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January 29, 2015

VIA FEDERAL EXPRESS and E-SUBMISSION

Chief Justice Tani Cantil-Sakauye
And the Justices of the California Supreme Court
Supreme Court of the State of California
350 McAllister Street
San Francisco, California 94102

Re: Amicus Curiae Letter in Support of Petition for Review – *Cleveland National Forest Foundation, et al. v. San Diego Association of Governments, et al.* (4th App. Dist., Case No. D063288 (2014)) (Cal. Supreme Court Case No. S223603)

To the Honorable Chief Justice and the Justices of the Supreme Court:

The California Association of Councils of Governments ("CALCOG"), the League of California Cities ("League"), the California State Association of Counties ("CSAC"), the Metropolitan Transportation Commission ("MTC"), and the California Association of Environmental Professionals ("AEP") respectfully request that the Supreme Court grant the Petition for Review filed by San Diego Association of Government ("SANDAG") in *Cleveland National Forest Foundation, et al. v. San Diego Association of Governments, et al.* ("Opinion") (Supreme Court Case No. S223603; Petition for Review filed January 6, 2015). This amicus curiae letter is submitted pursuant to California Rules of Court, rule 8.500, subdivision (g).

Review of this case is necessary to settle important questions of law and to secure uniformity of decision. (Cal. Rules of Court, rule 8.500, subd. (b)(1).) The Opinion establishes precedent that is inconsistent with the California Environmental Quality Act (Pub. Resources Code, § 21000, *et seq.*) ("CEQA"), the CEQA Guidelines (Cal. Code Regs., tit, 14, § 15000, *et seq.*), and other published appellate court decisions. Indeed, as the dissenting opinion ("Dissent") pithily notes, the Opinion "weaken[s] and confuse[s] the law." (Dissent, p. 1.)

The Opinion faults SANDAG for failing to use Executive Order No. S–3–05 as the basis for its analysis of greenhouse gas ("GHG") emissions in the environmental impact report ("EIR") prepared for SANDAG's Regional Transportation Plan/Sustainable Communities Strategy ("RTP/SCS"). Under CEQA, however, the lead agency has broad discretion to identify and rely upon appropriate standards, or "thresholds of significance," to determine whether a project's impacts will be significant. Published appellate court decisions and other guidance

documents on this issue uniformly recognize this principle extends to an agency's analysis of GHG emissions. The Opinion entirely strips away such discretion. In this respect, the Opinion is an outlier.

The Opinion's approach is particularly misguided because it imposed on SANDAG (and, by implication, on every other local agency in the State) a significance threshold established by executive order. Executive orders, such as Executive Order No. S–3–05, are not binding on local government agencies. They are not adopted via legislation. They are not adopted by formal rule-making. Neither SANDAG nor any other agency grappling with GHG emissions or transportation policy had an opportunity to weigh in on the complex trade-offs associated with Executive Order No. S–3–05, or to even understand that, at the time Governor Schwarzenegger issued the executive order, it would later be used to dictate to local agencies how GHG analysis must proceed. Thus, in addition to creating unwarranted confusion in CEQA case law, the Opinion elevates the executive order beyond its constitutional bounds and raises serious separation of powers concerns.

I. Interests of Amici Curiae

CALCOG is an association of 41 California Councils of Governments ("COGs"), including all 18 Metropolitan Planning Organizations ("MPOs") in California that are responsible for adopting the Regional Transportation Plans ("RTPs") like the one at issue in the Opinion. In addition, CALCOG represents many transportation authorities and commissions that have programming responsibilities under RTPs, or are otherwise directly affected by RTPs.

The League is an association of 472 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide significance. The Legal Advocacy Committee has concluded that this case has statewide significance.

CSAC is a non-profit corporation. Its membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide, and has determined that this case raises important issues that affect all counties.

MTC is the government agency responsible for regional transportation planning and financing in the San Francisco Bay Area. MTC represents 100 municipalities, eight counties, and one city and county in the greater San Francisco Bay Area. MTC functions as both the regional transportation planning agency — a state designation — and, for federal purposes, as the

region's MPO. As such, among other duties, it is responsible for regularly updating the Regional Transportation Plan.

AEP is a non-profit association of public and private sector professionals with a common interest in improving the standard of practice in CEQA. AEP has over 1,700 members statewide with expertise in environmental sciences, archeology and paleontology, land use planning, transportation, engineering, environmental law, and other disciplines integral to the environmental review process. AEP sponsors professional education opportunities, monitors case law, legislation and regulatory developments, and participates in the legislative and rulemaking processes.

The Opinion has particular significance to CALCOG, the League, CSAC, MTC and AEP because it is the first case to involve a challenge to the adequacy of an EIR prepared for an RTP/SCS. In addition to their interest in this case based on the specific factual scenario, these organizations also have a compelling interest in the Opinion because it has powerful implications beyond regional transportation planning. Importantly, the Opinion imposes new legal obligations on local agencies conducting environmental review not only for long-range plans like RTP/SCSs, but for every project under consideration. Moreover, these organizations, like all cities and counties in California, have a compelling interest in the Opinion because it has broad implications regarding the exercise of discretion over local planning decisions and determinations regarding thresholds of significance under CEQA.

Due to its significance, CALCOG, the League, CSAC, MTC and AEP have been closely monitoring this case since its inception. CALCOG, the League, CSAC and MTC (and others) submitted amicus curiae briefs in the Superior Court or the Court of Appeal. Both the trial court and the Court of Appeal refused to accept the amicus briefs.

If review is granted, CALCOG, the League, CSAC, MTC and AEP intend to request leave to submit an amicus curiae brief in support of SANDAG on the merits.

The authors of this letter have not been compensated for their efforts. This letter has been prepared on a pro bono basis on behalf of these organizations. None of the parties to this case has participated in, or provided funding or other direct or indirect support for, the preparation of this letter.

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II. Grounds Supporting Review

A. The Court Should Grant Review Because the Opinion Imposes New Obligations on Local Agencies that are Not Supported by CEQA, the CEQA Guidelines, or Existing Case Law. The Opinion also Disrupts Local Land-Use Decisionmaking by Intruding on the Discretion of Local Agencies.

1. A Lead Agency Is Not Required to Use Executive Order No. S–3–05 as the Basis for its GHG Emissions and Climate Change Analysis.

The Court of Appeal held that an EIR must use "consistency" with Executive Order S-3-05 as the standard or "threshold of significance" for evaluating the significance of GHG impacts. (Opinion, pp. 12-20.) [1] This holding is not consistent with CEQA, the CEQA Guidelines, or other published appellate court decisions.

CEQA delegates to lead agencies the discretion to establish "significance thresholds" used to assess a project's environmental effects. CEQA Guidelines section 15064.7 states public agencies are "encouraged to develop and publish thresholds." Case law uniformly holds, however, that CEQA does not require the adopting of formal thresholds. (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 896 (2011) [agency has discretion to rely on adopted standards to serve as significance thresholds for a particular project].)

A lead agency may also appropriately use existing environmental standards to determine a project's significant impacts. (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 111.) Even the decision not to adopt a formal threshold and use existing standards is an exercise of discretion. (*Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1068 [formal adoption of project-specific threshold was not required].)

A lead agency's determination of whether to characterize impacts as significant necessarily requires the lead agency to make careful policy judgments. As the CEQA Guidelines explain:

> The determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data. An ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting. For example, an activity which may not be significant in an urban area may be significant in a rural area.

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[1] / Although SANDAG's Petition for Review raises numerous additional grounds upon which review may properly be granted, this letter focuses on this portion of the Opinion because it has particular significance to the amici agencies.

(CEQA Guidelines, § 15064, subd. (b).)

The courts also recognize that differentiating between significant and insignificant impacts necessarily involves agency discretion, and that the exercise of such discretion is entitled to deference. (*Save Cuyama Valley v. County of Santa Barbara*, *supra*, 213 Cal.App.4th at p. 1068; *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 243; *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 375-376; *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 492-493; *National Parks & Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1357.)

In guidance regarding the proper analysis of GHG and climate change impacts in CEQA documents, the Governor's Office of Planning and Research ("OPR") has summarized these principles:

> [N]either the CEQA statute nor the CEQA Guidelines prescribe thresholds of significance or particular methodologies for performing an impact analysis. This is left to lead agency judgment and discretion, based upon factual data and guidance from regulatory agencies and other sources where available and applicable. A threshold of significance is essentially a regulatory standard or set of criteria that represent the level at which a lead agency finds a particular environmental effect of a project to be significant. Compliance with a given threshold means the effect normally will be considered less than significant. Public agencies are encouraged but not required to adopt thresholds of significance for environmental impacts.
>
> (Governor's Office of Planning and Research, Technical Advisory, *CEQA AND CLIMATE CHANGE: Addressing Climate Change through California Environmental Quality Act (CEQA) Review* (June 19, 2008) ("OPR, *CEQA and Climate Change*"), p. 4.)

If anything, these principles apply with even greater force to "significance thresholds" applicable to the lead agency's analysis of GHG emissions and climate change. In recent years, State and local agencies and experts have grappled with determining whether the GHG emissions of a plan or project contribute to the global phenomenon of climate change, and how to integrate that determination into the CEQA analysis for a project. These authorities uniformly recognize that each lead agency retains discretion to adopt appropriate significance thresholds addressing this issue.

Although Executive Order S-3-05 establishes State-wide 2050 goals for reducing GHG emissions, agencies are not required to use those goals to evaluate GHG emissions. In 2008, the Schwarzenegger administration issued guidance regarding this issue; that guidance stated that the

adoption of appropriate significance thresholds was a matter of discretion for the lead agency. The guidance states:

> [T]he global nature of climate change warrants investigation of a statewide threshold of significance for GHG emissions. To this end, OPR has asked [California Air Resources Board ("CARB")] technical staff to recommend a method for setting thresholds which will encourage consistency and uniformity in the CEQA analysis of GHG emissions throughout the state. Until such time as state guidance is available on thresholds of significance for GHG emissions, we recommend the following approach to your CEQA analysis.
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> . . .
>
> Determine Significance
>
> - When assessing a project's GHG emissions, lead agencies must describe the existing environmental conditions or setting, without the project, which normally constitutes the baseline physical conditions for determining whether a project's impacts are significant.
>
> - As with any environmental impact, lead agencies must determine what constitutes a significant impact. In the absence of regulatory standards for GHG emissions or other scientific data to clearly define what constitutes a "significant impact", individual lead agencies may undertake a project-by-project analysis, consistent with available guidance and current CEQA practice.
>
> - The potential effects of a project may be individually limited but cumulatively considerable. Lead agencies should not dismiss a proposed project's direct and/or indirect climate change impacts without careful consideration, supported by substantial evidence. Documentation of available information and analysis should be provided for any project that may significantly contribute new GHG emissions, either individually or cumulatively, directly or indirectly (e.g., transportation impacts).
>
> - Although climate change is ultimately a cumulative impact, not every individual project that emits GHGs must necessarily be found to contribute to a significant cumulative impact on the environment. CEQA authorizes reliance on previously approved plans and mitigation programs that have adequately analyzed and mitigated GHG emissions to a less than significant level as a means to avoid or substantially reduce the cumulative impact of a project.

(OPR, *CEQA and Climate Change*, pp. 4, 6.)

As these guidance documents make clear, OPR has not stated, or even hinted, that local agencies had to use Executive Order S-3-05 as a significance threshold under CEQA. Rather, OPR recognized that, until CARB establishes a state-wide standard, [2] selecting an appropriate threshold was within the discretion of the lead agency. Because CARB has not yet adopted such a threshold, the issue remains a matter of discretion for the lead agency.

In December 2009, the California Resources Agency, under then-Governor Schwarzenegger, adopted amendments to the State CEQA Guidelines. Among other things, the Resources Agency adopted CEQA Guidelines section 15064.4, entitled "Determining the Significance of Impacts from Greenhouse Gas Emissions." The guideline, which took effect in March 2010, states:

> (a) The determination of the significance of greenhouse gas emissions calls for a careful judgment by the lead agency consistent with the provisions in section 15064. A lead agency should make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project. . . .
>
> (b) A lead agency should consider the following factors, among others, when assessing the significance of impacts from greenhouse gas emissions on the environment:
>
> (1) The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting;
>
> (2) Whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project;
>
> (3) The extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions. Such requirements must be adopted by the relevant public agency through a public review process and must reduce or mitigate the project's incremental contribution of greenhouse gas emissions. If there is substantial evidence that the possible effects of a particular project are

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[2] / When CARB establishes official thresholds of significance for GHG impacts, it will go through an extensive public process. In addition to public review, agencies with expertise on the subject will be able to comment on any proposed thresholds. This public process will result in thresholds of significance that are based on science and reflect policy concerns implicated by such thresholds. These protections are absent when the Governor issues an executive order.

> still cumulatively considerable notwithstanding compliance with the adopted regulations or requirements, an EIR must be prepared for the project.

Nothing in CEQA Guideline section 15064.4 states, or implies, that agencies must use the emissions reductions goals in Executive Order S-3-05 as "significance thresholds" for CEQA purposes. Indeed, by requiring that agencies rely on Executive Order S-3-05 as a threshold of significance, the Opinion is not only inconsistent with, but as a practical matter invalidates, section 15064.4. That is inappropriate. (See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 428, fn. 5 ["In interpreting CEQA, we accord the Guidelines great weight except where they are clearly unauthorized or erroneous."].)

The Opinion is also inconsistent with existing published decisions on this point. Existing case law supports the conclusion that Executive Order S-3-05 does not establish mandatory "significance thresholds" under CEQA. Most notably, *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327 involved the environmental review process for a proposal to replace an existing Target store with a newer, bigger one. The threshold used to analyze the project's GHG emissions was whether the project would "[c]onflict with or obstruct the goals or strategies of the California Global Warming Solutions Act of 2006 (AB 32) or its governing regulation." (*Id.* at p. 335; Health & Saf. Code, §§ 38500-38599.) The opponents argued the analysis should have considered other recognized thresholds as well. In rejecting this argument, the Fourth District Court of Appeal stated:

> Effective March 18, 2010, the Guidelines were amended to address greenhouse gas emissions. (Guidelines, § 15064.4.) The amendment confirms that lead agencies retain the discretion to determine the significance of greenhouse gas emissions . . . . Thus, under the new guidelines, lead agencies are allowed to decide what threshold of significance it will apply to a project.
>
> (197 Cal.App.4th at p. 336.)

The Court held that, in light of this guideline, the city had discretion to focus on compliance with AB 32 as its significance threshold, and went on to uphold the city's application of this guideline to the GHG emissions from the new Target store. (*Id.* at pp. 336-337; see also *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 841 [finding adoption of similar threshold proper]; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 937 [agency did not abuse its discretion in concluding GHG and climate change impacts were too speculative to allow for determination whether Wal-Mart store's GHG emissions were significant in light of absence of recognized threshold].)

The Opinion cannot be squared with this case law, with CEQA Guidelines section 15064.4, or with the guidance documents described above. The Opinion's discussion regarding Executive Order S-3-05, and its role in the CEQA analysis, creates confusion on this topic and

imposes obligations on agencies beyond those required under CEQA or the CEQA Guidelines. (See Pub Resources Code, § 21083.1 [courts should not interpret CEQA to impose procedural or substantive requirements beyond those explicitly stated in CEQA or the CEQA Guidelines]; *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal. App. 4th 1134, 1145.) Accordingly, the Court should grant review.

2. Executive Order No. S–3–05 does not impose any legal obligations on local government agencies.

The Opinion suggests that an executive order can establish state-wide policy binding even on local agencies. (Opinion, pp. 12-20.) This premise expands the Governor's authority beyond its constitutional bounds and raises serious separation of powers concerns.

The Governor, as the state's "supreme executive," generally has the authority to issue executive orders regarding the actions of the various subdivisions of the executive branch of government. (Cal. Const. art. V, § 1.) The Governor may also issue executive orders as specifically provided by statute that allows executive discretion over a particular matter. But the Governor has no authority to issue executive orders beyond what is provided in the Constitution or by statute. Moreover, under the separation of powers clause, the Governor cannot issue orders regarding actions of the legislative or judicial branches of government, unless specifically allowed by the Constitution. (Cal. Const. art. III, § 3.)

Article IV, Section 1, vests legislative power in the California Legislature. (Cal. Const. art. IV, § 1.) Executive Order S-3-05 was not legislation. Nor was it adopted under authority delegated to the Governor by the Legislature under any statute. (See *Lukens v. Nye* (1909) 156 Cal. 498, 503; see also Dissent, pp. 2-4, discussing *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.App.4th 989.) Therefore, Executive Order S-3-05 is not binding on local agencies.

To the extent the Opinion turns the executive order into a state regulation of broad-based application, it also runs afoul of the Administrative Procedure Act ("APA") (Gov. Code, § 11340, *et seq.*). Unless expressly or specifically exempted, all state agencies not in the legislative or judicial branches must comply with APA rulemaking requirements when engaged in quasi-legislative activities. (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 125-128.) While the Governor has the power to adopt executive orders applicable to State agencies, that power stops where, as here, the executive order meets the definition of a broadly applicable regulation under the APA. (See Gov. Code, § 11342.600.)

The Opinion's suggestion that executive orders can have the binding effect of legislation has broad implications beyond CEQA. As noted above, unlike legislation or formal rule-making, an executive order may be issued by the Governor at any time and without any public vetting

process. Local agencies may be unable to comply with executive orders that can be issued or changed without notice, and without input from such agencies. The Opinion is silent about these problems.

III. Conclusion

GHG emissions and climate change pose serious, complex problems affecting all Californians. The Opinion may be right that, as a policy matter, agencies should strive to meet the 2050 emission reduction targets established by Executive Order S-3-05. The Court may also be right that, as a matter of policy, CEQA documents should assess whether a proposed project or plan is consistent with these targets.

The problem is that the Court of Appeal does not (or ought not to) make such policy. That is the job of the Legislature, of CARB, and of local agencies. The Court of Appeal deprives local agencies in particular of the discretion to adopt such policy, based on an application of Executive Order S-3-05 that cannot be squared with CEQA Guidelines and guidance adopted and issued by the very same Governor.

The Opinion is inconsistent with CEQA, the CEQA Guidelines, and existing published opinions and creates confusion for local agencies as they grapple with the immensely complicated problem of climate change while also being tasked with performing complex CEQA review for a diverse array of projects. Moreover, by elevating an executive order to essentially binding legislation, the Opinion will have ramifications far beyond CEQA. We respectfully request that the Court grant review of the Opinion.

Very truly yours,

Whitman F. Manley

cc: service list attached

Cleveland National Forest Foundation, et al v.
San Diego Association of Governments, et al.
California Supreme Court Case No. S223603
(CA Court of Appeal, Fourth Appellate District, Div. 1 Case No. D063288)
(San Diego County Superior Court CaseNo. 37-2011-00101593-CU-TT-CTL)
[Consolidated with Case No. 37-2011-00101660-CU-TT-CTL]

PROOF OF SERVICE

I, Angela Powers, am a citizen of the United States, employed in the City and County of Sacramento. My business address is 555 Capitol Mall, Suite 800, Sacramento, California 95814. My email address is apowers@rmmenvirolaw.com. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with Remy Moose Manley, LLP's practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in a U.S. mailbox after the close of each day's business.

On January 29, 2015, I served the following:

LETTER DATED JANUARY 29, 2014 TO CHIEF JUSTICE TANI CANTIL-SAKAUYE AND THE JUSTICES OF THE SUPREME COURT RE: AMICUS CURIAE IN SUPPORT OF PETITION FOR REVIEW

☑ On the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail addressed as follows; or

☐ On the parties in this action by causing a true copy thereof to be delivered via Federal Express to the following person(s) or their representative at the address(es) listed below; or

☐ On the parties in this action by causing a true copy thereof to be delivered by facsimile machine number (916) 443-9017 to the following person(s) or their representative at the address(es) and facsimile number(s) listed below; or

Cleveland National Forest Foundation, et al v.
San Diego Association of Governments, et al.
California Supreme Court Case No. S223603
(CA Court of Appeal, Fourth Appellate District, Div. 1 Case No. D063288)
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PROOF OF SERVICE (continued)

☐ On the parties in this action by causing a true copy thereof to be electronically delivered via the internet to the following person(s) or representative at the address(es) listed below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed on this 29th day of January, 2015, at Sacramento, California.

_____
Angela Powers

Cleveland National Forest Foundation, et al v.
San Diego Association of Governments, et al.
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Cleveland National Forest Foundation, et al v.
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(San Diego County Superior Court CaseNo. 37-2011-00101593-CU-TT-CTL)
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Cleveland National Forest Foundation, et al v.
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