan is limited to amendments to *further* the purposes of the existing ordinance. (AR 320:28703, § 16.) The record shows that the few minor amendments passed to date are consistent with this limitation. (AR 195:16919; 206:17466; 211:17560; 214:17575.) None involve major reallocations of funds that would undercut congestion relief or other major objectives of the Expenditure Plan to benefit transit projects. Since petitioners refuse to disclose precisely what changes to the Expenditure Plan they propose, it

cannot be determined whether the amendments would pass even this initial test, or, if so, whether such modest amendments would substantially reduce long-term GHG emissions.

Petitioners also do not explain why the voter-approved Expenditure Plan should be entitled to any less deference than the general plan discussed in *Goleta Valley*, or any other comprehensive plan. As the Supreme Court noted in *Goleta Valley*, a general plan is "not immutable," and may be amended as many as three times a year by a simple majority of a city council or board of supervisors. (*Goleta Valley*, 52 Cal.3d 553, 571.) The *TransNet* Expenditure Plan, may be amended only by a 2/3 vote of the SANDAG Board, or by a vote of the people themselves. The *TransNet* Expenditure Plan also constitutes, like a general plan, a comprehensive, long-term plan developed through an intensive process of weighing and balancing competing public concerns and interests. (*Id.*) Amendments to the plan cannot be undertaken lightly.

The decisionmakers in this case – SANDAG's Board of Directors – consist of elected public officials from all the region's local governments. (AR 15:4520.) The Board is thus uniquely qualified to determine whether significant revisions of the regional accord achieved in the *TransNet* Expenditure Plan represent a feasible policy option. Certainly, until petitioners themselves can identify some alteration to the Expenditure Plan that results in great reductions in GHG emissions without similarly great adverse collateral effects, SANDAG cannot be found to have abused its discretion by declining to consider major changes to the carefully thought out plans and priorities endorsed by a 2/3 majority of county voters as a feasible form of "mitigation."

F. Petitioners have Not Shown that Any of the "Specific" Mitigation Measures They Advocate are Feasible, Necessary, or Were Wrongfully Rejected by SANDAG

Petitioners' arguments do not become any more persuasive when they come to the five "specific" mitigation measures discussed in the CNFF brief. (CNFF RB/XOB, pp. 81-96.) To begin with, there is nothing specific about several of these measures. They suffer from all the vagueness problems discussed in previous sections. But even where the suggested measures are sufficiently defined to permit reasoned analysis, petitioners have failed to show that these measures are feasible or would provide substantial additional mitigation.

1. *Transit-Oriented Development Policy*

As discussed in SANDAG's opening brief, SANDAG has committed itself in the RTP/SCS to studying and developing a regional Transit Oriented Development ("TOD") policy in the next update of the Regional Comprehensive Plan Update. (AOB, pp. 39-40; AR 190a:13166.) Petitioners argue that a regional TOD policy should have been adopted *now* as a mitigation measure for the RTP/SCS. Development of any meaningful regional TOD policy within the time-frame for adoption of the 2050 RTP/SCS was not feasible, however, even if one believed that the RTP/SCS rather than the Regional Comprehensive Plan was the appropriate vehicle for such a policy. Petitioners also cannot show that hastened development of a TOD policy would necessarily provide any significantly greater long term reduction in GHG emissions. The principle that haste-makes-waste applies with full force to complex regional planning activities, which necessarily must take into account local conditions, existing policies and plans, and

SANDAG's lack of authority to legally mandate that local land use authorities implement the policy.

a. Petitioners Have Not Shown that Any Serious Regional TOD Policy Could Have Been Adopted Within the Time Frames for Preparation of the EIR

On appeal, petitioners contend that they provided SANDAG with "examples" of TOD policies that could have been adopted as a mitigation measure. A review of these "examples," however, simply confirms the process of developing an effective and viable TOD policy adapted to local conditions is not one which can be completed on the fly.

Petitioners' chief "exemplar" is a policy (Resolution 3434) adopted by the Metropolitan Transportation Commission in the San Francisco Bay Area. The full text of Resolution 3434 is not in the record. Summaries prepared by MTC, however, make it abundantly clear that such a policy could not simply be incorporated wholesale into the San Diego region's transportation planning scheme as a "mitigation measure." (AR 320:(23)28499-28500, (24):28501-28504.)

Although called a TOD policy, the MTC policy is essentially a funding priority policy. Funds from specified sources will not be allocated to various public transit projects until local land use densities reach critical thresholds. In addition, local agencies and others must participate in cooperative corridor planning groups, and prepare local station plans that facilitate transit development and higher population densities. (AR 320:(24)28502.) The policy, however, is not comprehensive. It applies only to physical extensions of existing transit services, not improvements to existing services or facilities. In addition, funds for right-of-way acquisition may be allocated even if threshold requirements have not yet been met. (Id.)

The MTC policy obviously was not crafted in a day. According to the summary, "The corridor thresholds have been developed based on potential for increased transit ridership, exemplary existing station sites in the Bay Area, local general plan data, predicted market demand for TOD-oriented housing in each county, and an independent analysis of feasible development potential in each transit corridor." (AR 320(24):28503.) "Feeding into the development of the TOD Policy, MTC undertook a TOD Study, an extensive analytical and outreach process that assessed the opportunities and barriers to increased levels of TOD in the San Francisco Bay Area." (AR 320(23)28499.) In other words, the MTC policy was the result of lengthy and intensive study of specific local conditions, accompanied no doubt by a great deal of public discussion and policy debate.

The MTC policy is also actually only the beginning, not the end, of a transit-oriented development strategy. To implement the policy, corridor working groups must be convened and develop Station Area Plans, which include appropriate revisions of local general plans and zoning after necessary environmental reviews. (AR 320(24)28502.) In the meantime, transit projects in the affected areas cannot be built, but must await the outcome of cooperative planning efforts by local jurisdictions. Implementation of the policy could thus actually delay construction of some transit extensions. The MTC policy is, thus, hardly the quick fix for GHG emissions or transit development that petitioners appear to imagine.

In choosing the MTC policy as an example, petitioners unwittingly prove the case against their own arguments. It is abundantly clear that the MTC policy could not be mechanically applied to San Diego county or any other region. Instead, development of any similar regional policy would

require extensive study and presumably consultation with affected local government agencies and the public. Petitioners also have offered no evidence whatsoever that the MTC policy has actually been successfully implemented even in the San Francisco Bay area, or that it has resulted in any actual major progress towards GHG reductions to date.

The other "example" of a TOD policy cited by petitioners fares no better. The MTC study entitled "Financing Transit-Oriented Development in the San Francisco Bay Area" is a canvas of options available for TOD measures in the San Francisco Bay Area. (AR 320(25)28505-28540.) It begins with the helpful advice that "There are many potential program approaches … that would support TOD and infill implementation in the region." (AR 320(25)28508.) This is hardly the stuff of a usable off-the-shelf regional TOD policy.

An EIR is not required to include mitigation measures that would take years to develop and interminably delay approval of a project. (*National Parks*, 71 Cal.App.4th 1341, 1364.) This rule must apply with special force to projects, such as the RTP/SCS, which must be completed within specific statutory deadlines. SANDAG is well qualified to determine whether development of a meaningful and viable regional TOD policy as mitigation was feasible, i.e., "capable of being accomplished in a successful manner within a reasonable time period." (PRC § 21061.1.) A decision to pursue this objective in the more appropriate context of updating the Regional Comprehensive Plan was not, as petitioners contend, and abdication or "deferral" of mitigation responsibilities.

b. Petitioners Cannot Show that a Regional TOD Policy Would Provide Greater Mitigation than Planning Efforts Already Undertaken by SANDAG

SANDAG does believe that a properly conceived regional TOD policy supported by the region's local governments could ultimately contribute to GHG reductions and other smart-growth goals. Petitioners cite no evidence, however, that adoption of a hastily contrived TOD policy developed merely to meet RTP/SCS deadlines would ultimately provide greater GHG reductions than the more deliberate approach adopted by SANDAG. If the MTC policy endorsed by petitioners demonstrates anything, it is that regional TOD planning is inherently a long term proposition.

Despite their enthusiasm for the catch-phrase "regional TOD policy," petitioners also fail to explain how such a policy would necessarily achieve greater results than the sum of planning strategies, programs and initiatives already undertaken by SANDAG in the RTP/SCS or elsewhere or by the regions 19 local government jurisdictions in their own planning processes. To be worthwhile, a regional TOD policy must augment existing local and regional planning efforts, not merely duplicate them. Poorly crafted, a regional TOD policy could even be counter-productive, as are the provisions of the MTC policy that would effectively allow local political opposition in hold-out jurisdictions to effectively block extensions of transit service. Sheer speculation that accelerated adoption of regional TOD policy of unknown content *might* contribute to reductions of GHG emissions is not sufficient to overcome SANDAG's policy judgment that such a policy is better developed in the context of updating the Regional Comprehensive Plan.

c. Petitioners Other Minor Arguments Have No Merit

Petitioners appear to contend that SANDAG has taken inconsistent positions on whether a regional TOD policy may be considered "mitigation." No. Petitioners are the parties who have insisted that such a policy should have been adopted as a form of "mitigation." SANDAG has simply pointed out that the EIR cannot be faulted for failing to recommend such a "mitigation measure" where the measure in question has already been included in the project under review. (SANDAG AOB, pp. 26-27, 29-30, 39.)

Petitioners also contend that "CEQA required SANDAG either to evaluate the proposed transit-oriented development measure in the EIR or to demonstrate its infeasibility." (CNFF RB/XOB, p. 84.) The infeasibility question is addressed above. If the argument is intended to imply that SANDAG was required to address the suggested measure in Board findings or in some other formal response, the argument is not only baseless but disingenuous. The issue of a regional TOD policy was never raised in comments on the DEIR, and only seriously presented, along with petitioners' purported "examples," in petitioners' October 27, 2011 comments on the FEIR, submitted literally only hours before the final hearing on the project.[3] (AR 14:4513, 320:27733-27334.) A lead agency is not required to respond to comments received after the formal comment period on the draft EIR, nor to discuss infeasible mitigation measures. (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1111; *San Diego Citizenry*, 219 Cal.App.4th 1, 15-

[3] Recommendations for a regional TOD policy and references to the MTC policy appear at only two other locations in the record. (AR 185:12559-12560; 310:25210.) In both cases the comments, from Move San Diego, speak of a regional TOD policy as a long term planning objective, not as an immediate element of the RTP/SCS.

16.) Formal findings are also not required for belatedly suggested mitigation measures that are infeasible. (*SCOPE,* 197 Cal.App.4th 1042, 1054-1056.) Petitioners cannot prevail by withholding comments on mitigation measures until the last possible moment, and then claim the respondent did not adequately explain its actions.

2. *Regional Parking Management*

The question of whether a regional parking management program is feasible mitigation poses both substantial evidence questions and matters of policy judgment. Petitioners apparently recognize that their burden here is to show that SANDAG's conclusions on this issue are not supported by any substantial evidence in the record. (*San Diego Citizenry,* 219 Cal.App.4th 1, 16.) In practice, however, petitioners address this problem simply by claiming that the evidence relied on by SANDAG is not substantial because petitioners disagree with it, or because the evidence is supposedly controverted by other evidence that petitioners consider more persuasive. That, of course, is not how the substantial evidence test works. (*Laurel Heights,* 47 Cal.3d 376, 407.)

Petitioners attempt to recharacterize the evidence in the record as showing that experts, including SANDAG itself, have found parking management strategies to be successful and cost-effective means of reducing vehicle travel. The record actually shows, however, that the results of parking management programs are mixed. While local programs geared to specific favorable conditions may produce significant results, the effectiveness of regional level programs is far more problematic and likely to vary greatly with circumstances. (AR 126:8632-8642, 190b:14401-14407; 216:17651.)

SANDAG's own modeling indicated that a regional parking fee program would be likely to have only marginal effects on vehicle ridership or transit use. (AR 8b:3800; 190b:16031-16032.) Petitioners claim this evidence is "out of context." The study, however, was performed for the specific purpose of evaluating the potential effectiveness of a regional parking fee program. (AR 8b:3800.) Petitioners also apparently claim that SANDAG misread the results of its own study because the study was "sensitive to parking costs." (AR 190b:16031.) The problem here, however, is that petitioners misconstrue the meaning of the term "sensitive" in this context. The modeling performed by SANDAG was sensitive in that it was calibrated to detect even modest changes in transportation preferences that might result from manipulation of parking costs. The conclusion of this sensitive modeling, however, was that the beneficial results of parking fee changes would, at a regional level, truly be minimal. SANDAG is not required by CEQA to adopt "nickel and dime" mitigation measures whose real life effectiveness is unlikely to justify the administrative burdens and costs. (*Gilroy Citizens*, 140 Cal.App.4th 911, 935.)

Petitioners also contend that they provided "detailed examples" of allegedly "successful" parking management programs that could have been utilized to patch together a regional parking management fee program in time for inclusion in the EIR. The cited pages in the record, however, contain only petitioners' own general comments or general discussion of parking fee management options. (CNFF RB/XOB, p. 85.) There is nothing that could even be remotely considered a policy or plan reasonably tailored to specific conditions in the San Diego region. Petitioners have offered nothing of substance to dispute SANDAG's conclusions that an effective

parking fee could not be unilaterally developed or imposed by SANDAG on a regional basis, and certainly not within the time limits for approval of the RTP/SCS. (AR 8b:3800-3801.)

Petitioners lastly argue that there is "no evidence" to support SANDAG's policy reasons for rejection of a parking fee program, i.e., that it would unduly burden lower income commuters and residents. (AR 8b:3801.) One questions what sort of "evidence" is needed to support such a policy judgment. Parking fee programs by definition increase costs and thus impose burdens on those who must either pay the fees or adopt alternative means of travel. Petitioners cannot seriously contend that the San Diego region has no working poor or single parent households for whom balancing rent, food, transportation and perhaps child care costs is not already a daily challenge. If statistical evidence is required, however, the record shows that SANDAG's concerns are not ill-founded. (AR 8a:2432-2433, 190a:13178-13234.)

3. *Reprioritization of Transit Projects*

Petitioners also contend that SANDAG could and should have reprioritized transit projects in order to mitigate GHG impacts. There is nothing specific, however, about this proposed "mitigation measure." As discussed previously, petitioners cannot show that SANDAG has wrongfully failed to consider mitigation measures unless they at least specifically identify the measures in question and explain why they should be deemed feasible. This subject, however, bears further discussion because it illustrates how petitioners' claims that significant additional mitigation measures were available to mitigate GHG emissions are baseless in practice.

a. Petitioners Cannot Demonstrate that Increased or Accelerated Transit Investment Will Significantly Decrease GHG Emissions

As discussed in SANDAG's opening brief, SANDAG did, in fact, extensively consider alternatives and variations to the proposed RTP/SCS which varied the mixture and timing of transit projects and other projects. Four such alternatives were formally evaluated in the EIR, but ultimately rejected as infeasible. (AR 3:136-145, 8a:3140-3161, 3184-3271.) None of these alternatives were found to actually decrease long term GHG emissions. (AR 8a:3317, 3324.) Two more alternatives proposed by the petitioners were also extensively reviewed and found to be infeasible. (AR 3:163-173; 8b:3806-3811.) Petitioners now apparently hypothesize that there must be some other variation or adjustment to the mix of projects or scheduling of projects in the RTP/SCS that would significantly reduce GHG emissions. Precisely what this option might be, however, petitioners do not say. Much less do they provide supporting evidence that any such option would, in fact, significantly reduce GHG emissions, even assuming that such measures would be feasible given the realities of public transportation funding and other relevant considerations.

Petitioners appear to be laboring under the illusion that any "reprioritization" that increases transit investment or accelerates transit development will necessarily reduce GHG emissions. The reality is different and far more complex. While increasing transit utilization is a major goal of the RTP/SCS, the fact remains that automobiles are and will for the foreseeable future remain the chosen means of transportation for the large majority of the region's commuters, shoppers and other travelers for a variety of reasons. (AR190b:13678 (performance measures 25-28).)

SANDAG strongly believes that expansion and improvement of public transit systems will attract an increasing share of regional travelers in coming years. The RTP/SCS plans over $106 billion in expenditures for precisely this purpose, plus another $31 billion for managed lanes to improve transit performance on highways. (AR 8a:2104-2112; 190:13247.) In the meantime, however, SANDAG cannot legally or as a matter of sound public policy simply ignore the needs of motorists, public safety issues, or the excess GHG and other pollutant emissions that result from congested roadway conditions. Even aside from the fiscal constraints imposed by the realities of public transportation funding, a balance must be struck between transit investment and improvement of roadway conditions.

Although petitioners may disagree, the evidence strongly suggests that the RTP/SCS has in fact struck an optimal balance for achieving GHG reductions. The evaluation of alternatives in the EIR confirmed that further tinkering with transit priorities would not reduce GHG emissions. (AR 8a:3317.) Indeed, by delaying highway congestion relief projects, more transit-intensive plans would actually increase GHG emissions. (AR 8a:3192-3193, 3213-3214, 3236-3237, 3258-3259, 3323.) This strongly suggests that the glass is already full as far as GHG reductions that can feasibly be achieved through transit projects. Simply plowing more money into transit systems is not the panacea that petitioners imagine. A mix of projects is needed.

b. Petitioners Ignore the Realities of Public Transit Funding

Funding realities for public transit are another problem. The RTP/SCS and transportation planning in general are based on anticipated long-term revenue streams, not cash-on-hand. (AR 8b:3786-3787;

190a:13246-13247.) SANDAG cannot, for example, fund transit improvements in 2015 with federal transit funds or *TransNet* sales tax revenues that will not be received until 2040.

The total amount of funds available for public transit are also finite. Like all public transportation improvements, expansion or creation of new transit systems is capital intensive, particularly if new rights of way must be acquired along with operating equipment and station facilities. Unlike most other public transportation services, however, public transit projects require major ongoing subsidies to remain in operation. Historically, "fare-box" returns – meaning revenue from transit users – covers only 35% of transit operating costs. (AR 190:13240.) The remainder must come from ongoing federal, state or local subsidies, which in turn represent funds that cannot be used for expanding or improving transit systems themselves. As it is, over $52 billion, or approximately 22% of the total RTP/SCS budget, will be expended for transit operating and maintenance expenses. (AR 190a:13247-13248.)

Consistent with these realities, transit planners must necessarily balance near-term capital expenditures with overall long term operating requirements and costs. No good would be served by expanding or improving transit systems if there is no money to operate them in the future. Construction or expansion of transit systems before they are likely to reach optimum ridership levels thus can be not only economically wasteful, but ultimately an obstacle to funding ongoing improvements to the transit system itself. This is a factor that SANDAG must and has taken into consideration in preparing the RTP/SCS, but apparently one petitioners ignore.

4. *Support for Climate Actions Plans*

Taking their cue from the trial court decision, petitioners continue to argue on appeal that SANDAG should have committed to funding of local Climate Action Plans ("CAPS") as a mitigation measure in the EIR, even though this issue was never raised until a few hours before the EIR was certified, and first mentioned in the trial court proceedings in a reply brief filed by the AG.[4]

Contrary to what petitioners suggest, a lead agency is not required to respond in the EIR or make findings regarding purported mitigation measures that are proposed long after the close of public comments on the draft EIR. (*SCOPE,* 197 Cal.App.4th 1042, 1054-1056; *Gray*, 167 Cal.App.4th 1099, 1111; *A Local & Regional Monitor v. City of Los Angeles* (*"A.L.A.R.M")* (1993) 12 Cal.App.4th 1773, 1808-1809.) But in any event, and as discussed in SANDAG's opening brief, funding for CAPS is at best a variation on support measures for climate action planning that SANDAG has already undertaken and committed to continue in the RTP/SCS or in

[4] Petitioners claim that this issue was timely raised in comments on the Draft EIR and "fully litigated" at the trial level. A review of the record citations provided by petitioners, confirms that petitioners did not raise this issue until last-minute comments on the EIR, or at any time before filing of the AG's reply brief at trial. Petitioners' comments on the Draft EIR requested only that SANDAG "identify" a source of funding for CAPS. (AR 8296:19687.) This is hardly the same thing as asking SANDAG to volunteer to provide the funds as a mitigation measure.

The CNFF petitioners in their brief also briefly note that they suggested preparation of a model climate action plan as another form of mitigation during the administrative proceedings. It does not appear that petitioners are seriously arguing that SANDAG abused its discretion by not adopting this additional variation on mitigation. In any event, this issue was not raised in the trial court proceedings.

mitigation measure GHG-B. (SANDAG AOB, pp. 41-42; AR 8a:2589; 190a:13166-13167; 216:17616-17672.)

Petitioners' response demonstrates that it is nearly always possible to quibble about form over substance, and always possible for determined petitioners to come up with some variation or nuance on project mitigation measures that allegedly should have been considered on top of all the rest. Petitioners, however, do not provide any basis for finding an abuse of discretion by SANDAG. An EIR cannot be found inadequate because it allegedly fails to consider every conceivable mitigation measure possible, or every conceivable variation on mitigation measures actually discussed in the EIR or measures already actually incorporated into a proposed project. (*Gilroy Citizens*, 140 Cal.App.4th 911, 935; *A.L.A.R.M.*, 12 Cal.App.4th 1773, 1809.)

Petitioners contend that SANDAG funding for CAPS is feasible because SANDAG admittedly has funds that can be used to subsidize local government climate action planning. But while SANDAG does have such funds, they are *already* allocated for support of local smart-growth planning measures by local governments. (AR 320(30):28696.) Petitioners do not explain how robbing Peter to pay Paul in this situation is going to reduce GHG emissions. In reality, petitioners are not proposing substantive mitigation, but attempting to micro-manage SANDAG's policy choices as to how resources are allocated to respond to the climate change issue.

Petitioners also do not attempt to explain why offering funds to local jurisdictions for CAPS will ultimately guarantee some higher degree of GHG reductions than are likely to be achieved with other forms of support by SANDAG. Instead, petitioners completely ignore the issue. While CAPS

are one planning tool for addressing GHG emissions, they are hardly the only one. Petitioners do not cite any evidence that any local jurisdiction has actually requested funds for preparation of a CAP from SANDAG, nor that any have foregone preparation of a CAP for lack of SANDAG subsidies. If petitioners believe that preparation of local CAPS will substantially reduce GHG emissions, they should have equal confidence that local jurisdictions are capable and willing to reduce GHG emissions by other means.

Petitioners' failure to meaningfully address the evidence concerning alternate planning and support actions by SANDAG that may achieve the same ends amounts to a forfeiture of the issue. (*San Diego Citizenry*, 219 Cal.App.4th 1, 17.) But in any event, sheer speculation that direct funding of CAPS might lead to greater long-term reductions of GHG emissions is not a basis for overturning the EIR.

It should be understood that SANDAG does not believe that CAPS themselves can be dismissed as mere "nickel and dime" measures that can be safely omitted from consideration in an EIR. The EIR specifically recommends the adoption of CAPS by local agencies. (AR 8a:2588-2589.) But to suggest that an EIR must propose every conceivable inducement possible for adoption of CAPS by independent local agencies has no basis in law or reason.

5. *Conditioning of Project Funding to Reduce Vehicle Miles Traveled*

Petitioners lastly continue to argue on appeal that SANDAG should have developed a mitigation measure which involved conditioning funding of future transportation projects upon reductions in vehicle miles traveled ("VMT"). As discussed in SANDAG's opening brief, VMT reductions are more in the nature of a performance standard than an actual mitigation

measure. (SANDAG AOB, p. 39.) To reduce VMT, one must first identify some mechanism, such as providing a substitute form of transportation for vehicle commuters, to reduce VMT. Petitioners, however, still refuse to identify any specific mitigation measure which might be utilized to reduce VMT, or explain how such mitigation measures could be required as a condition of project funding. (CNFF RB/XOB, pp. 94-96.)

It is true that reducing regional VMT is one method of reducing overall GHG emissions. The RTP/SCS is thus designed in part to reduce VMT (AR 8a:3820-3821; 190:13091-13104, 13153-13156.) But the issue posed by petitioners here is whether funding for individual transportation improvement projects to achieve VMT reductions is a feasible mitigation measure. The answer, of course, depends very much on what mechanism is proposed and on the circumstances to which it is to be applied, including legal restrictions on the funding source, the nature of the project, and ultimately whether it would be acceptable in light of competing, environmental, social or other policy concerns applicable to the specific project. Again, as this Court noted in *San Diego Citizenry*, 219 Cal.App.4th 1, 17, feasibility involves "a reasonable balancing of relevant economic, environmental, social and technological factors." Even in cases where it was theoretically possible to condition a project to reduce VMT, SANDAG would be required to determine whether the possible benefits of such mitigation would be outweighed by increased costs or other factors that jeopardized the project's ability to satisfy the condition while still accomplishing its congestion relief, traffic safety or other goals. CEQA does not require a lead agency to impose mitigation measures that would undermine the objectives of the project being mitigated. (*Id*. at 18.)

As a practical matter, it is difficult to envision just precisely how VMT reduction requirements could realistically be imposed on individual projects in the RTP/SCS. Petitioners do not explain, for example, how a simple local road-widening or intersection improvement project – in other words, the great bulk of individual projects programmed in the RTP/SCS – could be "conditioned" to require VMT reductions. Petitioners have conceded by silence that SANDAG cannot withhold or condition funding for these projects under Section 4.D of the *TransNet* ordinance. (AR 320(30):28698-28699.) Further, as a matter of physics, it is difficult to see how a simple road widening or intersection improvement could be conditioned upon reduction of VMT. While roads can be widened to relieve congestion or improve safety, probably even petitioners would concede that road segments cannot be simultaneously shortened so that vehicles traversing them travel fewer miles.

SANDAG has not categorically determined that VMT reductions may *never* be used a performance standard or mitigation goal, whether for legal or other reasons. It would be absurd, however, to attempt to fashion some sort of standardized requirement or blanket rule in the EIR that VMT reductions must be achieved by every transportation project, regardless of whether such reductions could actually be achieved, whether they could be legally imposed on the project in question, or whether enforcement of the policy would have unacceptable consequences in practice.

Petitioners lastly suggest that even if reductions in VMT are a type of performance standard rather than an actual mitigation measure, SANDAG was obligated to figure out on its own the ways in which VMT reductions might actually be achieved on a project-by-project basis. (CNFF RB/XOB,

p. 95, citing Guidelines § 15126.4(a)(1)(B).) This is merely a variation on the discredited argument that SANDAG bears the sole burden of identifying potential mitigation measures. As discussed previously, where an EIR identifies specific mitigation measures for an impact, the burden of demonstrating the existence of additional feasible mitigation measures falls on the challenger. (*San Diego Citizenry*, 219 Cal.App.4th 1, 17; see Part 1, Section IV.A.2, pp. 20-22, supra.) Petitioners cannot avoid this burden by simply refusing to even identify what specific form the additional mitigation measures might take.

PART 2: SANDAG RESPONDENTS' BRIEF ON CROSS-APPEALS

I. INTRODUCTION

In their cross-appeals, the petitioners attempt to pursue claims concerning the adequacy of the EIR with respect to air quality impacts and mitigation measures. The CNFF petitioners also attempt to pursue claims concerning agricultural impacts and project alternatives. The first problem with all of petitioners' claims is that they were forfeited by petitioners' failure to actually seek a ruling on these issues in the trial court. (Part 2 Section II, below.) In addition, several of the CNFF Petitioners' arguments were either not raised in the administrative proceedings, not timely raised in the trial court, or both. The Court is not required to expend time on any of these claims.

If the Court goes to the merits, the cross-appeals haven't any. The fundamental problem is that petitioners refuse to acknowledge the limits on what is legally required, and what can feasibly be provided, in a program EIR, and specifically a program EIR for a region-wide transportation plan involving literally hundreds of individual future transportation improvement projects over a time span of 40 years. Ultimately, petitioners' arguments boil down to variations on the problem recognized by the California Supreme Court in *Laurel Heights*, 47 Cal.3d 376, 415: "A project opponent or reviewing court can always imagine some additional study or analysis that might provide helpful information. It is not for them to design the EIR." The EIR faithfully fulfilled its function as an informational document addressing the regional impacts, potential mitigation measures, and alternatives for the 2050 RTP/SCS. It was not required to do more.

II. PETITIONERS FAILED TO PRESERVE THE ISSUES RAISED IN THEIR CROSS-APPEALS FOR APPELLATE REVIEW

"Acquiescence to error takes away the right of objecting to it." (Civil Code § 3516.) In this case, the trial court made it clear in its tentative decision before trial that it did not intend to address any of the issues now raised in petitioners' cross-appeals. Petitioners at no time objected to this decision or attempted to pursue these issues at the time of hearing or after. They cannot now pursue these issues on appeal.

A. Petitioners Never Objected to the Trial Court's Failure to Decide the Issues Presented in Their Cross-Appeals

The issues petitioners pursue in their cross-appeals were extensively briefed before trial. In the tentative decision issued 14 days before trial, however, the trial court made it clear that it was not going to decide or even address any of these issues in its ruling. (JA4 {70}995.) The court stated: "Because the court finds it can resolve the case solely on the inadequate treatment in the EIR of the greenhouse gas emission issue, it finds it need not address the other issues raised by the parties. [Citations.]" (*Id.*)

Faced with a clear warning that the trial court was either impliedly rejecting the claims now raised in their cross-appeal, or at least did not intend to decide them, petitioners did nothing. Although given essentially unlimited time to address all issues at trial, petitioners at no time objected to this aspect of the tentative decision. Neither did petitioners offer any argument whatsoever on the excluded issues. (RT, pp. 31-58.)[5]

[5] The bundle of PowerPoint slides lodged by petitioners at the time of trial contains several slides relating to air quality and agricultural impacts. (JA5 {75}1040-1045.) The trial transcript, however, discloses that these slides were never actually shown, discussed or even referenced at the trial.

Subsequently, on December 3, 2012, the trial court issued a final written decision reiterating its refusal to decide additional issues. (JA5 {75}1058.) Petitioners still made no objection. This was not for lack of opportunity. Petitioners submitted papers and appeared at an ex parte hearing concerning the scope of the judgment on December 18, 2013. (JA5 {77}1073-1079, {81}1098; RT, Vol. 2, pp. 71-76.) Petitioners also submitted written objections to the proposed judgment and proposed writ of mandate subsequently prepared by SANDAG. (JA5 {84}1105 – {87}1131.) Instead of objecting that the undecided issues should be decided before entry of judgment, however, petitioners instead merely contended that the judgment should specifically memorialize the trial court's decision not to rule on additional issues. (JA5 {84}1108:7-10, {86}1126:10-12.) To all appearances, petitioners were not merely acquiescing to this decision, but endorsing it.

On appeal, petitioners now contend that the trial court erred. As the AG puts it, "Therefore, the trial court erred in declining to reach the People's assertions of additional CEQA violations." (AG RB/XOB, p. 65.) The CNFF petitioners argue that they are aggrieved because the trial court did not address their issues, and contend they are entitled to appeal from the "unfavorable" portions of the trial court judgment and decision. (CNFF RB/XOB, pp. 99-100.) Unfortunately for petitioners, they failed to properly preserve these issues for appeal.

B. Petitioners' Acquiescence to the Trial Court Decision Operates as a Waiver of their Claims

The maxim expressed in Civil Code § 3516 is embodied in basic principles governing appellate review. As summarized by the Supreme

Court in *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184 (fn. 1) [citation omitted]:

> An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been but was not presented to the lower court by some appropriate method .... The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver .... Often, however, the explanation is simply that it is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial.

(*See also Royster v. Montanez* (1982) 134 Cal.App.3d 362, 367.)

The rule is not limited to appeals involving particular types of issues, but is one of virtually universal application. (See, e.g., *Andrus v. Estrada* (1996) 39 Cal.App.4th 1030, 1043-1044 [failure to object to sufficiency of order granting sanctions]; *People ex rel. Herrera v. Stender* (2013) 212 Cal.App.4th 614, 644-645 [failure to object to adequacy of notice]; *Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1065-1066 [failure to object to content of order granting preliminary injunction; failure to timely lodge evidentiary objections]; *City of San Marcos v. Coast Waste Management, Inc.* (1996) 47 Cal.App.4th 320, 327-328 [failure to object to content of order on preliminary injunction]; *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1380 [challenge to sufficiency of statement of decision waived by failure to lodge timely objections].)

Consistent with this rule, a party who wishes to preserve an appeal must make reasonable attempts to secure an actual ruling on the issue. In *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2008) 157 Cal.App.4th 885, the petitioners alleged separate causes of action for violations of CEQA and of the Subdivision Map Act

("SMA"). The trial court issued a tentative statement of decision which did not address the SMA claim. The petitioners, however, failed to expressly object to this omission. (*Id*. at 893 and 911-912.) On appeal, the reviewing court observed "It is axiomatic that a party may not complain on appeal of rulings to which it acquiesced in the lower court. '[F]orfeiture' is the correct legal term to describe the loss of the right to raise an issue on appeal due to failure to pursue it in the trial court.'" (*Id*. at 912, citations omitted.) Applying these principles, the court concluded "It follows that when a trial court announces a tentative decision, a party who failed to bring any deficiencies or omissions therein to the trial court's attention forfeits the right to raise such defects or omissions on appeal." (*Id*. at 912.) Consequently the petitioner "forfeited its SMA claim because it did not file objections ... or otherwise bring the trial court's attention to its failure to expressly rule on the SMA issue." (*Id*.)

The principle applied *Porterville Citizens* must apply with even greater force in CEQA cases. Public Resources Code § 21005(c) specifically requires that where non-compliance with CEQA is found by a trial court or reviewing court, the court "shall specifically address each of the alleged grounds for noncompliance." Consequently, failure to expressly rule on an issue is impliedly a ruling that no CEQA violation was found. Petitioners' failure to timely object and argue for a ruling in their favor in this case could only reasonably be construed as abandonment of the issues, and a waiver of the right to appeal.

C. Petitioners Cannot Argue Their Way Around the Effect of Their Waiver of Claims

Petitioners do not address the waiver issue in their opening briefs, but seem to anticipate it. They spend an unusual several pages in each brief

explaining why the cross-appeals should be allowed. (CNFF RB/XOB, pp. 99-102; AG RB/XOB, pp. 64-66.) Since petitioners will have the last say on this issue in their reply brief, it can be anticipated that additional arguments will be offered then. None of the arguments in petitioners' current briefs, nor any they are likely to make, can save the cross-appeals.

1. *Petitioners are Not Absolved of their Waiver Because the Court Applies an Independent Judgment Standard of Review*

Petitioners point out that this Court applies a de novo standard of review on appeal in CEQA cases, i.e., it independently determines whether the agency decision is supported by substantial evidence and complies with applicable procedural requirements. (*Vineyard*, 40 Cal.4th 412, 427.) This does not relieve petitioners, however, from the effects of their failure to properly preserve issues for appeal. That the reviewing Court independently reviews the record does not mean that issues do not have to be properly raised and preserved in the first place.

2. *Public Resources Code § 21005(c)*

Petitioners also point out that Public Resources Code § 21005(c) affirmatively requires that where a trial court or reviewing court finds noncompliance with CEQA, it "shall specifically address each of the alleged grounds for noncompliance." (PRC § 21005(c).) It is hard to see how this helps petitioners. On its face, Public Resources Code § 21005(c) would give petitioners all that much more reason to object to the trial court's lack of decision and to request a decision on the merits. The trial court's refusal to decide the issues was a clear indication that petitioners would not receive any relief on the undecided claims.

The policies underlying Public Resources Code § 21005(c) also strongly militate against relieving petitioners of the effects of their acquiescence in this case. As discussed in *Friends of the Santa Clara River v. Castaic Lake Water Agency* (2002) 95 Cal.App.4th 1373, 1387, Public Resources Code § 21105(c) is:

> [a]pparently intended to avoid situations in which a court, presented with numerous theories as to why a respondent agency purportedly violated CEQA, chooses to issue a writ based solely on one or handful of theories, leaving the parties to wonder whether or not unaddressed theories had merit. In such situations, where the respondent agency must conduct a second CEQA process to cure the problems identified by the court, the agency often does not know whether to modify its environmental document (or findings) to address concerns raised by the petitioners but ignored by the court. (*Id*., quoting Remy et al., Guide to the California Environmental Quality Act (10th Ed. 1999), pp. 646-647.)

In short, a respondent public agency should not have to guess which issues remain in play after entry of judgment. This policy is consistent with other provisions of CEQA designed to curtail delays, guesswork and uncertainty, and particularly Public Resources Code § 21168.9, which requires specificity in judgments and writs of mandate issued in CEQA actions. Consistent with this basic policy and with basic rules governing appellate review, petitioners cannot acquiesce to trial court silence on a CEQA issue. They have an affirmative duty to seek a ruling on the issue so that the respondent has fair warning of the import of the trial court decision. It is immaterial whether the petitioners' failure to request a decision on particular issues is motivated by a desire to avoid the risk of an adverse trial court decision – which may well be the case here – or is motivated by other tactical considerations.

3. *Affirmance on Alternate Grounds*

The CNFF petitioners also contend that a decision on their cross-appeal can be made on the theory that a favorable decision would amount to an affirmance of the judgment on alternate grounds. (CNFF RB/XOB, p. 101.) Petitioners do not cite any case in which this doctrine has been applied to save appellants from failure to preserve specific issues in the trial court. Neither do they explain how this doctrine can be applied where a trial court has expressly stated its intentions *not to rule* on the issue in question. (JA5 {75}1053-1054.) But in any event, this doctrine also must have limited application in the context of CEQA, where Public Resources Code §§ 21005(c) and 21168.9 and the nature of the statutory scheme in general demand particularized analysis and conclusions, and particularized relief, based on the merits of specific issues. This Court could not, for example, in fairness or reason reject all grounds relied on by the trial court in ruling on greenhouse gas related issues, but nevertheless affirm the judgment on the basis of some alleged defect in the discussion of transportation impacts, an issue that was raised in petitioners' briefs below, but not pursued at the time of hearing or on appeal. (JA2 {47}412-414.)

It should be acknowledged that *National Parks*, 71 Cal.App.4th 1341, contains language that might superficially be deemed to support petitioners' position. *National Parks*, however, did not involve a claim of waiver. The trial court had specifically ruled in favor of the petitioners on two issues, and overruled all other objections to respondent's return to a writ of mandate without detailed discussion. (*Id*. at 1348.) The petitioners did not appeal. The respondent did. The principal issue on appeal was whether the revised EIR prepared in response to a previous writ of mandate adequately addressed impacts of the project on the "wilderness experience" and related noise and

light impacts. On appeal, the agency argued that all aspects of the potential impacts on the "wilderness experience" were effectively addressed in other sections of the EIR which discussed related physical effects such as noise, odor, litter, air quality and visual effects. (*Id*. at 1359-1362.) The appellant agency attempted to hedge its bets on this issue by contending that the court of appeal should not reconsider the adequacy of discussion of the various related impacts because they had not been found inadequate by the trial court, and therefore should be deem resolved in the agency's favor under Public Resources Code § 21005(c). (*Id*. at 1353-1354.) The Court of Appeal rejected this argument as too cute by half, noting that the appellate standard of review was de novo, and that "the issues are sufficiently interrelated here that the record must be considered as a whole." (*Id*. at 1354.)

National Parks fairly stands for the proposition that the court of appeal may consider all relevant evidence and argument that relate to a particular issue on appeal, without regard to the trial court's treatment of such issues. *National Parks* cannot reasonably be read to establish that reviewing courts can or should undertake plenary review of agency decisions without regard to whether specific major issues were properly raised and preserved for appeal in the trial court. Petitioners here cannot reasonably contend that the issues they raise in their cross-appeals – issues concerning the EIR's analysis of toxic air pollution, agricultural impacts and project alternatives – are "sufficiently interrelated" with the issue of whether the EIR adequately addressed GHG emissions or mitigation measures.

4. *Judicial Economy and Efficiency*

Petitioners also contend that deciding the issues raised in the cross-appeal would be more "efficient" than remanding to the trial court for a

decision on the merits. Obviously it would more efficient still, as well as legally correct, for this Court to dismiss these claims altogether due to petitioners' failure to preserve the issues. Indeed, this is precisely the type of efficiency that the rules governing waiver of issues on appeal are intended to promote. Petitioners are not, in the name of judicial efficiency, entitled to take short cuts to appellate review by failing to timely press the issues at the trial level, and thus potentially avoiding the need for an appeal in the first place (to say nothing of avoiding the need for a remand for further trial court proceedings after the appeal).

5. *Request for Statement of Decision*

The AG in this case did orally request a formal statement of decision pursuant to Code of Civil Procedure § 632 at the time of hearing. (RT, p. 58:4-11.) Neither then or at any time after the final decision was released on December 3, 2012, however, did any petitioner request that the decision be expanded to address the issues now presented on cross-appeal.

Petitioners may contend that the AG's pro forma request for a statement of decision absolves them from any further attempt to secure rulings on specific issues not addressed in the tentative decision. The critical issue, however, is whether petitioners reasonably attempted to "bring the trial court's attention to its failure to expressly rule" on specific issues. (*Porterville Citizens*, 157 Cal.App.4th 885, 912.) Code of Civil Procedure § 632 specifically provides that "The request for a statement of decision shall *specify those controverted issues as to which the party is requesting a statement of decision*." (Emphasis added.) Petitioners did not make any such request.

6. *The Burden of Objecting was on Petitioners*

It can also be expected that petitioners will argue that the burden of objecting to the trial court's failure to decide issues was actually on SANDAG, not petitioners. The first problem with this theory is that petitioners are the parties appealing on the issues in question, not SANDAG. Petitioners, thus, bear the burden of showing that their issues were properly preserved. Whether SANDAG could arguably be deemed to have waived its right to appeal on these issues is irrelevant. Such a waiver would not relieve petitioners of their obligation to timely object and preserve the issues if they intend to appeal. To hold otherwise would also gravely conflict with the policies underlying Public Resources Code § 21005(c). As discussed above, the purpose is to promote greater certainty for respondents in CEQA cases. (*Friends of the Santa Clara River*, 95 Cal.App.4th 1373, 1387.) This purpose would not be served by relieving petitioners of the effects of a waiver or apparent abandonment of issues not fully argued in the trial court and not actually decided there. In the absence of an express trial court decision to the contrary, respondents should also be entitled to the presume that their duties under CEQA have been regularly performed (*San Diego Citizenry*, 219 Cal.App.4th 1, 11), and base their decisions to appeal or take remedial action in compliance with a writ of mandate issued on the scope of the issues actually decided in the trial court decision.

III. THE EIR FULLY AND ADEQUATELY ADDRESSED THE AIR QUALITY IMPACTS OF THE PROJECT

A. Facts – The EIR's Air Quality Analysis

Air quality impacts were analyzed in the EIR using five separate significance criteria. (AR 8a:2209-2276.) Criteria AQ-1 through AQ-3 address regional emission levels. These are addressed further in Section

III.D below. Petitioners' concerns on appeal focus primarily on the analysis of impacts from toxic air contaminants ("TACs"), including diesel particulates, conducted under Criterion AQ-4. (AR 8a:2249-2264.)

The Draft EIR contained a five-page discussion of toxic air quality impacts that concluded that although future TAC impacts were potentially significant, meaningful analysis of exposure levels and resulting impacts could only occur in future project-specific levels. (AR 7:486-491.) In response to extensive comments on the subject, the discussion of TAC impacts was vastly expanded in the main text and responses-to-comments section of the Final EIR. (AR 8a:2215, 2217-2221, 2249-2253; 8b:3815-3817.) In addition, SANDAG conducted a regional level Localized Air Quality Index Analysis which provides a qualitative road-segment by road-segment assessment, shown on maps, of where transportation related air quality health impacts are expected to increase along all the region's major transportation corridors. (AR 8a:2252-2257, 2259-2260, 2263-2264; 337:29420-29830 [supporting data]; 341:30033-30040.)

Overall, the FEIR contains extensive discussion of the specific health related impacts that could occur from increased PM and other TACs (including a review of recent studies); a discussion of existing background conditions for toxic pollutants, their regulatory status, and current strategies to reduce toxic emissions; and a regional-level impact analysis for each of the EIR horizon years, i.e., 2020, 2035 and 2050. The FEIR, however, continued to conclude that detailed assessment of future impacts along individual road segments, or to specific communities or individual sensitive receptors could only realistically be conducted in future project-level EIRs.

(AR 8a:2258, 2261, 2264.) To this end, the FEIR also included a revised Mitigation Measure AQ-C. (AR 8a:2272-2273, 8b:3815-3817.)

Mitigation Measure AQ-C provides that SANDAG will evaluate future individual projects it approves for health risks using applicable U.S. EPA guidelines, and incorporate feasible project-specific mitigation measures into these projects where appropriate and feasible. Examples of such mitigation measures that may be applied to construction equipment or transit projects include retrofitting of older higher emitting vehicles, routing traffic away from populated zones, and replacing older buses with cleaner buses. (AR 8a:2272.) Mitigation Measure AQ-C also provides that local agencies carrying out road or other transportation improvement projects can and should evaluate the projects and adopt mitigation measures accordingly, and that the County and local cities should similarly conduct health risk evaluations for land use and development projects they approve. Where the initial evaluation warrants, the project-level analysis shall include a full formal Health Risk Analysis ("HRA"). The HRA must specifically quantify cancer risks and, where appropriate, evaluate non-cancer health risks. (AR 8a:2273.) HRAs typically involve air dispersion modeling and detailed risk assessments in addition to detailing project-specific emissions quantification. (AR 8a:2273, 320:28077-28079.)

The EIR also concluded that while toxic air quality risks were considered significant, more detailed analysis was not feasible at the program level. (AR 8a:2273.)

B. The EIR was Not Required to Provide a Detailed, Project-by-Project Analysis for All Future Development and Future Transportation Projects Contemplated in the RTP/SCS

Petitioners' arguments concerning air quality impacts all basically come down the question of what level of detail is required in a program EIR. The principles governing program EIRs have been discussed previously in this brief and also in SANDAG's opening brief. (Part 1, Section IV.B.2, supra, pp. 25-28; SANDAG AOB, pp. 51-52.)

Petitioners again argue that since the general characteristics and location of future transportation improvements contemplated in the RTP/SCS are already known, the EIR was required to include what amounts to a project-level analysis of the potential effects of each of these projects. As discussed previously, such a contention cannot be squared with the full text and clear purpose of the rules governing program EIRs and tiering, nor with the Supreme Court's extensive discussion of these principles in *In Re Bay-Delta*, 43 Cal.4th 1143, 1170-1177. "[T]iering is properly used to defer analysis of environmental impacts and mitigation measures to later phases when the impacts or mitigation measures are not determined by the first-tier approval but are specific to the later phases." (*Id*. at 1170.) Thus, "it is proper for a lead agency to use its discretion to focus a first-tier EIR on only the general plan or program, leaving project-level details to subsequent [EIRs] when specific projects are being considered." (*Id*. at 1174-1175.) The Supreme Court in *In re Bay-Delta* reversed the appellate court decision because the decision "undermined the purpose of tiering and burdened the program EIR with detail that would be more feasibly given and be more useful at the second-tier stage." (*Id*. at 1173.) That is precisely the error petitioners wish to repeat in this case.

Petitioners now cite *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511 for the proposition that CEQA "does not permit an agency to defer analysis simply by labeling its EIR a 'program EIR.'" (CNFF RB/XOB, p. 112.) The program EIR considered in *Mammoth Lakes*, however, was not a conventional first-tier program EIR but a program EIR for a redevelopment project. The petitioners argued, and the court ultimately agreed, that the EIR was therefore subject to a special statutory requirement that all individual future development projects in the redevelopment plan be treated as a single large project. (*Id*. at 525-526, 529-532; see PRC § 21090; Guidelines § 15180.) The statutory scheme further specifically forbade further environmental review of individual projects in the plan unless new information or changed circumstances permitted subsequent environmental review under Public Resources Code § 21166. Consequently, a much higher level of specificity was required regarding individual future projects in the redevelopment plan, and the normal principles governing program EIRs and tiering did not apply. (*Id*. at 527-536.) *Mammoth Lakes* thus addresses a statutory *exception* to the general rules governing program EIRs. This exception has no application here.

Petitioners also again completely ignore the practical implications of their arguments and the rather critical question of feasibility. Over 140 individual highway and arterial road improvement projects are included in the RTP/SCS. (AR 8a:2115-2129; 190a:13281-13283.)

The record makes it clear that analysis of health risks from TACs and diesel particulate emissions from individual projects is classically a complicated task, which cannot realistically be performed at a programmatic

level. The degree to which incremental changes in air quality can be directly correlated to specific health impacts is actually a matter of scientific debate. (AR 8a:2218, 2252; 320(9):28086-28087.) What is known, however, is that health risks from TACs vary based on a wide range of factors. These include the quantity of pollutant and its particular toxicity, the manner of exposure, weather, terrain, and variations in individual human sensitivity, resistance and pre-existing health conditions. (AR 8a:2217, 2251, 8b:4422-4423; 320(9):28097-28108.) Health effects also may be acute effects associated with even short term exposures to high pollutant levels, or chronic effects which may result from longer term exposures to lower concentrations of the same pollutant. (AR 8a:2217; 8b:4422-4423; 320(9):28100-28103.) The level of individual human exposure, of course, varies with the quantity of emissions and distance from the source. Dispersal patterns for pollutants are governed by a large number of variable local factors, e.g., wind, humidity, topography, time of day and micro-climatic factors. (AR 8a:2251, 320(9):28079.) The overall public health risks caused by a project also necessarily vary with the number and sensitivity of persons exposed, and consequently with the population density, development patterns and number of sensitive receptors (e.g., school children, hospital patients or the elderly) in the affected area. (AR 320(9):28102-28105, 28233, 28244-28246.) Thankfully, health risks from transportation-related toxic emissions are usually confined to areas relatively close to major transportation routes, i.e., along major roadways. (AR 8a:2217-2219; 320(9):28093-28904.) Consequently, detailed health risk analysis is appropriately focused on relatively small geographic areas rather than the entire region.

Petitioners contend that project-level data concerning some of the foregoing variables could be ascertained with reasonable investigation or from existing information sources such as census data. Even accepting that as true, however, the sheer magnitude of data necessary to conduct project-level review for the scores of projects included in the RTP/SCS is far beyond what can reasonably be processed and evaluated in a program-level EIR.

There are additional reasons that a project level analysis was not only infeasible, but potentially wasteful and misleading in the case of the 2050 RTP/SCS. While TAC emissions remain a legitimate concern, transportation related TAC emissions have steadily declined in recent years due to regulation and increase fuel efficiencies. This trend is expected to continue into the future. (AR 8a:2212, 2216; 8b:4418; 348:30238; 320:28230-28231.) Consequently, a health risk analysis performed using baseline conditions or emission factors current today could be substantially misleading for projects commenced 10, 20 or 30 years in the future. In petitioners' view, the fact that an analysis today may over-predict impacts for such future projects may not be a concern. It is a legitimate concern, however, for anyone attempting to identify reasonable, cost-effective mitigation measures for such impacts.

Other factors affecting project-level analysis may change over time. While SANDAG has conducted extensive forecasting of future growth, development and population distribution, these forecasts are still just forecasts. They cannot necessarily fully account for changes in the location of sensitive receptors such as individual schools or hospitals, nor for demographic changes in affected populations brought on by redevelopment, gentrification or other economic or social factors.

Premature environmental review can be wasteful. In this case it would be doubly wasteful. The numerous individual transportation projects included in the RTP/SCS will generally be designed, approved and built or operated by agencies other than SANDAG. (AR 8a:2104-2128; 8b:3773-3774.) These agencies will be required to do their own environmental review and necessarily will be required to craft mitigation measures on a project-specific basis. Any attempt to develop project-level mitigation measures prior to project-level design and planning would at best be duplicative, but more likely wasted effort altogether. This is simply not required in a program EIR.

C. The EIR Provided an Adequate Program Level Analysis of Potential Impacts from Toxic Air Contaminants

Petitioners offer a number of specific arguments as to why additional detail was required in the EIR. None of these have merit.

1. *Existing Setting*

The CNFF petitioners contend that the EIR's discussion of existing conditions is deficient with respect to TAC impacts because the EIR failed to provide data on current TAC emission levels and "associated health risk levels" in all areas affected by the RTP/SCS. (CNFF RB/XOB, p. 105.) Petitioners also contend that the EIR should have analyzed the "number and location" of all sensitive receptors and identified all areas with "sensitive populations." (*Id*. at 107-109.)

This level of detail obviously is neither feasible nor required in a program EIR. As the EIR makes clear, the problem posed by mobile-source generated TACs is one of local concentrations or "hotspots" or concentrations of emissions in populated areas relatively close to transportation routes. (E.g., AR 8a:2219-2220, 2252-2253, 2258, 2272;

8b:4423) To determine existing health risk levels in affected areas, one must (1) determine local emission levels; (2) determine dispersal patterns and resulting exposure levels, taking into account such local variables as terrain, prevailing winds and other meteorological data; and (3) determine the location, sensitivity and exposure levels of affected persons, and particularly the location of "sensitive receptors" such as schools, hospitals or concentrations of elderly persons. (AR 8a:2215, 2217, 2253, 14:4514-4515.) There are, for example, some 12,491 existing schools alone in the San Diego region. (AR 8a:2733.)] The EIR was not required to attempt this level of detail for reasons stated above. This is hardly a case like *Cadiz Land Co., Inc. v. Rail Cycle L.P.* (2000) 83 Cal.App.4th 74, 92-95 where missing information on existing setting could be supplied by determining water levels in a single aquifer.

The CEQA Guidelines provide that an EIR's discussion of environmental setting **"**shall be no longer than is necessary to an understanding of the significant effects of the project and its alternatives.**"** (Guidelines § 15125(a).) Where the impact analysis is conducted at a regional program level, the existing setting analysis obviously must be conducted at a similar level. The EIR does contain an adequate program-level analysis of existing conditions. The full discussion of TACs in the EIR extends over 25 pages in the EIR, plus another 14 pages of responses to comments. (AR 8a:2215-2221, 2224-2225, 2249-2264; 8b:3815-3817, 4410-4413, 4422-4428.) The EIR's discussion of existing conditions includes a discussion of TACs and their relationship with transportation sources; existing monitoring efforts and regional emission levels (64.9 million pounds in 2009, AR 8a:2216); known health effects, and types of

sensitive receptors, as well as a review of recent health studies and applicable regulatory requirements. (AR 8a:2215-2221, 2224-2225.) Existing baseline conditions are discussed and mapped in "Local Air Quality Index Analysis" based on expected emissions from known vehicle volumes, truck traffic and level of service factors along all major roadways. (AR 8a:2252-2253, 2255-2256.) Other sections of the EIR also provide detailed region-wide information on the existing principal land uses and population and housing densities along the transportation routes that will be affected the project. (See, e.g., AR 8a:2735, 2738-2739, 2755, 2845, 2849, 2851, 2855, 2861, 2863.)

Petitioners suggest that certain additional information could have been included in the EIR, such as TAC air monitoring data from five stations dispersed broadly throughout the region. Given the localized nature of transportation-related TAC impacts and the number of variables other than background conditions, it is impossible to see how data for five specific locations with the 4,200 square mile territory of the County would contribute greatly to a more detailed analysis.

No doubt additional information could be acquired from many sources if a project-level review of TAC impacts was required. But this was not required. An EIR is not required to provide all information available on a subject or conduct every analysis requested by project opponents. (*Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 245; *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1395-1396; Guidelines § 15204(a).) The EIR's discussion of existing setting in the EIR was more than adequate for a program-level EIR.

2. *Health Impacts*

Predictably, petitioners also contend that a more detailed analysis of public health *impacts* should have been performed. It is clear from the technical literature that petitioners cite that the level of detail required and the resulting complexity (and expense) of the project-level analyses required would be more than is required or could feasibly be performed in a program EIR. (AR 320(9):28224-28246.) These types of detailed, project-specific health risk analyses can only realistically be performed in future project-level EIRs. (AR 8a:2254-2255, 2258, 2272-2273.)

The EIR does contain an adequate program-level analysis. The EIR fully describes the health risks associated with exposure to diesel particulate matter and other TACs. (AR 8a: 2215-2221.) The Air Quality Index Analysis shows where exposure to diesel particulates and other TACs may significantly increase as a result of increased overall traffic volumes, truck traffic or traffic congestion, which are the key factors governing vehicle TAC emissions. (AR 8a:2250, 2252-2264; see 337:29420-29865 and 341:30033-30040 for supporting data.) The analysis acknowledges that the RTP/SCS would, based on current assumptions, have a significant impact on sensitive receptors because it would increase local TAC emissions and related health risks along many segments of the transportation corridors in the 2020, 2035 and 2050 study years.[6]

[6] The CNFF Petitioners also attempt to make a point that a more detailed impact analysis would be useful in evaluating project alternatives. Extending this level of detail to the alternatives analysis would make the task of completing the EIR all that much more impossible. EIRs are not, however, required to analyze alternatives at the same level of detail as the proposed project. (Guidelines § 15126.6(d).) Since transportation-related TAC emissions are basically a function of traffic loads and conditions,

While petitioners contend that the qualitative analysis and impact classifications in the Air Quality Index Analysis are too general, they can offer no reasonable alternate approach. Existing tools for doing this type of analysis are designed for project-level use. (See AR 8a:2216 [California-adopted EMFAC air quality model]; AR 8a:2215 [federal PM Guidance].) Somewhat ironically, petitioners concede that there is a "large uncertainty range" even in project-level qualitative models, but contend that "this does not automatically invalidate their use in comparing alternatives." (CNFF RB/XOB, p. 118, quoting AR 320:28087.) Petitioners do not explain how, given the "large uncertainty range" of the models they advocate, the models would provide more informative results than the qualitative analysis performed for the EIR. Petitioners' argument actually strengthens the case for deferring more detailed health risk analyses until the time individual projects are reviewed, and the range of uncertainty can be reduced by focusing on project-specific factors under then-existing conditions.

The Air Quality Index Analysis presented in the EIR is fully adequate to the task of informing decisionmakers and the public of the potential severity of impacts at a program level. The analysis alerts the reader to the situations where further project level studies are likely to confirm the existence of significant impacts, and where means of reducing or avoiding these impacts will have to be considered. That is sufficient for a program-level EIR.

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reasonable predictions of how alternatives would compare in terms of TAC emissions can be made using traffic and emissions modeling data. A comparative analysis was performed on this basis for alternatives evaluated in the EIR. (See, e.g., discussion of impact AQ-4, AR 8a:3165-3166, 3321.)

3. *Finding of Significance*

The CNFF Petitioners briefly argue that SANDAG could not bypass the alleged requirement for a more detailed analysis of health impacts by simply declaring the impacts "significant" and moving on. (CNFF RB/XOB, pp. 119-120.) This is a non-issue. SANDAG has never relied on that rationale as a reason for not conducting more detailed analysis in the EIR.

D. The EIR Contained an Adequate Discussion of Mitigation Measures for Air Quality Impacts

Petitioners also contend that the SANDAG "improperly deferred and rejected" mitigation measures for air quality impacts. (CNFF RB/XOB, p. 120; AG RB/XOB, pp. 75-77.) The argument is essentially a recycling of attacks made on the mitigation measures identified to reduce GHG emission. The relevant principles of law are addressed in Part 1 of this brief and SANDAG's opening brief, and need not be fully reviewed here. (See Part 1, Section VI..B.2, pp. 25-32, infra; SANDAG AOB, pp. 51-55.) Briefly, an EIR may include mitigation measures that will have to be implemented by other agencies. (*Neighbors for Smart Rail*, 57 Cal.4th 439, 465; PRC § 21081(a)(2).) A lead agency is not required to develop project-level mitigation measures or performance standards in a program EIR. (*In re Bay-Delta*, 43 Cal.4th 1143, 1170.) Postponing formulation of actual project-level mitigation measures or performance standards until the time of individual project review does not violate the rules governing unlawful deferral of mitigation until *after* the time of project approval. Lastly, if the contention is that additional feasible mitigation measures existed, petitioners have the burden of specifically identifying the measures and demonstrating that they were potentially feasible. (*San Diego Citizenry*, 219 Cal.App.4th 1, 15-16; *Mount Shasta,* 210 Cal.App.4th 184, 199.)

Petitioners do not seriously attempt to discuss the air quality mitigation measures they contend are inadequate. It is easy to see why. All contemplate implementing actions that can only be carried out either at project-specific level or by the region's county and city governments utilizing their independent land use authority. (AR 8a:2269-2273.) These measures are by their very nature not susceptible to detailed formulation or prescription of categorical performance standards at a programmatic level.

Measure AQ-A1 lists measures that local governments may take under the land use authority to reduce air emissions. (AR 8a:2269-2270.) Many of these replicate measures also identified in Mitigation Measure GHG-B to reduce GHG emissions. Measure AQ-A2 identifies measures that SANDAG will, and other public agencies should, apply to reduce particulate emissions from individual future transportation improvement projects. (AR 8a:2270-2271.)

Measure AQ-B prescribes further measures to reduce NOx and particulate emissions from off-road construction vehicles at the project level, including such measures as utilizing "low emission diesel products, alternative fuels, engine retrofit technology" and others. (AR 8a:2271-2272.)

Measure AQ-C prescribes the conduct of detailed health risk analyses for future transportation improvement and land use projects, and identifies various specific types of mitigation measures that may be implemented where feasible on individual projects. (AR 8a:2272-2273.)

The CNFF petitioners offer three examples of "performance standards" they believe could have been adopted in the EIR. These examples, however, simply serve to underscore the impracticality of

attempting to prescribe project-specific mitigation measures or performance standards at a programmatic level.

Petitioners first cite the MTC TOD policy discussed in Part 1, Section IV.F.1 (pp. 43-48, infra) that purportedly "specif[ies] the minimum number of housing units that must be built near transit stations." (CNFF RB/XOB, p. 122.) Petitioners fail to mention that policy and specifications at issue were developed through years-long study by MTC, are tailored to specific transit projects and locales, and must be implemented through a collaborative process with local governments that may or may not result in the targeting housing densities being achieved. (AR 320:(24)28501-28504.) Further, if the specified densities are not achieved, the transit projects will not be built. This may make good economic sense, but not necessarily good environmental policy.

Setting aside the MTC policy as an example, achieving any "performance standard" requiring greater housing densities or any other land use regulatory goal would obviously depend upon the cooperation of local governments. Petitioners do not explain how achievable "performance standards" could realistically be calculated at a program level for the region's 19 local governments, nor consider what consequences would result if these performance standards were not satisfied. If the consequence of prematurely adopted and unobtainable performance standards is that major road improvement or transit projects in the RTP/SCS would not be built, the consequences may well be unacceptable on environmental and other grounds. SANDAG was not required to adopt mitigation measures whose feasibility is speculative in that they would prove defeat basic goals of the project. (*San Diego Citizenry*, 219 Cal.App.4th 1, 18.)

The same problems surround petitioners' suggestion that SANDAG "adopt standards requiring percentage-reductions in the number of roadway segments that expose nearby residents to dangerous levels of air pollutants." While the underlying goal may be worthy, it would be foolish to attempt to adopt a fixed regional standard without detailed study of what would be required, whether desired goals could feasibly be achieved, and consideration of the consequences that would result if attainment of the standards proved infeasible.

The AG suggests that SANDAG could establish a regional fund for mitigating impacts at the project level. (AG RB/XOB, p. 76.) The AG, however, does not suggest where the money would come from, or why this would result in any different results than relying on project-level review and use of project funds for such measures. Funding allocations in the RTP/SCS are intended to cover project-level mitigation. The AG also suggests that SANDAG should consider "whether certain individual transportation projects in the Plan should be modified," and whether certain transportation corridors should be "favored" for truck traffic. (Id.) Project-level modifications must, of course, be determined at the project level. Any proposal for redirecting major truck traffic as a programmatic "mitigation measure" would raise a host of feasibility issues. For example, even if SANDAG had the legal authority to do so, would mandatory rerouting of truck traffic to avoid one affected area increase overall emissions due to longer travel distances, or create equal or worse impacts on another area? Absent some specific proposal – and none has ever been made – one cannot even begin to assess whether this is a viable mitigation suggestion.

Petitioners do not identify any other mitigation measures or "performance standards" that allegedly could have been adopted, nor do they address the EIR's express conclusion that no additional mitigation measures were feasible. (AR 8a:2273.) There is simply no basis for the claim that the EIR's discussion of air quality mitigation measures was legally inadequate.

E. The EIR Adequately Addressed Regional Impacts from Particulate Emissions

The AG contends that the EIR also failed to adequately address the effects of particulate emissions (PM_{10} and $PM_{2.5}$) at a regional level. (AG RB/XOB, pp. 69-72.) Potential regional impacts from PM_{10} or $PM_{2.5}$,, however, were evaluated under significance criteria AQ-2 and AG-3 in the EIR. (AR 8a:2235-2249.) For the analyses, a detailed quantitative emissions forecast for transportation-related pollutants was developed using the latest (2007) EMFAC air quality model. (AR 8a:2229; 8b:4420-4421 [modeling data].) The analysis under criterion AQ-2 concluded that regional CO, NOx and ROG will decline (by more than 1/2 each) by 2050, but that PM_{10} and $PM_{2.5}$ emissions will increase, resulting in a significant impact. (AR 8a:2237.) A further cumulative impact analysis which reached similar conclusions was conducted under Criterion AQ-3. (AR 8a:2242-2249.) Under both analyses, future emissions from land use development were found to be unquantifiable at the present time, but were assumed to be significant. (AR 8a:2244, 2246, 2248.) Full assessment and mitigation of impacts from individual land use projects will be addressed in future, project-specific EIRs. (Id.) As discussed above, localized health impacts attributable to increased PM_{10} or $PM_{2.5}$ emissions are fully addressed under significance criterion AQ-4. (AR 8a:2249-2264.) Even at the project level, applicable modeling is not required to account for emissions emanating from

a wide area beyond the focal point of the project. (*Gray*, 167 Cal.App.4th 1099, 1125-1126.)

The analyses conducted under criteria AQ-2 and AQ-3 are standard, emission-based approaches to regional air quality impact analysis. The AG is completely vague as to what further analysis should have been performed, but apparently contends, without actually saying so, that ambient air quality modeling should have been done for the entire RTP/SCS. This is the only way one could determine whether the additional PM emissions predicted in the EIR will result in violation of the ambient air quality standards the AG is apparently referring to. (AG RB/XOB, p. 71; see 8a:2211-2212, 2235-2240; 8b:4421-4425.) These standards measure air quality in terms of parts-per-million (ppm) of each pollutant, or, in the case of particulates, micrograms per cubic meter ($\mu g/M^3$). (AR 8a:2212.)

To actually develop long-term ambient air quality forecasts on a region-wide basis would be effectively impossible. Accepted ambient air quality models (dispersion models) do exist for modeling impacts from point sources (e.g., a new factory) or small areas, e.g., a new housing tract. To produce any meaningful results, however, such models must have accurate data on expected emissions, existing or expected background conditions in the affected area, and all the factors that affect dispersal of air pollutants, e.g., prevailing winds and local topography. The difficulties of forecasting ambient air quality increase geometrically is one must attempt to capture all the relevant information for not one, or two or five discrete sources, but for literally hundreds of miles or roadways and hundreds of individual development projects, all with overlapping zones of impact. The task becomes impossible altogether if one takes into account the vast

uncertainties inherent in attempting to predict the exact timing and net emissions of future land use developments in the region, or changes in background air quality conditions that may result from continuing technology-driven emission reductions and surrounding development.

Attempting to quantify health impacts from PM emissions on a regional basis would be infeasible for the same reasons. As discussed in previous sections, the health impacts from particulate emissions are associated primarily with local concentrations generated by transportation emissions or other sources. These impacts were adequately addressed in the EIR. Even assuming that increased regional PM emissions will occasionally result in ambient air quality levels in excess of the state or federal health standards at some additional locations, there is no way of determining the likelihood, frequency or location of these exceedances without detailed ambient air quality modeling. This type of analysis is simply not feasible or required in a regional, program level EIR. (AR 8b:4421, 4424-4425.)

IV. THE ANALYSIS OF AGRICULTURAL RESOURCE IMPACTS IS ADEQUATE

The CNFF petitioners' next set of arguments concern the analysis of impacts to agriculture in the EIR. Two of these issues were never raised by petitioners (or others) in the administrative proceedings, and are therefore not properly before the Court. (PRC § 21177.) One of them was not even raised in the trial court proceedings until the filing of petitioners' reply brief. But in any event, petitioners' arguments boil down to disagreements over the methodologies used and conclusions reached in the EIR. Substantial evidence supports all aspects of the EIR's analysis of agriculture impacts. While petitioners' claim there is also contrary evidence on at least one of their issues, even there they do not seriously attempt to meet their burden of

showing that there is *no* substantial evidence supporting SANDAG's conclusions or choice of methodologies. (*California Native Plant Soc. v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626.)

A. Analysis of Agricultural Impacts in the EIR

Agricultural impacts were evaluated under two significance criteria in the EIR. (AR 8a:2188-2199.) Under criterion AG-1, the EIR evaluated impacts to land classified as prime farmland, unique farmland or farmland of statewide significance under the state Farmland Mapping and Monitoring ("FMMP") program. Under criterion AG-2, the EIR evaluated impacts to all lands containing existing agricultural uses regardless of classification, and also impacts to lands under Williamson Act contracts and lands designated under the California Farmland Conservancy Act. (AR 8a:2194-2199.)

The EIR concluded that direct impact of the RTP/SCS on existing agricultural lands – i.e., impacts from construction or improvement of roads, highways and transit facilities – will be relatively small, i.e., 10.57 acres by 2050. (AR 8a:2199.) However, the EIR also undertook to evaluate potential impacts that will result from future population growth and development in the region that were not attributable to transportation projects. These impacts are far more significant. The EIR forecasts losses of 7,012.5 acres of existing agricultural land by 2050. (AR 8a:2198.) Petitioners believe this estimate to be too low.

B. Petitioners Failed to Exhaust Administrative Remedies on Two of Their Issues, and Failed to Timely Raise One in the Trial Court

Although the CNFF Petitioners now seek to litigate three distinct issues concerning the EIR's analysis of agricultural impacts, only one of these was fairly raised during the administrative proceedings. Petitioners are

now barred from raising these issues on appeal by Public Resources Code § 21177.

The CNFF petitioners first commented on agricultural issues only in their last-minute comments on the FEIR. They complained there that SANDAG's calculations for loss of agricultural land vary dramatically from those found in other studies, particularly in the EIR prepared by the County of San Diego for its general plan update. (AR 320:27724-27725.) The comment letter, however, nowhere addressed the specific methodologies used in the EIR. The letter also nowhere states that the EIR was defective for failure to include agricultural parcels of less than 10 acres in size in the analysis, nor that the EIR's analysis of potential impacts on rural residential lands was defective. The former argument appears only in CNFF's opening brief below. (JA2 {47}414-417.) The latter argument does not appear, and then only briefly, until the filing of CNFF's reply brief. (JA4 {65}828:4-13.)

These specific claims also were not raised by any other petitioner. The only other correspondence cited by petitioners – a letter from the American Farmland Trust – advocates that the RTP/SCS itself include more vigorous policies for protection of agriculture, and particularly higher value agricultural operations which may take place on smaller parcels. (AR 279:19462-19465.) This letter, however, nowhere even mentions the EIR, much less raises issues concerning its particular methodologies or conclusions.

The requirements of Public Resources Code § 21177 are intended to ensure that lead agencies "have the opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review." *(Porterville Citizens,* 157 Cal.App.4th 885, 910.)

Consequently, the "objections must be sufficiently specific so that the agency has the opportunity to evaluate and respond to them. [Citation omitted.]" (*Id.*) The "exact issue" thus must have been fairly raised in the administrative proceedings. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535-536.) General complaints concerning a certain subject or specific comments actually directed at a different issue do not allow petitioners to raise distinctly new and more technical legal, factual or methodological issues in litigation. (See, e.g., *North Coast*, 216 Cal.App.4th 614, 646; *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 686-687 [challenge to specific methodology must be timely raised].)

The case for strict application of the exhaustion requirement is particularly strong here. First, petitioners' comments were prepared by experienced counsel who apparently lacked neither the expertise nor time to prepare an otherwise exhaustive analysis of the alleged defects of the EIR, albeit at the last possible moment. (AR 320:27695-27745.) The specific issues now raised in this litigation could have been raised in the comment letter, allowing SANDAG a fair opportunity to respond, but were not. These issues, thus, classically appear to be issues hatched as afterthoughts for litigation purposes, not as part of any genuine effort to seek resolution of significant issues at the administrative level. In other words, precisely the type of tactics barred by Public Resources Code § 21177(a).

C. Disagreements Over the Amount of Agricultural Lands that Will Be Affected by Future Development are Not a Basis for Invalidating the EIR

It is axiomatic that a reviewing court "does not pass upon the correctness of the EIR's environmental conclusions, but only its sufficiency

as an informational document." (*Laurel Heights*, 47 Cal.3d 376, 392, 409.) Nevertheless, petitioners contend that the EIR's assessment of agricultural impacts is factually inaccurate because it understates the amount of agricultural land that will be lost to development over the next 40 years. (CNFF RB/XOB, pp. 123-126.) Petitioners contend that this must be true because SANDAG's estimates differ substantially from estimates found in the EIR for San Diego County's most recent general plan update.

This claim obviously presents a straightforward substantial evidence question. CNFF can prevail on such claims only by showing that there is *no* substantial evidence supporting SANDAG's conclusions. (*CNPS v. Rancho Cordova,* 172 Cal.App.4th 603, 626.) It hardly needs saying that the existence of conflicting opinions or conclusions in the record is not grounds for invalidating an EIR. (*Laurel Heights*, 47 Cal.3d 376, 393, 407-408.) This rule is not affected by the fact that some of the conflicting information petitioners rely on comes from another public agency. (*North Coast*, 216 Cal.App.4th 614, 643; *CNPS v. Rancho Cordova*, 172 Cal.App.4th 603. 626.) Further, petitioners must fairly discuss *all* of the evidence which supports the respondent's conclusions, and show why it is lacking. (*San Diego Citizenry*, 219 Cal.App.4th 1, 17.)

Petitioners make no serious effort to meet their burden. Instead, they attempt to shift the burden to SANDAG by contending that SANDAG must "explain" why its estimates are different than those of the County. (CNFF RB/XOB, pp. 125.) Had petitioners timely raised their issues in comments on the draft EIR, some "explanation" might have been required in responses to these comments. (Guidelines § 15088.) Since petitioners did not raise any issue until last minute comments on the FEIR, however, the only issue is

whether SANDAG's analysis is supported by substantial evidence. As further discussed below, the record shows that the EIR's estimates were based on extensive analysis of available GIS data, aerial photography and other records which could reasonably be relied on for the impact analysis. That is all the evidence that is necessary to sustain the EIR's conclusions, no matter how much petitioners may disagree with them. (*Laurel Heights*, 47 Cal.3d 376, 407-409; *National Parks*, 71 Cal.App.4th 1341, 1364-1365.) However, the record also does explain the likely sources of disparity between SANDAG's and the County's estimates of agricultural impacts. As noted in the staff report prepared in response to petitioners' last minute comments, the definition of agricultural land used in the County EIR included any lands deemed available or suitable for agricultural use, including lands previously used for agriculture that are no longer in active production. (AR 14:4515-4516; 305:20422.) Differences in the age of data or sources of data used in preparing an assessment may also make significant differences, as may assumptions and projections about the extent and patterns of future development. (Id.) The County analysis also includes grazing land, which comprises over 70% of the total acreage considered, while SANDAG's analysis of impacts to existing agricultural lands did not. (AR 305:20423, 20458-20459; 8a:2194.)

Underlying the necessarily brief staff response is the fact that assessment of agricultural impacts is not an exact science. The extent of land planted with crops or used for grazing in any given area varies from year to year. Expert opinion (and regulatory definitions) often differ as to what lands should be considered viable, long-term agricultural lands for analytical purposes. CEQA Guidelines Appendix G recommends that significance

assessments be based on impacts to lands specifically designated as Prime Farmland, Unique Farmland or Farmland of Statewide Importance on maps prepared under the state Farmland Mapping and Monitoring Program ("FMMP"). (See Guidelines, App. G, Sec. II(a).) This represents a policy judgment that not every pocket farm or experimental plot should be treated as a significant long-term agricultural resource. Lead agencies have discretion to apply significance criteria that are appropriate to the circumstances. (*Save Cuyama Valley v. County of Santa* Barbara (2013) 213 Cal.App.4th 1059, 1068.) While both SANDAG and the County did use a more exacting approach than required by Guidelines Appendix G in this case, it is hardly startling that the two EIRs reached different conclusions.

The record discloses that SANDAG did make a good faith effort to comprehensively evaluate long term agricultural impacts in the region. The analysis was based on hard data obtained from GIS mapping and other sources, and conducted by qualified expert consultants. (AR 8a:3356-3358, 3399; 346:30229.) This is all the substantial evidence that is needed to uphold the EIR. Petitioners' opinions that the County EIR used better methods or was more accurate do not change the result.

D. The EIR Did Not Improperly Ignore Potential Impacts on Rural Residential Lands

Petitioners next contention is that the EIR failed to properly account for potential agricultural impacts on lands zoned "rural residential" by the County or other jurisdictions. The argument fails on procedural grounds, but also on the merits, should the Court elect to reach them.

1. *The Issue was Not Timely Raised in the Administrative Proceedings or in the Trial Court*

As already discussed, this alleged inadequacy in the EIR was not raised as an issue in the administrative proceedings, and is therefore not properly before the Court. (PRC § 21177(a).) Beyond this, however, the issue was first raised in the trial court proceedings only in the CNFF Petitioners' reply brief. (JA4 {65}828:4-13.) Even then, no further effort was made to argue the issue at the time of hearing. The trial court also did not address the issue at all in its final decision. (JA5 {75}1046-1058.) Petitioners made no objection.

Parties may not raise substantive issues for the first time in a reply brief. (*Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010.) Since petitioners failed to properly raise this issue below, this Court can and should deem the issue waived.

2. *The EIR Did Not Ignore Potential Impacts to Rural Residential Lands*

On the merits, petitioners' issue here boils down to a difference of opinion as to how potential long-range agricultural impacts on rural residential lands should be assessed. Under criterion AG-2 (impacts to existing agriculture), the EIR separately calculated the acreage of lands that would remain classified exclusively for agricultural uses, and acreages that would be converted to rural-residential designations for each of the three horizon years. (AR 8a:2194, 2197, 2198.) The EIR correctly recognizes that redesignation of land for rural residential use does not, in and of itself, preclude continuation of existing agricultural uses. Instead, agricultural uses are generally permitted and often encouraged by rural residential zoning

regulations. (AR 8a:2189-2189.) Consequently, as stated in the EIR, these converted lands were considered as remaining available for agriculture.

Petitioners apparently believe that the EIR should have instead taken a glass-is-half-empty approach and assumed that some unspecified amount of rural-residential land would be lost to agriculture as an inevitable result of reclassification. SANDAG should then have apparently attempted to quantity the amount of agricultural land lost to new structures or other development.

Petitioners' argument appears to rest in equal parts on mistaken assumptions of fact, misunderstanding of the analytical methods used in preparing the EIR, and on an erroneous understanding of what is required by CEQA.

On the factual level, petitioners falsely assume that development on lands with existing agricultural uses necessarily results in loss of agricultural use. This is not so. For the analysis of impacts to existing agricultural lands conducted under significance criterion AG-2, SANDAG determined the combined acreage of all parcels that *contain* substantial existing agricultural uses, not merely the extent of lands under cultivation at the time the EIR was prepared. (AR 8a:2194; 346:30229.) Not all parcels containing agricultural uses are completely devoted to agricultural uses. Some of the land may be unsuitable for crops or orchards (e.g., slopes, ravines, rock outcroppings) and some may already be occupied by, or set aside for, future development for rural residences, accessory uses or other purposes, including possible future agriculture. In fact, a great number of the small farms that petitioners refer to in their brief are precisely this type of property. Sixty-eight percent of the county's 6,687 farms are under 10 acres in size, 92 percent are family owned

and 77 percent include dwellings. (AR 305:20426-20427.) Thus, while the AG-2 analysis shows that there were 118,741.5 acres of land containing existing agricultural uses in the county in 2010, GIS mapping done for the biology section of the EIR indicates that only 104,320 acres of this land was covered with identifiable agricultural vegetation. (AR 8b:3653.) This leaves approximately 14,000 acres of land on agricultural parcels available for other uses. This is room for a lot of homes.

The fact is that existing agricultural uses often co-exist with low-level residential development and accessory uses. The reclassifying of lands containing such uses does not necessarily open these lands for further development. It may simply confirm what is already on the ground. It is true that reclassifying land as rural residential will also typically open larger parcels for subdivision into smaller parcels, many of which may be currently undeveloped. Even then, however, new residences or accessory uses do not necessarily eliminate or even encroach on existing agriculture. Preferred home sites, for example, are often located on portions of a property least suited to agriculture, e.g., hillsides with views. The County EIR upon which petitioners rely concluded that rural residential classifications are generally compatible with continued agricultural use, and may even facilitate expansion of agriculture in some situations by increasing the affordability of parcels suitable for smaller farms. (AR 305:20436-20437.) Given that most of the agriculture conducted on smaller parcels in the region consists of high value operations such as nurseries and vineyards (AR 305:20425-20426, 20460, 20469-20470), future purchasers of rural residential parcels may have

a strong economic motive, and often aesthetic or other motives, to avoid impacts to existing productive lands.[7]

Even if one assumes that existing agricultural uses will diminish or be lost on some rural residential lands, predicting the amount of loss would be no easy task given the variables that may apply on a parcel-by-parcel basis. Petitioners apparently believe that SANDAG should have taken the leap. While CEQA may require reasonable forecasting, however, it does not require speculation. (Guidelines § 15145; *Friends of the Eel River*, 108 Cal.App.4th 859, 877; *Marin Mun. Water Dist. v. KG Land California Corp.* (1991) 235 Cal.App.3d 1652, 1662.) It is certainly not practical (or legally required) to individually assess the development potential of every future rural residential parcel in the San Diego region in the context of a program EIR. Even if this detailed level of analysis were performed, any forecasting of actual losses would have to incorporate assumptions about the timing and rate of development and the degree to which economic conditions and trends in owner preferences might affect the amount of agriculture lost. SANDAG could reasonably conclude, as it did, that this type of analysis was not feasible or necessary for the purposes of the RTP/SCS EIR. As it is, the EIR

[7] Petitioners cite AR 8a:2327 for the proposition that "the EIR itself admitted that rural residential land typically becomes partially developed." The cited page, however, discusses the very conservative assumptions that were used to forecast worst-case impacts to sensitive biological habitat areas on rural residential lands. These conservative assumptions, i.e., that theoretical maximum permitted development would occur, obviously are not predictions of actual development. While this sort of worst-case analysis may be appropriate for analyzing potential impacts to sensitive habitat areas, SANDAG was not obligated to use the same approach to assessing potential agricultural impacts, not the least reason being that such an approach would inevitably overstate actual future impacts.

fairly discloses the amount of land that is expected to be reclassified for rural residential use. (AR 8a:2194, 2197-2198.)

Petitioners may still contend that some sort of general forecasting could have been attempted, as was done by the County. The mere fact that some sort of speculative forecasting could have been attempted, however, does not mean it is legally required. (Guidelines § 15204(a).)

3. *The Error, If Any Occurred, Was Not Prejudicial*

Should the Court conclude that some sort of more detailed analysis of potential impacts to rural residential lands was required, there remains the question of whether the omission of such information amounts to a prejudicial abuse of discretion. (*Neighbors for Smart Rail*, 57 Cal.4th 439, 463-465.) Omission, even of legally required information from an EIR, is prejudicial only when it "precludes informed public decisionmaking and informed public participation." (*Id*. at 463, quoting *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712.)

An error might reasonably be deemed prejudicial if it leads to neglect or substantial understatement of impacts caused by a project or of ways to mitigate such impacts. Applying a similar standard, the Supreme Court in *Neighbors for Smart Rail* found that a major legal error – use of an impermissible impact baseline – was not prejudicial because there was no evidence that a proper analysis would have revealed impacts that were substantially different or worse than those predicted using a proper baseline. In *Save Cuyama Valley*, 213 Cal.App.4th 1059, 1073-1074 the court determined that the respondent did not commit prejudicial error by mistakenly classifying a particular environmental impact as insignificant,

where the EIR also contained relevant factual information and the error did not affect the EIR's recommendations concerning mitigation.

Here, the impacts that petitioners are concerned with – impacts from future residential or other development on agricultural lands in rural residential zones – are not impacts of the RTP/SCS at all. Decisions to zone lands rural residential, and decisions as to what development actually may occur on such lands are made by local land use authorities (generally the County in this region), not by SANDAG in the context of adopting a RTP/SCS. Not even petitioners appear to claim that the RTP/SCS itself will induce the County or others to designate additional lands for rural residential development in coming years, thus potentially allowing more development in these areas.

While future transportation projects programmed in the RTP/SCS will impact some limited amounts of agricultural land, these impacts have nothing to do with the potential impacts of future land use development on rural residential lands. Petitioners cannot realistically argue that possible future development impacts on rural residential lands are impacts *caused* by the RTP/SCS.[8]

It is true, as a general proposition, that transportation projects may significantly influence the timing and intensity of development. The transportation improvements contemplated in the RTP/SCS, however, are overwhelmingly urban in nature. The overall thrust of the RTP/SCS,

[8] At the trial level petitioners briefly challenged the accuracy of the EIR's assessment of agricultural impacts caused directly by transportation improvements, but did not claim any errors were attributable to the EIR's treatment of rural residential lands. (JA2 {47}415:3-6.) On appeal, petitioners have abandoned altogether their past claims concerning agricultural impacts from transportation projects.

moreover, is to further concentrate anticipated development *in urban areas* and along existing transportation corridors, not to facilitate rural residential development. (AR 8a:2857-2860, 190:13092-13093.) The EIR concluded, in its analysis of the "No-Project" alternative, that agricultural impacts would increase if the RTP/SCS were not implemented, due to greater dispersal of new development. (AR 8a:3163-3164, 3320.) Petitioners have cited no evidence to dispute this conclusion. Petitioners also cannot seriously dispute that improvement of urban transportation systems and reductions in congestion planned in the RTP/SCS will generally make urban living a more attractive option to new residents, thus alleviating development pressures on rural land. The probable effects of the RTP/SCS as a whole on rural residential agricultural land are thus actually positive or, at worst, neutral.[9] If any error occurred here, it is precisely the type of error found nonprejudicial in *Neighbors for Smart Rail*, 57 Cal.4th 439, 463-465.

On these facts, petitioners cannot claim that any technical errors in EIR's assumptions or methodologies concerning development on rural residential lands were prejudicial.

[9] If petitioners contend that some individual road projects in the RTP/SCS might have significant effects on agriculture on rural residential lands, it is their burden to provide credible evidence that these impacts could be regionally significant. To the extent that there is any possibility of such project-specific effects, however, these potential impacts are properly studied in environmental documents for each specific project, not in a region-wide Program EIR. As even petitioners should understand by now, the mere inclusion of such projects in the RTP/SCS does not commit the respective state or local lead agencies for these projects to granting approvals if a project level EIR identifies significant unavoidable impacts. If significant project-specific effects are determined to exist, appropriate mitigation measures or alternatives must also be developed in a project-level EIR.

E. The EIR Did Not Fail to Consider Impacts to Agricultural Lands On Parcels Smaller than Ten Acres

Petitioners' final contention is that the EIR failed to evaluate impacts on "small farms," meaning impacts on agricultural parcels of less than 10 acres in size, i.e., the minimum size necessary to be designated for inclusion in FMMP maps

It is true that the analysis conducted in the EIR for agriculture impact category AG-1 did, consistent with CEQA Guidelines Appendix G, consider only losses to FMMP mapped agricultural parcels of 10 acres or more, i.e., parcels traditionally considered as significant long-term viable agricultural resources. (AR 8a:2188.) Had the EIR stopped there, the question facing this Court would be whether in the context of regional transportation plan which will have only very limited direct impacts on agriculture (i.e., from expansion or extension of existing roadways or other transportation facilities), analysis based on the state Guidelines criterion was legally insufficient.

Criterion AG-1, however, was *not* the only significance criterion or impact analysis utilized in the EIR. Under significance criterion AG-2, the EIR also analyzed direct and indirect impacts on all lands which were (1) in current agricultural use; (2) under Williamson Act contracts; or (3) designated under the California Farmland Conservancy Act. (AR 8a:2194.) This analysis, by its terms, was *not* limited to mapped FMMP lands or by the 10-acre minimum that applies to FMMP mapping. The data used to calculate the extent of existing agricultural lands included aerial photography and other information from SANDAG's constantly updated GIS data base. (AR 346:30229.)

Using this data, the FEIR concluded that in 2010, the baseline year, 118,741.5 acres of land were in active agricultural use. (AR 8a:2194.) Land use changes through 2050 would result in a projected loss of 7,023.7 acres, of which only 10.6 acres would be attributable to transportation projects. (AR 8a:2198-2199.) An additional 73,253 acres would be converted to rural residential use, which would allow but not guarantee continued agricultural use. (AR 8a:2198.) Similar analyses were performed for 2020 and 2035. (AR 8a:2194-2196.) These figures clearly show that the analysis performed under significance criterion was broader and more detailed than that performed under criteria AG-1. The analysis under AG-1 considered impacts to 70,140 acres of existing FMMP lands, and concluded that only a relatively small portion of these core agricultural lands – 3,485.09 acres – would be lost to development by 2050. (AR 8a:2189, 2194.) The analysis under AG-2, in contrast, considered impacts to 118,741.5 acres of existing agriculture and concluded that 7,023.07 acres would be lost by 2050. (AR 8a:2194, 2199.)

On appeal, petitioners claim that that the record does not affirmatively prove that the analysis conducted under AG-2 considered agriculture on parcels under 10 acres in size. According to petitioners, in order to prove this rather simple proposition the EIR would have had to (1) provide the source of the data; (2) disclose the location or individual parcel sizes of all land considered. (CNFF RB/CAOB, p. 130.) According to petitioners, the public cannot be sure that smaller agricultural parcels were considered without this information.

An EIR is not required to explain each and every study assumption or methodological choice utilized in developing the EIR, particularly where no

issue was raised about these methods in comments on the Draft EIR. Had petitioners timely raised this issue in the administrative proceedings, they might have been entitled to some more detailed explanation of the data used to forecast impacts under significance criterion AG-2. Instead, as discussed in Part 2, Section IV.B above, petitioners did not raise the issue at all, and they are now barred from pursuing it before this Court. (PRC § 21177.) But in any event, the record contains more than adequate evidence to rebut a claim that the EIR considered impacts only to agricultural parcels of 10 acres or more in size.

As an initial matter, petitioners point to no evidence in the record suggesting that the analysis under significance criterion AG-2 was anything other than described in the EIR, i.e., an analysis of impacts to all existing agricultural lands. (AR 8a:2194.) The sheer differences in numbers generated by the analyses under significance criteria AG-1 and AG-2 discussed above also confirm that analysis under the latter analysis was not limited to FMMP lands of 10 acres or more in size. The GIS mapping and data gathering process utilized in the analysis is described in the record and in the discussion of habitat impacts in the EIR. (AR 8a:2278-2281; 346:30229.) As that discussion indicates, the computer data-base driven mapping conducted for the EIR included identification of all parcels in agricultural use and mapping of all lands currently showing agricultural vegetation. (AR 8a:2277, 2279.) A breakdown of existing agricultural lands by zoning type shows that the EIR analysis extended to all types of land, including land in residential, commercial and industrial zones. (AR {336}29418.) This analysis obviously was not confined to conventional large parcel agriculture. Lastly, once grazing lands are excluded,

SANDAG's estimates of existing agricultural land are very close to those of the County, which petitioners admit included smaller parcels. (AR 305:20422-20423, 20463.) There is utterly no basis for petitioners' contention that parcels under 10 acres were excluded from SANDAG's analysis.

V. THE EIR CONSIDERED AN ADEQUATE RANGE OF ALTERNATIVES

The CNFF Petitioners' final contention is that the EIR failed to analyze a reasonable range of alternatives to the Project. The dispute, however, appears more philosophical – or rhetorical – than substantive. Petitioners contend that SANDAG "remained wedded to a highway-centric approach to transportation" rather than consider "transit-focused" alternatives or other alternatives that would "implement [] the fundamental changes necessary to meaningfully reduce greenhouse gas emissions." (CNFF RB/XOB, pp. 132, 135, 136.) Petitioners nowhere, however, undertake to actually discuss the seven alternatives studied in the EIR other than by innuendo, and fail even more completely to discuss any of the numerous legal, technical and funding constraints which govern adoption of a legally viable RTP/SCS and the feasibility of alternatives. These omissions alone are sufficient to justify rejection of petitioners' arguments on alternatives out of hand. (See *Mount Shasta*, 210 Cal.App.4th 184, 199.)

As discussed below, however, the RTP/SCS process was accompanied by an intensive effort to consider and evaluate alternatives which would maximize public transit improvements. Four such potential alternatives (and three other alternatives) were fully evaluated in the EIR. Despite petitioners' preconceived notions, these alternatives would not decrease GHG emissions even had they not ultimately been determined to be

infeasible. The EIR's discussion of alternatives not only satisfied, but vastly exceeded, CEQA requirements.

A. Background Facts – Alternatives Considered and Rejected in the EIR Process

The EIR's discussion of alternatives in this case extends over 200 pages and provided in-depth evaluation of six separate potential project alternatives, as well as the mandatory "No-Project" alternative. (AR 8a:3131-3337.) The six "project" alternatives consist of the following. (AR 8b:3802-3803, 8a:3131-3162):

- Alternative 2a: Modified Funding Strategy/2050 Growth Forecast Land Use;
- Alternative 2b: Modified Funding Strategy/Modified Land Use;
- Alternative 3a: Transit Emphasis/Modified Phasing/2050 Growth Forecast Land Use;
- Alternative 3b: Transit Emphasis/Modified Phasing/Modified Land Use;
- Alternative 4: 2050 RTP/SCS Transportation Network/Modified Land Use; and
- Alternative 5: Slow Growth.

Four of these alternatives (2a, 2b, 3a and 3b) consist of plans that would alter the mix or timing of transit projects and roadway projects in favor of transit. (AR 8a:3140-3161, 3184-3271.) In other words, precisely the type of alternatives petitioners contend should have been considered. The last two alternatives evaluate the potential effects of modified land use plans, that might be adopted by local land use authorities. (AR 3162, 3262-3316.) While SANDAG has no power to directly implement these latter alternatives, discussion of these alternatives serves an informational function by informing SANDAG's member agencies and the public of the effects that

changes in land use regulation might have when added (or subtracted) from the effects of the RTP/SCS. (AR 8a:3318-3319; 8b:3804-3805.)

The environmental impacts of these alternatives compared to the Project are set out in a detailed matrix extending through over 150 pages of the EIR. (AR 8a:3163- 3316, 3320-3329 [summary].)

The alternatives fully evaluated in the EIR are by no means the only alternatives considered in the long process of preparing a draft RTP/SCS, and evaluating the proposed Project. The process by which alternatives were selected and numerous additional variations and alternatives determined to be infeasible is discussed in detail in the EIR, as are the criteria which governed selection of alternatives. (AR 8a:3131-3136, 3331-3336; 8b:3802-3811; 136:9279-9301.) Throughout the process, intensive efforts were made to consider options for increasing transit development.

B. Governing Legal Standards – An EIR is Not Required to Give In-Depth Consideration to Alternatives that are Infeasible, Fail to Meet Most Project Objectives or Conflict with Basic Policy Goals

An EIR must describe and compare a reasonable range of alternatives to a proposed project. (PRC § 21100(b)(4); Guidelines § 15126.6(a).) However, "[a]n EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decisionmaking and public participation." (Guidelines § 15126.6(a).) The range of alternatives considered is governed by a "rule of reason." (Guidelines § 15126.6(f); *Goleta Valley*, 52 Cal.3d 553, 565; *Cherry Valley*, 190 Cal.App.4th 316, 354-355.) An EIR is *not* required to evaluate alternatives that are infeasible, or would not achieve most of the project's basic objectives. (Guidelines §

15126.6(c), (f); *Goleta Valley*, 52 Cal.3d at 565.) A lead agency therefore may – indeed, must – structure its EIR alternatives analysis around the basic project objectives, and need not study alternatives that cannot achieve basic project goals. (*In re Bay-Delta*, 43 Cal.4th 1143, 1163-166.)

For multi-component projects like the RTP/SCS, an EIR need not evaluate alternatives for each project component, but rather can evaluate integrated multi-component alternatives. (*California Oak Foundation v. Regents of the University of California* (2010) 188 Cal.App.4th 227, 276-277; *CNPS v. Santa Cruz*, 177 Cal.App.4th 957, 993.) An EIR also is not required to evaluate multiple variations or permutations of the major alternatives analyzed in the EIR. (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1994) 23 Cal.App.4th 704, 713-714; *Cherry Valley*, 190 Cal.App.4th 316, 355.)

Upon judicial review, "absolute perfection is not the standard governing a lead agency's proposed range of project alternatives." (*California Oak*, 188 Cal.App.4th 227, 275-276; *Cherry Valley*, 190 Cal.App.4th 316, 355.) "Rather, in preparing an EIR, a lead agency need only make an objective, good faith effort to provide information permitting a reasonable choice of alternatives that would feasibly attain most of the basic objectives of the project, while avoiding or substantially lessening the project's significant adverse environmental impacts." (*California Oak*, 188 Cal.App.4th 227, 276.) The EIR's selection of alternatives "will be upheld, unless the challenger demonstrates 'that the alternatives are manifestly unreasonable and that they do not contribute to reasonable range of alternatives.' [Citation omitted.]" (*CNPS v. Santa Cruz*, 177 Cal.App.4th 957, 988.)

C. Seven is Enough – The EIR Considered an Adequate Range of Alternatives

1. *Petitioners Have Not Met Their Burden of Identifying Additional Feasible Alternatives that Should Reasonably Have Been Considered in the EIR*

Petitioners contend that the seven alternatives evaluated in the EIR were not enough. Such allegations, however, simply beg the question of what additional, potentially feasible alternatives could have been considered. To prevail, petitioners must specifically identify such alternatives, and provide evidence that these alternatives are both feasible and would actually reduce significant environmental effects of the proposed project in practice. (*Mount Shasta*, 210 Cal.App.4th 184, 199.)

Commendably, petitioners did offer one detailed alternative and one conceptual alternative for consideration by SANDAG during the administrative proceedings. These alternatives, and the reasons they were determined to be infeasible, are discussed in greater depth in Part 2, Section V.D below. Beyond these two, however, petitioners fall back on general exhortations that the EIR should have considered still more "transit-focused" alternatives or "fundamental changes" that would reduce GHG emissions. They not only fail to concretely describe any such alternative, but make no effort at all to explain how such alternatives might reasonably be expected to meet basic project objectives, feasibly satisfy the numerous legal requirements and fiscal constraints that apply to RTPs, or actually reduce environmental impacts. The latter is a particularly important concern as the EIR demonstrated that some mixes of transit and road/highway investments may actually produce more GHG emissions and other environmental impacts than the Project. (AR 8a:3317, 3324.) Petitioners, however, have completely failed to meet their burden.

2. *The EIR Evaluated a Full Range of Feasible Transportation Planning Options*

Although they cannot state precisely what additional alternatives should have been considered, petitioners contend that EIR evaluated only an artificially narrow range of alternatives, all of which "varied only slightly in substance from the Project," and all of which purportedly "would construct most or all of the Plan's highway projects" with little reallocation of resources to public transit projects. These claims are, to begin with, simply false. Alternatives 2a and 2b incorporate a "modified funding strategy" that would construct fewer highway projects and phase them later. (AR 8a:3140, 3144.) In particular, *the majority of highway projects phased for 2035 and 2050 in the RTP/SCS would not be developed.* (AR 8a:3140-3143.) For transit, the modified funding strategy would "add [transit] projects, increase service frequencies, and alter project phasing to increase the number of transit projects that are implemented earlier than under the 2050 RTP/SCS." (AR 8a:3144; see tables at 8a:3144-3147 for details.) Similarly, the EIR's two "transit emphasis" alternatives (Alternatives 3a and 3b) would implement RTP/SCS transit projects on an accelerated schedule compared to the Project. (AR 8a:3153.) Alternatives 3a and 3b also address other transit improvement goals and improvements addressed in the various additional suggested alternatives that CNFF endorses, i.e., "50-10 Transit Plan" and "FAST Plan" proposed in public comments. (AR 8b:3806-3807, 3809; 8a:3153.)

Petitioners do not and cannot explain how the alternatives discussion could have gone farther than it did given the complex constraints imposed by statutory requirements governing RTPs, fiscal realities, basic project objectives and other feasibility concerns.

These constraints are formidable. Among other things, RTPs must be revenue constrained, meaning that there must be identifiable, realistic funding for all components of the plan. (23 CFR § 450.322(f)(10)(i); AR 8b:3810; 218:17780-17784.) This funding does not come, as petitioners seem to imagine, from some giant slush fund. Funding comes from a variety of revenue streams which have their own timing and which are generally dedicated to specific types of transportation modes (or even specific projects), and which cannot be freely reallocated between roads, transit, rail or other types of projects. (AR 8b:3778, 3786-3787, 3810-3811; 145:9908-9923; 190a:13237-13247; 190b:13655-13666.) A RTP must also address the needs of all transportation sectors. It cannot under existing law simply ignore the needs of motorists, and freight-carriers – or pedestrians and bicyclists – in order to focus solely on improving public transit. (Gov. Code § 65080(a); AR 218:17685, 17786-17794.)

The EIR demonstrates more than a good faith effort to evaluate potentially feasible transit-intensive alternatives. More extreme proposals submitted by petitioners were also evaluated and found infeasible. (AR 8b:3806-3811.) There are no categorical rules governing the scope or number of alternatives which must be considered. (*Goleta Valley*, 52 Cal.3d 553, 566; *Mount Shasta*, 210 Cal.App.4th 184, 199.) Four transit-oriented alternatives in the EIR, plus variations considered and rejected in the scoping process or in responses to comments on the Draft EIR, would seem to be enough. Petitioners manifestly have not shown that any additional feasible alternatives exist.

3. *The EIR Considered an Adequate Range of Alternative Environmental Outcomes*

Petitioners also fault the EIR because all the alternatives will have significant adverse impacts, and many will have the same or worse impacts in some impact categories than the Project itself. Petitioners particularly complain that five of the six project alternatives would result in greater GHG emissions than the Project. (RB/XOB, pp. 133-134.)

Given that the Project at issue involves regional transportation planning for anticipated population growth of 1.2 million persons over a 40-year period, it is hardly surprising that all rational alternatives will involve significant environmental impacts. Most of these impacts, moreover, will be caused by population growth and related development, not the RTP/SCS or the transportation improvements planned in it. This is borne out, for example, in the No-Project analysis in the EIR, which concludes that overall impacts would be the same or greater in most categories without implementation of the 2050 RTP/SCS. (AR 8a:3163-3183.)

An EIR should, of course, strive to identify alternatives that will avoid or substantially lessen "one or more" of the proposed project's significant impacts. (Guidelines § 15126.6(c); *Sierra Club v. City of Orange*, 163 Cal.App.4th 523, 546; *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 490.) However, this requirement is also subject to the rule of reason. An EIR cannot be required to evaluate feasible less environmentally damaging alternatives unless such alternatives actually exist. (*Mount Shasta*, 210 Cal.App.4th 184, 199 [EIR which identified *no* feasible alternatives upheld where petitioners failed to show existence of any feasible less damaging alternative]; *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 313 [approving range of alternatives that

would have same or "slightly lower" levels of impacts in various categories].) It would be odd indeed if an EIR could be held invalid because the project being evaluated proved to be the most environmentally sensitive option available for meeting the project's core objectives. Where, as in this case, all reasonable alternatives to the proposed project will unavoidably have significant effects, an EIR may properly focus on alternatives that will at least incrementally reduce these effects. That is, in fact, precisely what the EIR does in this case.

Both the summary tables and detailed 150+ page matrix of comparable environmental effects in the EIR show that that there are indeed substantial differences, quantitatively or qualitatively, in the net severity of impacts that would result from the Project and various alternatives. (AR 8a:3317-3329 [summary], 8a:3162-3316 [matrix].) This information permits a "reasonable choice of alternatives so far as environmental aspects are concerned." (*Cherry Valley*, 190 Cal.App.4th 316, 355; *Mira Mar Mobile Community*, 119 Cal.App.4th 477, 490; Guidelines § 15126.6(f).)

The analysis in the EIR also badly undercuts one of petitioners' basic suppositions, i.e., that greater emphasis on transit development will reduce environmental impacts, and particularly GHG emissions. In fact, all four alternatives that would reduce or delay highway improvements and increase or advance transit projects (alternatives 2a, 2b, 3a and 3b) would result in the same or somewhat *higher* GHG emissions than the Project in all horizon years. (AR 8a:3192-3193, 3213-3214, 3236-3237, 3258-3259, 3317-3318, 3323-3324.) Other impacts would be slightly reduced in some categories, though never to less than significant levels, and would actually increase in others, notably congested vehicle miles traveled and other transportation

related impacts. (AR 8a:3319, 3328-3329.) In other words, pitting highway projects against transit projects is not the environmental panacea that petitioners believe. The fact that the EIR tends to undermine some of petitioners' cherished beliefs about the relative benefits of the two modes does not make the EIR legally invalid or insufficient as an informational document. Within the realm of hard facts that govern regional transportation planning, the EIR provided more than reasonable number of choices as far as relative environmental effects were concerned.

D. SANDAG Properly Determined that Additional "Transit-Friendly" Alternatives Proffered by Petitioners Were Infeasible

Petitioners also contend that two detailed alternatives they submitted during the administrative process – the FAST Plan and 50-10 Plan alternatives – should have been evaluated as feasible alternatives in the EIR. (CNFF RB/XOB, pp. 135; AR 8b:3936-4031 (FAST Plan), 296:19749-19768 (50-10 Plan). These claims also have no merit.

1. *Petitioners Have Failed to Provide Any Basis for Finding that Their Proposed Additional Alternatives Were Improperly Rejected for Further Analysis*

Petitioners admit in passing that the Fast Plan and 50-10 Plan alternatives were reviewed in six pages of detailed comments in the Final EIR. (AR 8b:3806-3811.) These putative alternatives were also addressed and found to be infeasible or otherwise properly excluded from further consideration in the EIR in the seven pages of detailed findings by the SANDAG Board of Directors. (AR 3:163-166, 169-173.) Although petitioners contend in conclusory fashion that SANDAG's "excuses" for rejecting these alternatives were "either plainly incorrect or unsupported by substantial evidence," they do not offer any further explanation of these

claims. As far as supporting "evidence," petitioners cite only to comments in their last minute comment letter addressed to the SANDAG Board. (AR 320:27737-27742.) These comments consist almost entirely of arguments, not facts, concerning the 50-10 Plan and barely mention the FAST Plan at all.

Again, petitioners ignore the basic rules governing judicial review. They fail to make any serious effort to "lay out the evidence favorable to the other side and show why it is lacking." (*San Diego Citizenry*, 219 Cal.App.4th 1, 17.) Nevertheless, lest there be any doubt that SANDAG has conscientiously attempted to evaluate reasonable alternatives to the Project, the basis for rejection of these alternatives is further discussed below.

2. *FAST Plan*

The FAST Plan alternative was rejected for formal inclusion in the EIR alternatives for three reasons. (AR 8b:3806-3808.) First, it is not a genuine alternative to the RTP/SCS at all. The Fast Plan consists only of a set of proposals for improved transit service. It makes no provision for road or highway improvements or other measures to address the needs of the automobile-using public. (AR 8b:3806; 3965-4009.) The FAST Plan thus does not fulfill basic objectives of the project and could not satisfy basic statutory requirements governing RTPs. Next, the transit improvements proposed in the FAST Plan are not that dissimilar from those proposed in the Project itself or the four transit-oriented alternatives (2a, 2b, 3a and 3b) evaluated in the EIR. (AR 8b:3806-3808.) The approved RTP/SCS actually provides for a more extensive transit infrastructure network than the FAST Plan in some respects. (AR 8b:3807-3808.) An EIR is not required to evaluate endless variations on the same general alternative theme.

(*Sequoyah Hills*, 23 Cal.App.4th 704, 713-714.) Finally, there is no evidence that the FAST Plan would substantially reduce environmental impacts. Indeed, some aspects of the FAST Plan, such as its proposals for an extensive system of grade-separated "quickways" which utilize tunneling, bridges and elevated roadways would likely substantially increase project impacts. (AR 8b:3968, 3978-3984.)

The SANDAG Board found that a FAST Plan alternative was infeasible and properly omitted from further consideration in the EIR for the foregoing reasons. (AR 3:169-173.)

3. *50-10 Plan*

The "50-10 Plan" actually reads more like a polemic against past SANDAG planning practices than an alternative RTP/SCS. (AR 296:19749-19768.) The "alternative" it proposes is entirely conceptual. The "plan" consists of halting all major roadway improvements in the San Diego region for the next ten years, and diverting all funds to transit improvements instead. (AR 296:19750.) The 50-10 Plan thus is not a true alternative to the RTP/SCS because it does not contain any concrete provisions for most of the essential elements of a RTP/SCS. (AR 8b:3808-3809.) Even if this global defect is overlooked, the plan is patently infeasible for several reasons. (AR 8b:3808-3811.) First, it would unacceptably delay major highway projects that are fundamental to congestion relief and balanced transportation improvement objectives of the RTP/SCS, which include development of multi-purpose lanes to improve transit. (AR 8a:2115, 8b:3778.) Financially the 50-10 Plan is infeasible because the funding streams for transit and highway projects cannot be legally manipulated to support the scheme. Forty years worth of future transit funding simply cannot be obtained and

spent in one decade. (AR 8b:3810-3811; 190:13245-13246.) In addition, there is no basis for believing that the 50-10 plan would ultimately achieve environmentally superior results over the adopted RTP/SCS or other alternatives considered in the EIR. (AR 8b:3809.)

Petitioners have not addressed any of these issues, and cannot provide any evidence to show that SANDAG's conclusions on the 50-10 plan are incorrect.

VI. CONCLUSION

For the reasons stated above, petitioners' cross-appeals must be denied. The issues raised are not even properly before the Court. Petitioners' claims are also uniformly without legal merit. Assuming that SANDAG's appeal on the merits is granted, the trial court should be directed to enter a new judgment denying petitioners' relief on all grounds.

DATE: December 3, 2013

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CERTIFICATION OF WORD COUNT

The text of the SANDAG APPELLANTS' COMBINED REPLY BRIEF AND RESPONDENTS' BRIEF ON CROSS-APPEAL consists of 31,852 words, including footnotes. The undersigned legal counsel has relied on the word count of the Microsoft Word 2013 Word processing program to generate this brief. (Cal. Rules of Court, Rule 8.204(c)(1).)

DATE: December 3, 2013 By: _____

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

PROOF OF SERVICE

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

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

On December 3, 2013, I served true copies of the following document(s) described as **SANDAG APPELLANTS' COMBINED REPLY BRIEF AND RESPONDENTS' BRIEF ON CROSS-APPEAL** on the interested parties in this action as follows:

☒ BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address cmcaleece@sohagi.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☒ BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

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

Executed on December 3, 2013, at Los Angeles, California.

Cheron J. McAleece
Printed Name

Cheron J. McAleece
Signature

Cleveland National forest Foundation; Sierra Club; Center for Biological Diversity; CREED-21; Affordable Housing Coalition of San Diego; People of the State of California v. San Diego Association of Governments; San Diego Association of Governments Board of Directors
Court of Appeal, Fourth Appellate District, Division 1
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