In the Supreme Court of the State of California

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

Plaintiffs and Cross-Appellants,

v.

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

Defendants and Appellants.

Case No. S223603

Fourth Appellate District, Div. Two, Case No. D063288
County Superior Court, Case No. 37-2011-00101593-CU-TT-CTL
Timothy B. Taylor, Judge

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STATEMENT OF THE ISSUE

"Must the environmental impact report for a regional transportation plan include an analysis of the plan's consistency with the greenhouse gas emission reduction goals reflected in Executive Order No. S-3-05 to comply with the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)?"

SHORT ANSWER TO STATEMENT OF THE ISSUE

To preserve our existing environment and reduce the risk of dangerous climate change, science instructs that we must continually and substantially reduce our greenhouse gas emissions through midcentury. The objective of climate stabilization is now firmly embedded in state law and policy, including the State's foundational climate law, the Global Warming Solutions Act of 2006, commonly referred to as AB 32 (Health & Saf. Code, § 38500 et seq.).

Where the proposed update to a 40-year regional transportation plan shows near-term reductions in greenhouse gas emissions, but the reductions are not projected to continue over the longer-term, the lead agency must make a good faith, reasonable effort to analyze and discuss in its Environmental Impact Report whether the proposed project may conflict or interfere with the State's climate stabilization objectives, or explain why it cannot conduct such an analysis. To be clear, in the present case, this requirement arises not from any executive order, but from CEQA's requirement that a public agency exercise its careful judgment in light of the available facts and science and disclose all that it reasonably can about a project's short- and long-term environmental effects, including whether the project may undermine well-established, long-term environmental goals.

INTRODUCTION

Appellants, the San Diego Association of Governments (SANDAG) and its Board, contend this case presents a thicket of thorny questions on such things as the proper standard of review, deference to agency decision making, separation of powers and the effect of executive orders, and interpretation of the CEQA Guidelines as applied to greenhouse-gas related impacts. But this case turns on a simpler and more fundamental question: Whether SANDAG in its Environmental Impact Report for the 2050 Regional Transportation Plan and Sustainable Communities Strategy (2050 Plan) could decline to consider the State's long-term climate stabilization objectives, and the science that underlies those objectives, and still produce a document that serves the basic informational purposes of CEQA. As both the trial court and Court of Appeal held, it could not.

In enacting CEQA, the Legislature determined "that the long-term protection of the environment, consistent with the provision of a decent home and suitable living environment for every Californian, shall be the guiding criterion in public decisions." (Pub. Resources Code, § 21001, subd. (d).)[1] This end is served by requiring an Environmental Impact Report for any project that may have a significant effect on the environment. In the seminal *Laurel Heights* decision, this court described the EIR as the "heart of CEQA" and an "environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392 [internal quotations omitted].) The public agency's charge in preparing an EIR thus is to make a reasonable, good faith effort to disclose all that it reasonably can about the project's significant

[1] All cites are to the Public Resources Code unless otherwise noted.

environmental effects. The agency is required to present the hard questions about the project's potential impacts, and to endeavor to answer those questions in light of available facts and science, and with short- and long-term environmental objectives in mind. When the agency meets its CEQA obligations, the EIR serves the law's purposes by fostering informed public discussion and ensuring governmental accountability. In those circumstances, though a challenger may view the document as imperfect, or the agency's decision as unwise, the EIR and the agency's decision to approve the project are legally sufficient and must stand as an exercise of the lead agency's considerable discretion.

This same deference cannot apply where, as in this case, the agency declines to present or attempt to answer the hard environmental questions. In 2011, SANDAG, the Metropolitan Planning Organization for the 4,200-plus square mile San Diego region, prepared an EIR for its 2050 Plan, a planning and expenditure document that, in SANDAG's words, will serve as the region's transportation system "blueprint" for the next 40 years. As the Attorney General noted in her comments on the EIR, while the 2050 Plan may result in near-term reductions in greenhouse gases, projected per capita and total greenhouse gas emissions begin to *rise* after 2020. In light of climate science and the State's well-established policy to continually and substantially reduce greenhouse gas emissions through midcentury in order to achieve climate stabilization, the relevant question is, what is the environmental significance of the region's post-2020 rising emissions trajectory? Should the public and decision makers be concerned? Can current and future actions bend the curve downward, or are the decisions being made today irreversibly committing the region, and the State, to increasing emissions?

SANDAG's response, then and now, is that neither the Legislature nor the California Resources Agency has specifically directed SANDAG, in

carrying out its duties under CEQA, to consider the State's long-term statewide emissions reduction target—80 percent below 1990 emissions level by 2050—that is set out in Executive Order S-3-05 (2005). In the absence of such a directive, SANDAG argues, it was free to ignore these questions. It is irrelevant, however, that Executive Order No. S-3-05 is not directed at SANDAG. CEQA itself, apart from this executive order, requires SANDAG as the lead agency to exercise its own careful judgment, based to the extent possible on scientific and factual data, to determine whether the greenhouse gas emissions resulting from its regional transportation plan will be significant over the longer term, and to produce a document that allows for public discussion and fully informed decision making.

SANDAG failed to meet its obligation. The 2050 Plan EIR disclosed, without any meaningful analysis or discussion, that greenhouse gas emissions would be higher in 2050 than in 2010, but moved quickly to minimize rather than highlight any concerns that might be raised by the longer-term increase. The EIR asserted, for example, that in the year 2020, the 2050 Plan will not conflict with the Air Resources Board's Scoping Plan—the framework document setting out how the State will meet the 2020 statewide greenhouse gas emissions limit established by the Global Warming Solutions Act of 2006. The EIR failed to note, however, that the 2020 target is not an environmental end in itself, but rather an interim step towards achieving substantial longer-term emissions reductions and climate stabilization. The resulting EIR was not only incomplete—it was misleading. In the words of the Court of Appeal, the EIR made it "falsely appear as if the transportation plan is furthering state climate policy when, in fact, the trajectory of the transportation plan's post-2020 [greenhouse gas] emissions directly contravenes it." (Opinion (Nov. 24, 2014) (Opn.) 19.)

This court need not—and should not—prescribe precisely how SANDAG must account for the environmental objective of long-term climate stabilization in making its significance determination. A lead agency has considerable discretion in this regard. Contrary to SANDAG's assertions, the People do not argue that CEQA requires SANDAG to engage in a strict "consistency" analysis, under which any failure of its regional transportation plan to follow in lockstep the statewide reductions described in the Scoping Plan and Executive Order would render the project's greenhouse gas impacts necessarily significant. SANDAG could comply with CEQA by, for example, discussing whether the 2050 Plan's projected increases in greenhouse gas emissions and vehicle miles traveled over the longer-term may interfere with or make it more difficult to achieve the continual and substantial statewide emissions reductions required to meet the State's longer-term climate objectives. Indeed, that appears to be the approach that SANDAG is taking in the currently circulating draft EIR for the 2050 Plan's required four-year update. Had SANDAG included in the 2011 EIR the discussion of significance for the project's greenhouse gas-related impacts that is contained in its current draft EIR, the People likely would not be before this court on this particular issue. Since SANDAG in its opening brief contends that it is not legally required to provide this information to the public and decision makers, there is still a need for this court to settle the question of SANDAG's obligations under CEQA, which could otherwise evade judicial review due to the relatively short amendment cycle for regional transportation plans.

The court should hold that where a regional transportation plan—a large-scale, long-term infrastructure and land use planning project—may commit a region to substantial greenhouse gas emissions for decades to come, the lead agency in its EIR must disclose not only the project's near-term emissions, but also whether early trends are sustainable over the

project's lifespan. If the project's near-term emissions reductions are not expected to continue, the lead agency should make a reasonable effort to analyze and discuss whether the project may conflict or interfere with the State's long-term climate stabilization objectives, or explain why it cannot, supporting its explanation with substantial evidence. The court should hold that SANDAG abused its discretion in determining that, for the 2050 Plan, it had no legal obligation under CEQA to consider the environmental objective of climate stabilization. It should further affirm the judgment of the Court of Appeal that SANDAG's error was prejudicial, provide that SANDAG must decertify the deficient 2011 EIR, and remand the case for further proceedings and the issuance of a writ consistent with this court's opinion.

STATEMENT OF THE CASE

I. SANDAG'S REGIONAL TRANSPORTATION PLANNING OBLIGATIONS

SANDAG is a Metropolitan Planning Organization, one of 18 regional transportation planning entities across the State. (See Administrative Record (AR) 8a:2065, 218:17688-17689.)[2] The area under SANDAG's jurisdiction encompasses the County of San Diego and the region's 18 cities and covers more than 4,200 square miles. (AR 8a:1998, 2142.) By law, SANDAG is required to prepare a regional transportation plan and to update it every four years. (Pub. Util. Code, §§ 120300, 132050, 132051; Gov. Code, § 65080 et seq.; 23 U.S.C. § 134; see also AR 8a:2065 [EIR].) "The purpose of the [regional transportation plan] is to establish regional goals, identify present and future needs, deficiencies and

[2] See also the website for the Institute for Local Government at <http://www.ca-ilg.org/post/californias-18-metropolitan-planning-organizations> [as of July 6, 2015].

constraints, analyze potential solutions, estimate available funding, and propose investments." (AR 218:17690 [Regional Transportation Plan Guidelines].) The 2050 Plan is a planning and transportation expenditure document that, in SANDAG's words, "is the blueprint for a regional transportation system, serving existing and projected residents and workers within the San Diego region . . . over the next 40 years." (AR 8a:1997 [EIR]; see also *id.* at 1998, 2066; *Edna Valley Assn. v. San Luis Obispo County and Cities APCC* (1977) 67 Cal.App.3d 444, 447-448.)

The Sustainable Communities Strategy Law, SB 375, enacted in September 2008, requires SANDAG and other regional transportation planning entities throughout California to incorporate a "Sustainable Communities Strategy" in each region's regional transportation plan. (Gov. Code, § 65080, subd. (b)(2).) Its purpose is to "align regional transportation, housing, and land use plans to reduce the amount of vehicle miles traveled to attain the regional GHG [greenhouse gas] reduction target[s]" set by the Air Resources Board. (AR 8a:2071 [EIR].)[3]

SANDAG began the process for the required 2011 update to its 2050 Regional Transportation Plan and Sustainable Communities Strategy in 2008, and released the draft 2050 Plan in April 2011. (See Appellants' Opening Brief (AOB) 12-13.)

II. THE CEQA PROCESS FOR THE 2011 UPDATE TO SANDAG'S 2050 PLAN

Because a regional transportation plan is a project undertaken by a public agency that may have significant effects on the environment, CEQA requires the Metropolitan Planning Organization as "lead agency" to prepare an Environmental Impact Report. (*Edna Valley*, *supra*, 67

[3] SB 375 and the targets set for the SANDAG region are discussed in greater detail at p. 20, below.

Cal.App.3d at pp. 448-449.) The purpose of an EIR is to identify for the public (through the EIR process) and agency decision makers (presented with a final EIR, including staff's responses to public comments) the project's "significant" environmental effects, and to determine whether there are feasible alternatives, design changes, or mitigation measures that could reduce or eliminate those effects. (§§ 21002, 21002.1, subd. (a), (b), 21061.) If the identified impacts cannot be reduced to less-than-significant levels, the lead agency may still approve the project, but its decision makers must make specific findings that alternatives and further mitigation are not feasible and that other "overriding" benefits—which may include economic and social benefits—outweigh the project's environmental harm. (§§ 21002.1, subd. (c), 21081.)

SANDAG released its draft EIR for the 2050 Plan in June 2011. (AR 7:227.) The Attorney General on behalf of the People, among a number of other entities, individuals, and organizations, commented on the draft EIR. (AR 8b:3763 [EIR Appendix G, Responses to Comments].) Both the Attorney General and the Governor's Office of Planning and Research expressed concern that while the draft EIR stated that the Plan meets the per capita emissions reduction targets set under SB 375 targets, the Plan's per capita emissions from passenger vehicles appear to rise after 2020, which would appear to run counter to SB 375's purposes. (AR 311:25643 [Attorney General's comment letter]; *id.* at 308:25004-25005 [OPR's comment letter].) The Attorney General's comment letter noted, among other things, that the draft EIR showed that the Plan's near-term greenhouse gas-related benefits did not appear to be sustainable beyond 2020. (AR 311:25641-25642.) The Attorney General advised that under these circumstances, in order to fully inform the public and decision makers of the Plan's greenhouse gas-related impacts, SANDAG must evaluate the project over the longer term in relationship to the "overarching

environmental objective" of climate stabilization, which requires continual and substantial emissions reductions through midcentury. (AR 311:25640-25641.) The Attorney General cited relevant climate science, the objectives of the Global Warming Solutions Act of 2006 and its implementing Scoping Plan, and Executive Order No. S-3-05, which sets science-based declining statewide greenhouse gas emissions reduction targets, including a target of reducing total emissions to 80 percent below 1990 levels by the year 2050. (AR 311:25640-25643; see also AR 319:27049-27050 [Executive Order].)

SANDAG declined to consider the Plan's longer-term emissions as they relate to the objective of climate stabilization, stating that "the Legislature declined to include the Executive Order's aspirational 2050 goal in AB 32[,]" and that the Executive Order is not specifically identified in the CEQA Guidelines [Cal. Code Regs., tit. 14, § 15000 et seq.], and is not directly binding on SANDAG as a regional entity. (AR 8b:4430-4433 [response to Attorney General's comments].)

On October 28, 2011, SANDAG conducted a public hearing on the proposed 2050 Plan and Final EIR. (AR 186:12709-13 [Board of Directors meeting minutes].) On that day, the SANDAG Board of Directors adopted resolutions certifying the Final EIR and approving the 2050 Plan, adopting a statement of overriding considerations, and adopting the 2050 Plan. (AR 186:12713.)[4] The same day, SANDAG also filed a Notice of Determination for the Final EIR and the 2050 Plan. (AR 1:2-3.)

[4] A "statement of overriding considerations" reflects "the ultimate balancing of competing public objectives when the agency decides to approve a project that will cause one or more significant effects on the environment." (CEQA Guidelines, § 15021, subd. (d).)

III. THE ENSUING CEQA LITIGATION AND LOWER COURT DECISIONS

In November 2011, Cleveland National Forest Foundation and Center for Biological Diversity filed a petition for writ of mandate and complaint for injunctive relief alleging numerous violations of CEQA (CNFF case). (JA {2} 14-42.) At the same time, CREED-21 and the Affordable Housing Coalition of San Diego County filed a separate action challenging the EIR. (JA {1} 1-13.) In January 2012, the Sierra Club joined the CNFF case. (JA {25}151-189.)

The Attorney General on behalf of the People moved to intervene in the CNFF case (see Gov. Code, §§ 12600, subd. (b), 12606), and the trial court granted the People's application two days later, on January 25, 2012. (JA {22} 102-137, {29} 198-199.) The cases subsequently were consolidated and briefed. (JA {34} 251; JA {38} 264-274.)

Following oral argument, the trial court issued its ruling (JA {75} 1046-59) and on December 20, 2012, its judgment and peremptory writ of mandate. (JA {88} 1132-34; JA {89} 1135-37.)

The trial court held that "the EIR is impermissibly dismissive" of Executive Order No. S-03-05 given that the order's midcentury greenhouse gas goal is official state policy, is integral to the Air Resources Board's AB 32 Scoping Plan, and was "designed to address an environmental objective that is highly relevant under CEQA (climate stabilization)." (JA {75} 1056-57.) The trial court concluded that the EIR's failure to discuss the increase in total emissions from 2020 through 2050 in light of "the statewide policy of reducing same during the same three decades (2020-2050) constitutes a legally defective failure of the EIR to provide the SANDAG decision makers (and thus the public) with adequate information about the environmental impacts of the [2050 Plan]." (*Id.* at 1057.) The trial court did not reach any other issues presented, such as whether the EIR

adequately disclosed and analyzed the Plan's impacts on public health from particulate matter pollution. (*Id.* at 1058.)

On December 26, 2012, SANDAG timely appealed the trial court's judgment. (JA {92} 1140-1141.) The People, CNFF, and CREED-21 filed cross-appeals on the issues that the trial court did not reach. (JA {95} 1161-1163; JA {96} 1164-1168.)

The Court of Appeal issued its opinion on November 24, 2014, as modified on denial of rehearing on December 16, 2014, concluding that "the EIR failed to comply with CEQA in all identified respects." (Opn. 3.) For purposes of the current appeal, only the court's decision as it relates to the adequacy of the 2050 Plan's disclosure and analysis of greenhouse gas emissions is relevant, and on that issue, the decision was split. The majority held that SANDAG "prejudicially abused its discretion by omitting from the EIR an analysis of the transportation plan's consistency with the state climate policy, reflected in the Executive Order, of continual greenhouse gas emissions reductions." (Opn. 20.) The majority concluded that "[t]he omission was prejudicial because it precluded informed decisionmaking and public participation." (Opn. 15.)

Justice Benke dissented, opining that the majority overstepped its judicial review function by effectively mandating how SANDAG must determine the significance of the 2050 Plan's greenhouse gas emissions. (See, e.g., Dis. Opn. 4, 8.)

SANDAG timely filed a petition for review on January 6, 2015, which this court granted on March 11, 2015 on the single issue set out above.

BACKGROUND: THE SCIENCE, LAW, AND POLICY OF CLIMATE CHANGE

Climate change is caused by emissions of greenhouse gases on the planet's surface from actions such as the burning of fossil fuels. (AR 8a:2553-2554 [EIR], 311:25640 [Attorney General's comment letter].)[5] Greenhouse gases reach the atmosphere, where they accumulate and persist. (*Ibid*.) Higher concentrations of atmospheric greenhouse gases in turn lead to disruptions of our environment and climate, including increases in global average temperatures. (AR 8a:2553-2554.) California already is experiencing the effects of climate change, which include longer fire seasons, longer and more frequent heat waves, rising sea levels, and reductions in the Sierra snowpack, a substantial source of the State's water. (AR 311:25640, 320(5):27870.) The harms resulting from climate change fall especially hard on our most vulnerable residents—"the urban poor, the elderly, children, traditional societies, agricultural workers and rural populations." (AR 311:25640.)

The 2050 Plan EIR, the lower courts' decisions, and the briefs in this case discuss the relationship of a number of greenhouse gas- and climate-related statues, regulations, and policy documents to SANDAG's obligations under CEQA. The People briefly summarize these authorities, and the climate science that underlies them, for the court's convenience.

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[5] The Attorney General's comment letter discusses the causes and effects of climate change and provides citations to authoritative sources. (AR 311:25640-25641.) Since SANDAG does not dispute the mechanism of climate change or its serious, adverse effects, the People in this brief provide only an abbreviated discussion of these topics. For the court's reference, the Intergovernmental Panel on Climate Change's 2007 "Frequently Asked Questions" document, cited in the Attorney General's comment letter, is a concise and authoritative summary, and is available at https://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-faqs.pdf.

A. Executive Order No. S-03-05 (2005)

Responding to California's particular vulnerability to climate change, in 2005, Governor Schwarzenegger issued Executive Order No. S-3-05. The Executive Order sets out an overarching framework to guide California's climate efforts. It provides in relevant part "[t]hat the following greenhouse gas emission reduction targets are hereby established for California: by 2010, reduce GHG emissions to 2000 levels; by 2020, reduce GHG emissions to 1990 levels; [and] by 2050, reduce GHG emissions to 80 percent below 1990 levels . . . ."

As SANDAG acknowledges in its opening brief, the Executive Order's targets are "based on studies estimating that stabilization of atmospheric CO_2[-equivalent] levels at approximately 450 parts per million (ppm) would stabilize [average] global temperature levels at approximately 2 degrees [Celsius] above pre-industrial levels." (AOB 7.) More specifically, they are grounded in work by the Intergovernmental Panel on Climate Change (IPCC), the leading international scientific body for the assessment of climate change, which acts under the auspices of the United Nations. As SANDAG noted in its EIR, the IPCC constructed a number of possible future global greenhouse gas "emission trajectories" to understand what must be done "to stabilize global temperatures and climate change impacts." (AR 8a:2553-2554 [EIR].)[6] The "IPCC concluded that a stabilization of GHGs at 400 to 450 parts per million (ppm) CO_2 [carbon dioxide] equivalent concentration is required to keep global mean warming

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[6] See IPCC 4th Assessment Report (2007), <https://www.ipcc.ch/publications_and_data/ar4/syr/en/mains5-4.html#table-5-1> [July 6, 2015]; see also IPCC 5th Assessment Report (2014) <http://www.ipcc.ch/pdf/assessment-report/ar5/wg3/ipcc_wg3_ar5_summary-for-policymakers.pdf> [as of July 6, 2015] at pp. 12-13.

below 3.6º F (2º Celsius), which is assumed to be necessary to avoid dangerous climate change." (AR 8a:2553-54 [EIR].) Stabilization at these levels would require that global emissions peak sometime in the 2000-2015 period and show a substantial reduction by 2050.[7] Achieving stabilization will require greater reductions in annual emissions from developed countries. (See, e.g., AR 216:17623 [SANDAG's Climate Action Strategy].)[8]

As SANDAG observes in its opening brief, meeting the greenhouse gas emissions targets described in the Executive Order "could avoid more extreme climate change scenarios." (AOB 7.)

B. The Global Warming Solutions Act (AB 32) (2006) and the AB 32 Scoping Plan (2008)

The Legislature followed Executive Order No. S-03-5 with the Global Warming Solutions Act of 2006, commonly known as AB 32. (Health & Saf. Code, § 38500 et seq.) AB 32 mandates that by 2020, California must reduce its total statewide annual greenhouse gas emissions to the level they were in 1990. (*Id.*, §§ 38550, 38551.) The Legislature stated its further intent that "the statewide greenhouse gas emissions limit continue in existence and be used to maintain and continue reductions of greenhouse gases beyond 2020." (*Id.*, § 38551, subd. (b).)[9] The 2020 emissions limit

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[7] See previous footnote.

[8] See, also, e.g., Union of Concerned Scientists, *Avoiding Dangerous Climate Change, A Target for U.S. Emissions Reductions* (2007), available at http://www.usclimatenetwork.org/resource-database/WEB%20emissions-target-fact-sheet.pdf [as of July 6, 2015], recommending that the U.S. reduce emissions by at least 80 percent below 2000 levels by 2050.

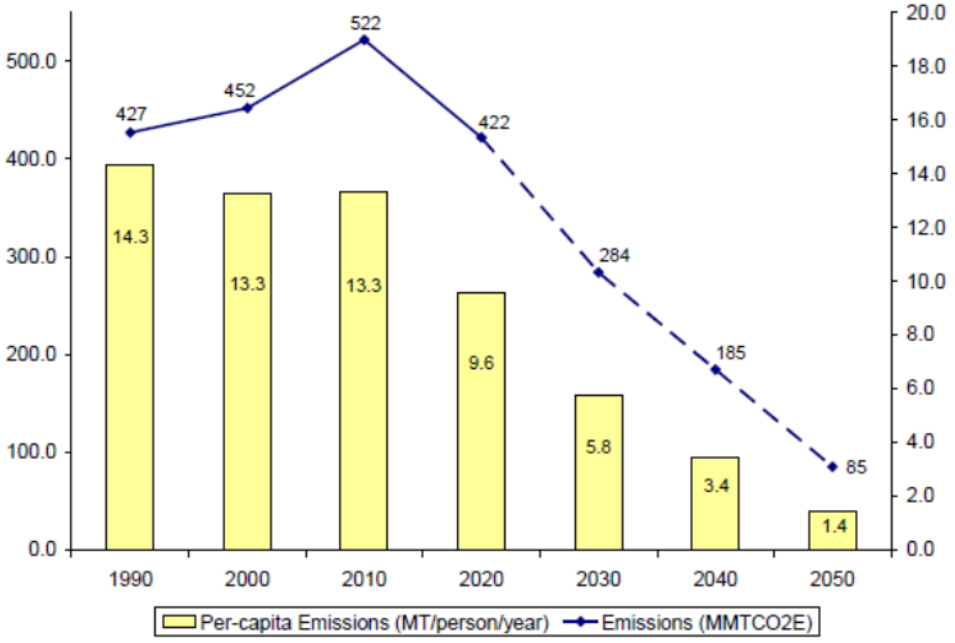
[9] SANDAG asserts that "AB 32 did not ratify the Executive Order[.]" (AOB 42.) While this statement is beside the point, the People (continued…)

is not an end in itself, but "is but a step towards achieving" the "longer-term climate goal" described in Executive Order No. S-3-05. (*Assn. of Irritated Residents v. California Air Resources Bd.* (2012) 206 Cal.App.4th 1487, 1496, citing the Executive Order].)

AB 32 requires the Air Resources Board to develop a framework plan—the Scoping Plan—outlining how California will achieve the required 2020 greenhouse gas limit through such things as direct emission regulations, "market-based compliance mechanisms," incentives, and voluntary actions. (Health & Saf. Code, § 38561.) The Air Resources Board completed the initial AB 32 Scoping Plan in 2008. (AR 320(5):27842.) In the Scoping Plan, the Air Resources Board observed that "[g]etting to the 2020 goal is not the end of the State's effort." (AR 320(5):27848; see also Health & Saf. Code, § 38551, subds. (b), (c).) "The 2020 goal was established to be an aggressive, but achievable, mid-term target, and the 2050 greenhouse gas emissions reduction goal represents the level scientists believe is necessary to reach levels that will stabilize climate." (AR 320(5):27864 [Scoping Plan]; see also 311:25641 [Attorney General's comment letter].) The Attorney General's comment letter on the 2050 Plan draft EIR attached a chart from the Scoping Plan that describes changes in the State's total and per capita emissions over time—California's "emissions trajectory"—necessary to achieve the State's climate stabilization objective:

(…continued)
note that it is also wrong. The Legislature in fact did sanction the science and policy reflected in Executive Order No. S-3-05. (See, e.g., Health & Saf. Code, §§ 38501, subd. (i), 38551.)

Figure 6: Emissions Trajectory Toward 2050



(AR 311:25645.)[10]

In the Scoping Plan, the Air Resources Board noted the important role of better land use and transportation planning, and the need to begin action in the near term. Looking beyond 2020, "it will be necessary to significantly change California's current land use and transportation planning policies. Although these changes will take time, getting started now will help put California on course to cut statewide greenhouse gas emissions by 80 percent in 2050 as called for by Governor Schwarzenegger." (AR 320(5):27858-27859; see also *id.* at 320(5):27879-27880.)

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[10] During this litigation, the Air Resources Board approved the first update to the Scoping Plan on May 22, 2014. (See <http://www.arb.ca.gov/cc/scopingplan/document/updatedscopingplan2013.htm> [as of July 6, 2015].) The updated Scoping Plan contains a similar figure at p. 33.

C. Legislation Directing Amendments to the CEQA Guidelines to Address Greenhouse Gas Emissions (2007) and Resulting Amendments (2010)

From its outset, CEQA has required that "the long-term protection of the environment" must be "the guiding criterion in public decisions." (§ 21001, subd. (d); see Stats. 1970, ch. 1433, p. 2781.) While concerns about human-caused climate change were not yet part of the regular public discourse in 1970, the statute was written to address environmental problems as they might arise. The statute's description of "tipping points" is prescient:

> The capacity of the environment is limited, and it is the intent of the Legislature that the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds being reached.

(§ 21000, subd. (d), added by Stats. 1970, ch. 1433, p. 2780; see also AR 216:17623 [SANDAG's Climate Action Strategy, noting risk of climate change tipping points].)[11]

Public agencies are guided in their compliance by the CEQA Guidelines, contained at California Code of Regulations, title 14, sections 15000 et seq.[12] The CEQA Guidelines "include criteria for public agencies to follow in determining whether or not a proposed project may have a 'significant effect on the environment'"—the triggering condition for an

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[11] For the court's reference, the People have provided the original version of CEQA—a succinct four pages—as enacted in September 1970 (Stats. 1970, ch. 1433, pp. 2780-2783). (People's Motion for Judicial Notice, People's Decl., Ex. 2.)

[12] "In interpreting CEQA, [the courts] accord the Guidelines great weight except where they are clearly unauthorized or erroneous." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 428, fn. 5.)

EIR. (§ 21083, subd. (b).) As greenhouse gases and climate change began to be discussed more routinely in CEQA comment letters and CEQA documents, there was a perceived need for the CEQA Guidelines to offer guidance that was more specific to this issue. In August 2007, with the passage of Senate Bill 97, the Legislature added section 21083.05, which directed the Governor's Office of Planning and Research to prepare and the Resources Agency to adopt "guidelines for the mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions as required by this division, including, but not limited to, effects associated with transportation or energy consumption . . . ." (Stats. 2007, ch. 185, § 1 [SB 97].)

Amendments to the CEQA Guidelines became effective in March 2010.[13] Included in the amendments is new section 15064.4, entitled "Determining the Significance of Impacts from Greenhouse Gas Emissions." The provision includes a non-exclusive list of three "factors" that a lead agency should consider: whether the project increases emissions over existing conditions; whether the project's emissions exceed a "threshold of significance" the lead agency determines should apply to the project; and the extent to which the project complies with requirements in a plan to reduce greenhouse gas emissions. (CEQA Guidelines, § 15064.4, subd. (b)(1).)[14] It further instructs that "[t]he determination of the significance of greenhouse gas emissions calls for a careful judgment by the lead agency consistent with the provisions in section 15064[,]" the pre-existing and generally applicable provision outlining a lead agency's obligations in determining significance. (CEQA Guidelines, § 15064.4,

[13] Section 21083.05 was amended in 2012 to reflect that the guidelines had been issued. (Stats. 2012, ch. 548, § 5 [AB 2669].)

[14] The concept of "thresholds" is discussed at p. 42, below. (See also CEQA Guidelines, § 15064.7.)

subd. (a).) The SB 97 amendments "add[ed] no additional substantive requirements; rather, the Guidelines merely assist lead agencies in complying with CEQA's existing requirements." (AR 319:25828 [Final Statement of Reasons (FSOR)].) The provision incorporates by reference the general provision addressing significance determinations and reiterates the obligation of the agency to consider "scientific and factual data" and to make a "good-faith effort." (§§ 15064.4, subd. (a), 15064, subd. (b).)

D. SANDAG's Climate Action Strategy (2010)

In March 2010, SANDAG issued its own "Climate Action Strategy" to serve as a "guide to help policymakers address climate change as they make decisions to meet the needs of our growing population, maintain and enhance our quality of life, and promote economic stability." (AR 216:17618.) The document sets out "theoretical emissions reduction[ ]" targets for total regional greenhouse emissions through 2050 on a declining trajectory. (*Id.* at p. 17628 [Figure 3-1].) In its Climate Action Strategy, SANDAG observed that the Executive Order's 2050 reduction goal is based on climate science and "is used as the long-term driver for state climate change policy development." (*Id.* at p. 17627.) Meeting "the long-term goal of reducing statewide greenhouse gas emissions to 80 percent below the 1990 level by the year 2050 will require fundamental changes in policy, technology, and behavior." (*Id.* at p. 17628.) The Strategy states that "[b]y 2030, the region must have met and gone below the 1990 level and be well on its way to doing its share for achieving the 2050 greenhouse gas reduction level." (*Id.* at p. 17629.)

SANDAG's Climate Action Strategy notes that on-road transportation is the single largest source of greenhouse gas emissions in the region. (AR 216:17641.) Thus, "reductions in total miles vehicles travel are needed to help achieve the goals of AB 32." (*Id.* at p. 17644.) Further, "[t]he

Scoping Plan and other studies in a growing body of evidence strongly suggest that the trend of vehicle miles traveled growth needs to be slowed, stopped, and soon reversed in order to successfully lower greenhouse gas emissions from the on[-]road transportation sector." (*Ibid.*)

E. The Sustainable Communities Strategies Law (2008) and SANDAG's Regional Targets (2010)

As noted above, the Sustainable Communities Strategy Law, SB 375, enacted in September 2008, requires SANDAG and other regional transportation planning entities to incorporate a Sustainable Communities Strategy in each regional transportation plan. The Sustainable Communities Strategy must demonstrate how the region would achieve greenhouse emissions reductions targets established by the Air Resources Board for emissions from passenger vehicles (cars and light-duty trucks). (Gov. Code, § 65080, subd. (b)(2); AR 8a:2080 [EIR]; see also AR 218:17776 [2010 California Regional Transportation Plan Guidelines].) In September 2010, the Air Resources Board established declining SB 375 greenhouse gas emissions targets for the SANDAG region, which require a 7 percent per capita emissions reduction by 2020, and a 13 percent per capita reduction by 2035, measured against emissions in 2005. (AR 8a:2076.) The Strategy's purpose is to align regional transportation, housing, and land use plans to reduce vehicle miles traveled and thereby meet regional SB 375 targets. (AR 8a:2071 [EIR]; AR 218:17776 [2010 Regional Transportation Plan Guidelines].) While a regional planning entity such as SANDAG cannot require that cities and counties amend their general plans, it can create incentives for change, by, for example, "[p]rovid[ing] funds and technical assistance to local agencies" to implement regional planning. (AR 218:17912 [2010 Regional Transportation Plan Guidelines].)

STANDARD OF REVIEW

This "[C]ourt's review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus cases, is the same as the trial court's: the appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427.) Courts review an agency's action under CEQA for a prejudicial abuse of discretion. (Pub. Resources Code, § 21168.5; *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1109.) An agency abuses its discretion if it either commits legal error or fails to support its fact-based determinations with substantial evidence in the record. (*Berkeley Hillside*, *supra*, 60 Cal.4th at p. 1109-1110; *Vineyard*, *supra*, 40 Cal.4th at p. 427.)

As this court noted in *Vineyard*, "a reviewing court must adjust its scrutiny to the nature of the alleged defect," depending on whether the claimed error falls "predominately" into the factual or legal category. (*Vineyard*, *supra*, 40 Cal.4th at p. 435.) A court independently determines "whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements[.]'" (*Id.*, quoting *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564.) Similarly, where an agency's determination is not based on disputed facts, but rather on a disputed question of law, review is de novo. (*City of Marina v. Bd. of Trustees of the California State University* (2006) 39 Cal.4th 341, 355-356 [rejecting agency's determination that it lacked power to mitigate off-site impacts "based on [agency's] erroneous legal assumptions"].) In contrast, a court "accord[s] greater deference to the agency's substantive factual conclusions." (*Vineyard*, *supra*, 40 Cal.4th at p. 435.) An agency's factual findings will be upheld where they are supported by substantial evidence, "even though other conclusions might be

reached." (*Laurel Heights*, *supra*, 47 Cal.3d at p. 422.) "Substantial evidence . . . include[s] facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (CEQA Guidelines, § 15384, subd. (b).) It does not, however, include "[a]rgument, speculation, unsubstantiated opinion or narrative, [or] evidence which is clearly erroneous or inaccurate . . . ." (*Id.*, subd. (a).)

In this case, SANDAG's stated reason for refusing to disclose and analyze whether the 2050 Plan's projected longer-term emissions are in line or instead may interfere with climate stabilization is the asserted lack of a legal mandate. (AR 8b:3766-3770 [Master Response #2], 4430-4433 [response to Attorney General's comments].) Because SANDAG's justification is predominantly legal, it is reviewed de novo. But even if SANDAG's justification is considered to be in part factual—because of the EIR's summary assertion that "SANDAG's role in achieving th[e] [2050] target is uncertain and likely small" (see AR 8b:3769)—it must fail as unsupported by the law or by any substantial evidence in the record.

ARGUMENT

I. SUMMARY OF ARGUMENT

As a lead agency under CEQA, SANDAG has a duty to discuss whether the failure of its large-scale, long-term infrastructure and planning project to continue early reductions in greenhouse gas emissions over the longer term would conflict or interfere with the State's climate stabilization objectives. The duty does not arise from Executive Order No. S-3-05, but from CEQA itself. CEQA obliges SANDAG to prepare an EIR that puts a project's significant environmental problems squarely before the public and decision makers, thereby allowing for informed public discussion and governmental accountability. Under CEQA, SANDAG has a duty to consider whether the 2050 Plan may disadvantage long-term environmental

goals. And, of particular import in considering climate change, it must consider the relevant science and data, exercising its own judgment and discretion, and making a good faith effort to disclose all that it reasonably can about the 2050 Plan's impact in the short and long term. SANDAG's flat refusal to consider climate stabilization policy and science resulted in a document that was not only incomplete, but prejudicially misleading.

In response, SANDAG appeals first to the substantial discretion afforded to lead agencies under CEQA. Courts do defer to agencies whose EIRs highlight difficult environmental issues presented by a project and endeavor to confront and address those issues. Deference is not appropriate, however, where an agency instead minimizes an issue and effectively disclaims its responsibility to engage. SANDAG also argues that it "scrupulously" complied with CEQA Guidelines section 15064.4, which provides guidance on determining the significance of a project's greenhouse gas emissions. But that provision is not a rote check list ensuring compliance. It sets out three *non-exclusive* factors that agencies should consider in evaluating the significance of a project's greenhouse gas emissions, and incorporates the general proposition that there is no single, "ironclad" definition of significance. Accordingly, an agency must always exercise its judgment and consider other factors where required to meet CEQA's purposes. Where the very authorities on which SANDAG relies—including the Sustainable Communities Strategy Law and its declining targets, and the AB 32 Scoping Plan—are intended to create an emissions reduction path that continues beyond the year 2020, the Plan's upswing in emissions at the 2020 mark required additional discussion and analysis. SANDAG further suggests that a reader could have constructed an analysis of the 2050 Plan's relationship to climate stabilization by engaging in some arithmetic and pulling together scattered references to the Executive Order. An examination of the record citations provided by SANDAG shows the

futility of any such effort, and, in any event, it is SANDAG's job to disclose and explain—not the public's job to divine—the project's significant impacts.

SANDAG's counsel's statements about the purported difficulty of considering climate stabilization science and policy are irrelevant, as SANDAG's contemporaneous justification for omitting this analysis was a legal one. Moreover, the currently circulating draft EIR for the 2050 Plan's 2015 update establishes that SANDAG can in fact take climate stabilization into account in determining whether its long-term regional transportation plan will have significant impacts. Any question whether the pending process for the current update of the 2050 Plan will satisfy CEQA is outside the scope of this appeal. But, as discussed below, the current approach appears to have triggered a more robust exploration in the EIR of greenhouse gas-related mitigation and alternatives, which undoubtedly will be discussed and debated in the ensuing public process, and will better ensure governmental accountability for SANDAG's ultimate decision.

This court should make clear that SANDAG erred as a matter of law in determining that, for this large-scale, long-term transportation infrastructure and land use planning project, it had no legal obligation under CEQA to consider the science and state policy of long-term climate stabilization. It should further affirm the judgment of the Court of Appeal that SANDAG's error was prejudicial, provide that SANDAG must decertify its deficient 2011 EIR, and remand the case for further proceedings consistent with this court's opinion.

II. SUMMARY OF THE 2050 PLAN EIR

A. Project Description

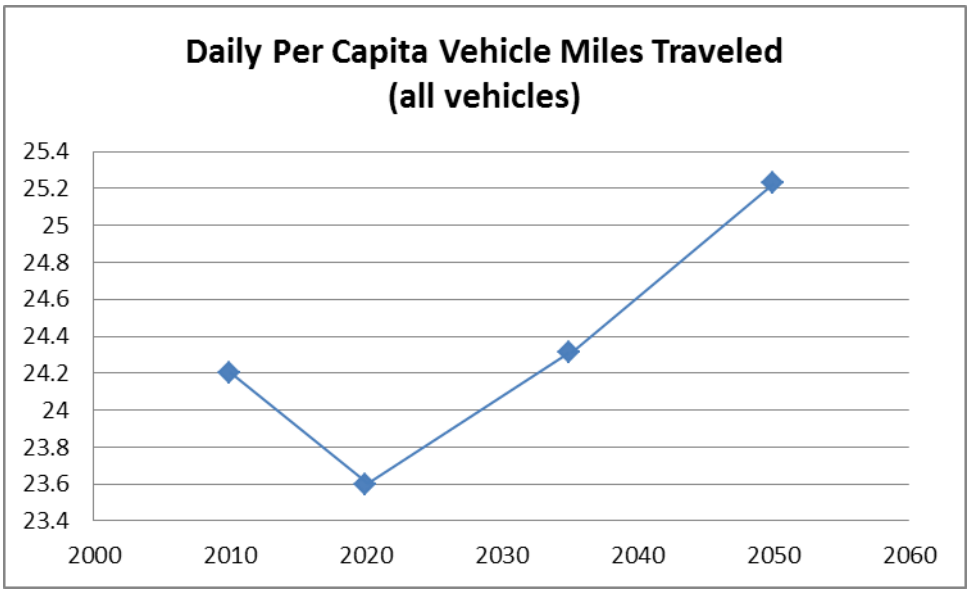
SANDAG's 2050 Plan, while it includes transit projects, places a significant emphasis on highway widening through 2020. (See, e.g., AR 8a:2583 [EIR].) Additional highway widening projects are scheduled to be in place by 2035. (AR 8a:2586 [EIR].) The 2050 Plan contemplates the construction of projects that will expand or extend hundreds of miles of freeways in the San Diego region. (See, e.g., AR 8a:2116-21 [EIR]; see also AR 190b:14214, 14217 [RTP].)

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

B. Disclosure and Analysis of the 2050 Plan's Greenhouse Gas Emissions

In the San Diego region, transportation is responsible for nearly 50 percent of greenhouse gas emissions. (See AR 8a:2556-57 [Tables 4.8-4 (land use emissions) and 4.8-5 (transportation emissions)].) The total amount of driving expected under the 2050 Plan, termed "vehicle miles traveled" or VMT, will increase by more than 50 percent over the life of the

Plan. (AR 8b:4436 [EIR].) The expected increase in driving is not due solely to increases in population in the San Diego area; under the 2050 Plan, people will drive more on a per capita basis in 2050 than they did in 2010. (AR 8b:4435 [Table 3].) In 2010, daily per capita vehicle miles traveled for all vehicle types was 24.2 miles per day. By 2020, the average under the Plan is projected to dip down to 23.6 miles per day, but by 2035, it is above the 2010 average at 24.3 miles, and by 2050, it has risen to 25.2 miles. (AR 8b:4435 [Table 3]; see also 8b:3753, 3755, 3757.)[15] While this is *not* illustrated in the EIR, the People have plotted the trend below:

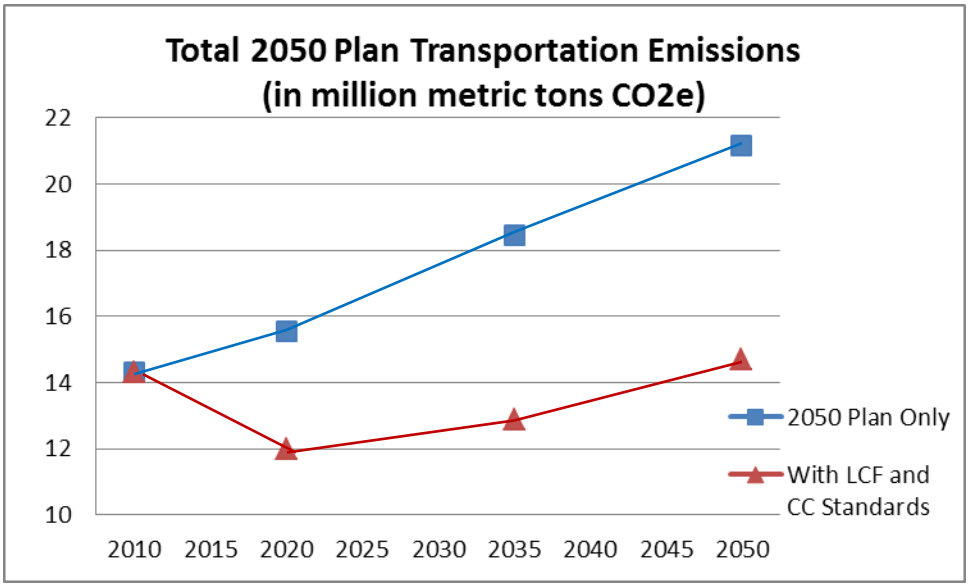


The 2050 Plan's near-term reductions in per capita vehicle miles traveled thus do not appear to be sustainable in the longer term.

Greenhouse gas emissions under the 2050 Plan reflect these driving patterns. There is a steady climb in transportation-related greenhouse gas

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

emissions over the life of the project.[16] After taking into account the effect of state laws requiring reductions in the carbon content of fuel and increased fuel efficiency—the Low Carbon Fuel and "Clean Car" standards—the region's transportation emissions dip a bit below existing levels by 2020, but begin to climb thereafter, exceeding their 2010 starting point by 2050.[17] While these greenhouse gas emissions data are *not* graphed in the EIR, the People illustrate them below so that the upward trend in emissions over the longer term can be seen clearly.[18]



C. Significance Determination

In the 2011 EIR for the 2050 Plan, SANDAG employs three separate "significance criteria" and, under each, makes a determination of significance for discrete future years. (AR 8a:2567 [listing the criteria].)

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[16] AR 8a:2557, 2572, 2575, 2577 [Tables 4.8-5, 4.8-8, 4.8-10, 4.8-12].

[17] *Ibid.*

[18] In million metric tons carbon dioxide equivalent.

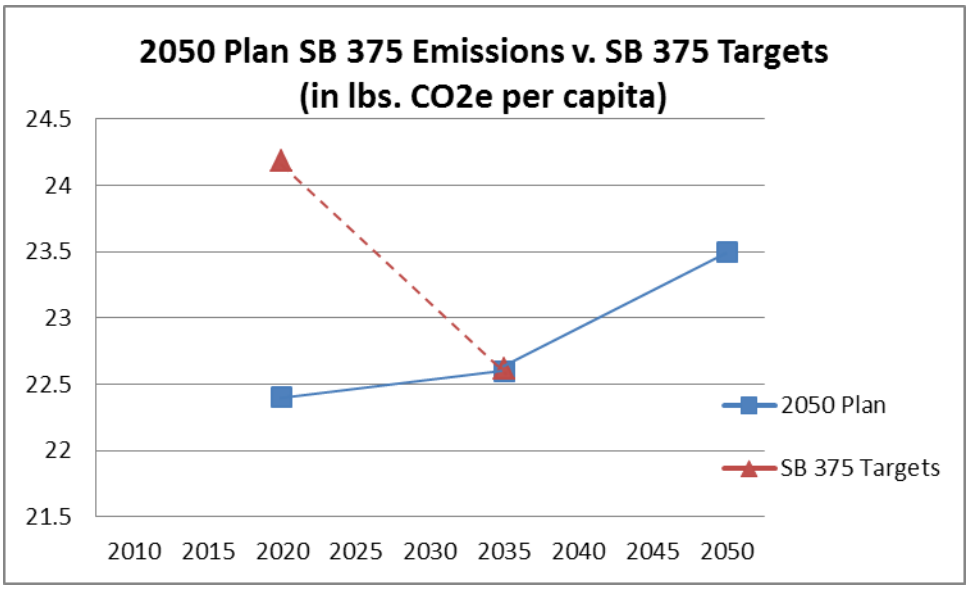
Before discussing these criteria, the People briefly summarize the role of the significance determination in CEQA, for the court's convenience.

The lead agency's determination of whether a proposed project's effects on the environment are significant—viewed in isolation or in light of other past, present, and future projects—plays a "critical role in the CEQA process." (CEQA Guidelines, § 15064, subd. (a); see also § 15064, subd. (h)(1) [discussing significance determination for cumulative effects].) The determination controls the nature of the environmental document, if any, that the agency must prepare. If the project is subject to CEQA and may have a significant effect on the environment, an Environmental Impact Report instead of a more summary Negative Declaration is required. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83-85; § 21151.) The EIR in turn must identify and focus on the project's significant environmental effects. (See, e.g., *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 184-185; § 21061.) "If the EIR identifies significant effects on the environment the lead agency may not approve the project unless it finds that changes have been made in the project to avoid these effects, or, if the mitigation measures or alternatives identified in the EIR are not feasible, there are overriding benefits that outweigh the impact on the environment." (*Id.* at p. 185, citing § 21081.)

SANDAG employs three separate "significance criteria" and, under each, makes a determination of significance for discrete future years. (AR 8a:2567 [listing the criteria].) The EIR first considers whether the Plan's total emissions would increase over 2010 levels. The EIR summarily states that the Plan's impact will be less than significant in the year 2020 because (with the help of the Low Carbon Fuel and Clean Car regulations) annual emissions are below 2010 levels in that year. (AR 8a:2571-2572.) Without placing these emissions into any meaningful context, the EIR summarily

concludes that the impacts are "significant and unavoidable" in 2035 and 2050 because gross annual emissions will be above 2010 levels in these discrete years. (AR 8a:2027; see AR 8a:2567-2578, 3092, 3095-3096.)

SANDAG's other significance analyses suggest to the reader that, even with the rising trend in total emissions, the region will be doing its part to address climate change. The EIR states that the 2050 Plan's impacts will be less than significant in 2020 and 2035 because the Plan will meet the SB 375 targets. (AR 8a:2030, 2578-2581, 3092, 3094-3095.) The EIR does not highlight that, while the Plan complies with the letter of SB 375 by meeting or exceeding the discrete targets for 2020 and 2035, per capita emissions from SB 375 vehicles (cars and light-duty trucks) begin to *rise* after 2020. (AR 8b:4435 [response to Attorney General's comments, table 2].) Again, while this data is not plotted in the EIR, the People present it in graphic form so that the trend is clear:



Nor does the EIR disclose that the California Air Resources Board staff found the increase in per capita emissions to be "unexpected" given the "expectation that the benefits of an SCS [Sustainable Communities Strategy] would increase with time given the nature of land use patterns and

transportation systems." (SANDAG's Supplement to the Administrative Record (AR Supp.) 344:30143.) Staff observed that the Air Resources Board "set regional targets with that expectation." (*Ibid.*) The EIR contains no analysis or determination of significance for any year beyond 2035 under this criterion, on the ground that SB 375 has no post-2035 targets. (AR 8a:2581, 3096.)

Finally, the EIR purports to examine whether the 2050 Plan's greenhouse gas impacts are significant in light of the potential for the Plan to conflict with the AB 32 Scoping Plan (examined for year 2020 only) and SANDAG's own Climate Action Strategy. (AR 8a:2030; 2581-2588.) In analyzing the potential for the 2050 Plan to conflict with the Scoping Plan, the EIR concludes that the 2050 Plan's land use and transportation greenhouse gas emissions are less than significant in 2020. The EIR supports this assertion by stating summarily that the 2050 Plan "encourages its jurisdictions to align with the Scoping Plan" and that, taking into account the effect of the Low Carbon Fuel and Clean Car regulations, transportation emissions will more than 15 percent below 2005 levels in 2020. (AR 8a:2583, 2583-84; see 320(5):27887.) The EIR states that SANDAG has no obligation to look beyond 2020 in applying this criterion because "[t]he Scoping Plan does not have targets established beyond 2020[.]" (AR 8a:2586.)

Similarly, in analyzing compliance with SANDAG's own Climate Action Strategy, the EIR summarily asserts that the 2050 Plan "would not impede" the Strategy because the 2050 Plan "encourage[es] compact development" and "promotes reduced VMT[.]" (AR 8a:2585-86, 2588.) The EIR does not acknowledge that SANDAG's own Climate Action Strategy observes that "[b]y 2030, the region must have met and gone below the 1990 level and be well on its way to doing its share for achieving the 2050 greenhouse gas reduction level." (AR 216:17629.)

D. Response to Comments Requesting Consideration of Climate Stabilization

The Attorney General, on behalf of the People, and other commenters requested that SANDAG, in discussing and determining significance, take into account the long-term, downward emissions trajectory necessary to achieve climate stabilization, as set out in the Executive Order and the Scoping Plan, which appeared to be inconsistent with the 2050 Plan's emissions trajectory over the longer term. (See, e.g., AR 311:25640-25642 [Attorney General's comment letter].) SANDAG did not find that such an analysis was infeasible or would be misleading under the circumstances. In responding to the Attorney General's comments, SANDAG acknowledged that "the Executive Order target for 2050 can inform CEQA analysis . . . ." (AR 8b:4432.) SANDAG, however, "chose not to" include any such analysis, emphasizing its discretion to select "thresholds of significance" and stating that the Executive Order was "not an adopted GHG [greenhouse gas] reduction plan within the meaning of CEQA Guidelines[.]" (*Ibid*.) It further opined that "SANDAG plays no formal role in implementing the Executive Order, as an executive order has no binding legal effect on agencies and personnel outside of the Governor's chain of command." (AR 8b:4433; see also 8b:3768-3770, 8a:2581-2582.) SANDAG also asserted—in a single sentence and without supporting evidence—that "SANDAG's role in achieving" the 2050 "target is uncertain and likely small." (AR 8b:3769.)

III. CEQA REQUIRES SANDAG TO CONSIDER THE SCIENCE AND POLICY OF CLIMATE STABILIZATION IN DETERMINING THE SIGNIFICANCE OF THE 2050 PLAN'S GREENHOUSE GAS EMISSIONS

The purposes of the Environmental Impact Report—the "heart of CEQA"—and the responsibilities that the EIR's preparation place on a lead agency bear repeating. "Its purpose is to inform the public and its

responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR 'protects not only the environment but also informed self-government.'" (*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 [italics in *Goleta*], quoting *Laurel Heights, supra*, 47 Cal.3d at p. 392.) "Because the EIR must be certified or rejected by public officials, it is a document of accountability." (*Laurel Heights*, *supra*, 47 Cal.3d at p. 392.)

SANDAG justifies limiting the information it provided to the public and decision makers about the 2050 Plan's longer-term greenhouse gas-related impacts on the ground that Executive Order No. S-3-05 is not directly binding on SANDAG as a regional entity and does not purport to require any action by SANDAG. (See AOB 4, 7, 23, 38-42.) That argument is beside the point. The People have never contended that this particular executive order by its own force imposes any obligation on SANDAG. Rather, fundamental CEQA requirements—to consider long-term environmental objectives, and to account for the science relevant to those objectives—combine to require SANDAG to make a good faith effort to disclose and analyze the 2050 Plan's long-term emissions in light of the objective of climate stabilization.[19]

[19] In theory, SANDAG could meet these requirements without specifically citing the Executive Order—provided it addresses the underlying science and state climate policy, as required by CEQA.

From the outset, the Legislature has made clear that CEQA requires lead agencies to look at the long-term impacts of the projects they approve or undertake directly. The concern for the longer term is seen in the statements of the Legislature's intent, which include the finding that "[t]he maintenance of a quality environment for the people of this state now *and in the future* is a matter of statewide concern." (§ 21000, subd. (a) [italics added].) Further, the Legislature declared through CEQA that it is "the policy of the state to[,]" among other things:

> Develop and maintain a high-quality environment now *and in the future* . . . .;
>
> [P]reserve for *future generations* representations of all plant and animal communities . . . .; and
>
> Ensure that *the long-term protection of the environment*, consistent with the provision of a decent home and suitable living environment for every Californian, shall be the *guiding criterion* in public decisions.

(§ 21001, subds. (a), (c), (d) [italics added].)

These concepts are reflected in the CEQA Guidelines, which provide that a lead agency may not focus only on the short term, but must also consider a project's long-term environmental impacts, and whether the project will work "to the disadvantage of long-term environmental goals" (CEQA Guidelines, § 15065, subd. (a)(2); see also *id.* at § 15126.2, subds. (a), (c).) And there is no suggestion that an agency can elect to truncate its analysis before the end of a project's acknowledged lifespan. (See, e.g., CEQA Guidelines, §§ 15003, subd. (h) [lead agency "must consider the whole of an action"]; 15216 ["[a]ll phases of a project must be considered"].) Further, as the CEQA Guidelines provide, in general, and in the specific context of climate change, "[t]he determination of whether a project may have a significant effect on the environment calls for careful

judgment on the part of the public agency involved, based to the extent possible on *scientific and factual data*." (CEQA Guidelines, §§ 15064, subd. (b) [italics added]; 15064.4, subd. (a) [stating that determination of significance of greenhouse gas-related impacts is made consistent with the provisions of section 15064].) These obligations are, of course, governed by CEQA's rule of reason—that lead agencies must make a reasonable, good-faith effort at full disclosure in their EIRs. (See, e.g., CEQA Guidelines, § 15003, subd. (i) [content of EIR]; see also *id.* at §§ 15151 [standards for adequacy of EIR], 15144 [forecasting], 15204 [adequacy of EIR determined by what is "reasonably feasible"].)

SANDAG thus must make a reasonable, good faith effort to consider the need to continually and substantially reduce emissions though midcentury not merely because certain targets are set out in Executive Order No. S-3-05, but because a declining emissions trajectory is scientifically relevant to achieving the objective of long-term climate stabilization. Moreover, the objective of reducing emissions to achieve climate stabilization is now firmly embedded in state law and policy, including AB 32, the AB 32 Scoping Plan, and SB 375. (See discussion at pp. 14-20, above.) As SANDAG noted in its Climate Action Strategy, the 2050 target of 80 percent below 1990 levels "is used as the long-term driver for state climate change policy development." (AR 216:17627.)

The public and decision makers were thus entitled to know whether the 2050 Plan, by making long-term planning decisions and authorizing the funding and construction of durable transportation infrastructure will lock the region into increased vehicle miles traveled and greenhouse gas emissions. They were entitled to this information before any decision was made, as such increases could cancel out improvements in vehicle and fuel efficiency and other statewide efforts, and make it difficult or impossible to bend the region's and the State's emissions curve downward over the

longer term. (See AR 216:17642 [SANDAG's Climate Action Strategy, noting that "continued growth in the rate of driving would likely cancel out" fuel and vehicle improvements]; see also CEQA Guidelines, § 15126.2, subd. (d) [EIR should address significant irreversible environmental changes, "such as highway improvement which provides access to a previously inaccessible area" and would "generally commit future generations to similar uses"].) SANDAG's failure to provide this information was error.

IV. THE 2050 PLAN EIR'S FAILURE TO CONSIDER CLIMATE SCIENCE AND POLICY WAS PREJUDICIAL

CEQA does not require perfection. "Insubstantial or merely technical omissions [from an EIR] are not grounds for relief." (*Neighbors for Smart Rail v. Exposition Metro Line Construction* (2013) 57 Cal.4th 439, 463.) On the other hand, a lead agency commits a prejudicial abuse of discretion where, among other things, it "'fail[s] to include relevant information [that] precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.'" (*Ibid.* [brackets added], quoting *Kings County Farm Bur. v. City of Hanford* (1990) 221 Cal.App.3d 692, 712.) Where an EIR fails to "contain sufficient detail to help ensure the integrity of the process of decisionmaking" its fails in its central purpose—to "preclud[e] stubborn problems or serious criticism from being swept under the rug." (*Kings County Farm Bur., supra*, 221 Cal.App.3d at p. 733, citing *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935; see also CEQA Guidelines, § 15151.)

Here, the EIR's failure to analyze the longer-term effects of the land use and transportation decisions made in the initial decades of the 2050 Plan on the ability to achieve the State's climate stabilization objectives was not a mere technical omission. As noted, the EIR emphasized the

Plan's technical compliance with SB 375's discrete 2020 and 2035 greenhouse gas emission targets (AR 8a:2579, 2581)—without considering the upward incline of the region's emissions between those years. Further, it asserted that the Plan will "not impede" and will "assist" and "align with" the Scoping Plan (AR 8a:2582-2585) and SANDAG's Climate Action Strategy (AR 8a:2585-2588)—even though both documents acknowledge that nearer-term targets are interim steps towards achieving a midcentury stabilization goal. (See AR 320(5):27977 [Scoping Plan], 216:17628-17629 [Climate Action Strategy]; see also *Assn. of Irritated Residents*, *supra*, 206 Cal.App.4th at p. 1496.) As the Court of Appeal observed, the net effect of the EIR's approach to determining the significance of the 2050 Plan's greenhouse gas emissions was affirmatively misleading, obscuring the full impact of the Plan's effect on climate change, and undermining SANDAG's accountability for the decision ultimately made. (Opn. 19.) A document that "mislead[s] the public as to the reality of the impacts and subvert[s] full consideration of the actual environmental impacts" is "at direct odds with CEQA's intent." (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 322 [internal quotation omitted].)

SANDAG asserts that had the 2011 EIR included an analysis of the Executive Order and the science and policy that underlie it, this "would not have altered the conclusion that impacts would be significant and unavoidable in 2035 and 2050" under the gross emissions significance criterion. (AOB 2.) This is also beside the point. The agency's obligation is not simply to make determinations, but to show its "analytic route," which allows for full public discussion and "informed decision making." (*Vineyard*, *supra*, 40 Cal.4th at p. 445, internal quotations omitted; see also *Berkeley Keep Jets Over the Bay v. Bd. of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1371 [holding that agency may not avoid "explor[ing]

the significant environmental effects created by the project" by labeling the effects significant and unavoidable].)

The practical effect of including in the significance analysis some discussion of whether SANDAG's Regional Transportation Plan is generally consistent, or instead may interfere, with the State's long-term climate stabilization objectives can be seen in the currently circulating draft EIR for the next update to the 2050 Plan. SANDAG has now chosen to approach the question of long-term climate significance by plotting the 2050 Plan's emissions over the project's full lifespan and comparing that emission trajectory to the statewide objectives, while correctly noting that "there is no requirement that the SANDAG region's emissions be reduced by the same percentage ('equal share') as the statewide percentage in order for the State to achieve the AB 32 target[.]" (See People's Motion for Judicial Notice, People's Decl., Ex. 1, p. 34.) This approach places squarely before the public and decision makers the greenhouse gas-related impacts of the 2050 Plan viewed over the longer term. It may trigger substantial discussion about the efficacy of SANDAG's proposed project design features and mitigation measures—many of which are new to this draft EIR—and whether other alternatives might meet the project objectives with fewer impacts. While the question whether SANDAG's current process will satisfy CEQA is outside the scope of this appeal, the new approach to determining the significance of the 2050 Plan's long-term greenhouse gas emissions would appear to foster accountability as CEQA intends and requires. The same cannot be said of the deficient 2011 EIR.

V. SANDAG'S ADDITIONAL ARGUMENTS DO NOT EXCUSE THE 2050 PLAN EIR'S SUBSTANTIAL DEFICIENCIES

A. Deference to Agency Discretion Does Not Sanction a Document that Minimizes a Project's Environmental Effects

SANDAG attempts to defend the contents of the 2011 EIR with general appeals to agency discretion. It notes that "lead agencies have discretion to design EIRs . . . ." (AOB 3.) "[S]electing analytical criteria for assessing greenhouse gas emission impacts involves agency discretion, informed by relevant technical and scientific understanding." (AOB 21.) And courts have "upheld the discretion afforded to lead agencies by Guidelines section 15064[,]" and to choose "significance criteria to evaluate greenhouse gas emissions" and "how to analyze the significance of greenhouse gas emissions." (AOB 33, 34.) All of these statements are true, as far as they go. But SANDAG further asserts that "[b]ecause SANDAG 'properly exercised its discretion' under CEQA, its EIR fulfilled its function as an informational document and should be upheld." (AOB 23, quoting Dis. Opn. at p. 24-30.) This is where SANDAG errs. A lead agency has no discretion to produce an environmental document that obscures, rather than highlights, the difficult environmental questions and tradeoffs posed by a proposed project. CEQA requires that an EIR, regardless of the significance criteria used by the lead agency, be "prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences." (CEQA Guidelines, § 15151.)

As the trial court recognized, the record here establishes that SANDAG's treatment of the science and state policy related to long-term climate stabilization, as reflected in the Executive Order, was improperly

"dismissive." (JA {75} 1056.) While a lead agency has substantial discretion that will not be lightly disturbed by the courts when it is exercised, that protection does not extend where the lead agency refuses to engage in the hard questions presented by the project before it.

Similarly, SANDAG contends that it "is entitled to the 'safe harbor' provided by Public Resources Code section 21083.1" because it has complied with "all of CEQA's and the Guidelines' explicit requirements[.]" (AOB 28, citing *Berkeley Hillside, supra,* 60 Cal.4th at p. 1107.) Section 21083.1 "directs courts 'not [to] interpret [the CEQA statutes] or the state guidelines adopted pursuant to Section 21083 in a manner which imposes procedural or substantive requirements beyond those explicitly stated in [CEQA] or in the state guidelines.'" (*Id.* at p. 1107, quoting § 21083.1 [brackets in *Berkeley Hillside*; italics omitted].) One purpose of section 21083.1 is to provide a "'safe harbor'" to local entities" that "'comply with the explicit requirements of the law.'" (*Ibid.*, quoting Assem. Com. on Natural Resources, Analysis of Sen. Bill No. 722 (1993-1994 Reg. Sess.) July 12, 1993, p. 2.)

The People agree that if SANDAG had actually exercised its careful judgment in determining significance, making a good faith effort to account for climate science and the State's policy to work toward long-term climate stabilization, and supported its analysis and conclusion with substantial evidence, then there would be no legal basis to require more. But the concept of a safe harbor has no application where a lead agency "disclaims [its] power and duty" under CEQA "based on erroneous legal assumptions . . . ." (See *City of Marina*, *supra*, 39 Cal.4th at p. 365 [holding that university trustees abused their discretion in refusing to take action to mitigate off-site impacts based on erroneous legal assumptions].) That is the situation here.

B. The 2009 Amendments to the CEQA Guidelines Did Not Excuse Lead Agencies From Exercising Careful Judgment and Making Their Best Efforts in Determining Significance

SANDAG contends that it "scrupulously followed" section 15064.4 of the CEQA Guidelines because it employed significance criteria described in that provision and because the Resources Agency could have, but did not, specifically list the Executive Order in section 15064.4 as relevant to determining the significance of a project's greenhouse gas emissions. (AOB 30; see also *id.* 22, 24-29.)[20] In essence, SANDAG characterizes section 15064.4 as a rote exercise: if a lead agency checks certain boxes, it is excused from considering whether, in the specific context of the project before it, some additional discussion of climate science and California's policy to work toward climate stabilization is relevant and necessary to a fully informed significance determination. This reading of section 15064.4 is unsupported.

The preamble language of section 15064.4 stresses that while it is intended to provide guidance to lead agencies, the agency remains responsible for conducting an adequate analysis and preparing an adequate informational document. The provision directs agencies to exercise their own "careful judgment" in making the significance determination. (CEQA Guideline, § 15064.4, subd. (a).) In its statement of reasons for adopting this provision, the Resources Agency explained that the provision "reflects the existing CEQA principle that there is no iron-clad definition of

[20] SANDAG devotes several pages to discussing the legal effect of executive orders generally. (AOB 39-41.) That discussion misses the mark, as the People do not contend that Executive Order No. S-3-05 is the source of the legal requirement to consider the State's long-term climate objectives. (See p. 32, above.) Whether or not the Governor, through an executive order, could impose such requirements is therefore not at issue in this case.

'significance'" and that, "[a]ccordingly, lead agencies must use their best efforts to investigate and disclose all that they reasonably can regarding a project's potential adverse impacts." (AR 319:25846; see also CEQA Guidelines, § 15144; *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 279, fn. 21.) Further, the part of section 15064.4 on which SANDAG relies—subdivision (b)—expressly is written as a non-exclusive list of considerations relevant to the significance determination. As the Resources Agency explained in the supporting Statement of Reasons, "while subdivision (b) provides a list of factors that should be considered by public agencies in determining the significance of a project's GHG emissions, other factors can and should be considered as appropriate." (AR 319:25850.)

Moreover, the listed factors themselves reflect the need for the agency to exercise judgment and best efforts in order to meet CEQA's public disclosure and informational purposes. Section 15064.4, subdivision (b)(2), states that an agency should consider "[w]hether the project emissions exceed a threshold of significance that the lead agency determines applies to the project."[21] SANDAG's consideration of whether the 2050 Plan would "[c]onflict with SB 375 GHG emission reduction targets" appears to fall into this category. (AR 8a:2567; see AOB 27.)[22] But the fact that the 2050 Plan technically complies with the discrete per capita greenhouse gas emission targets for passenger vehicles in the years 2020 and 2035 does not

[21] To clarify, the Resources Agency does not develop and adopt thresholds of significance for use by local and regional governments. (See AOB 25 [erroneously referring to "thresholds adopted by the Resources Agency under SB 97"]; CEQA Guidelines, § 15064.7, subd. (a); AR 319:25851 [SB 97 FSOR].)

[22] SANDAG states that SB 375 may also constitute a greenhouse gas emissions reduction "plan" as defined in section 15064.4, subdivision (b)(3). (AOB 27.)

automatically end SANDAG's inquiry. A threshold is in essence a working presumption of significance—"an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will *normally* be determined to be significant by the agency and compliance with which means the effect *normally* will be determined to be less than significant." (CEQA Guidelines, § 15064.7, subd. (a) [italics added].) While compliance with laws and regulations, including those designed to meet environmental objectives, may be highly relevant to determining significance (see *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 112-114, disapproved on other grounds in *Berkeley Hillside*, *supra*, 60 Cal.4th at p. 1109, fn. 3), such compliance, standing alone, cannot always support a conclusion that the project's impacts will be less than significant. (*Ibid.*, see also, e.g., *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1108-1111 [reduction in stream flow may be a significant environmental effect despite water pipeline project's compliance with environmental requirements]; *Californians for Alternatives to Toxics v. Dept. of Food & Agriculture* (2005) 136 Cal.App.4th 1, 16 [lead agency's sole reliance on state agency's registration of pesticides and its regulatory program was inadequate to address environmental concerns of CEQA].) Here, where per capita emissions from cars and light trucks *rise* between 2020 and 2035, contrary to SB 375's objective of declining emissions (see AR Supp. 344:30143 [Air Resources Board staff report]), SANDAG had an obligation to go beyond a recitation of the 2050 Plan's compliance with a SB 375-based threshold.

Similarly, section 15064.4, subdivision (b)(3) states that an agency should consider "[t]he 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." In its EIR,

however, SANDAG identified only those discrete, shorter term objectives and policies set out in the Scoping Plan and its Climate Action Strategy that, in SANDAG's view, the 2050 Plan would not impede.[23] A project's ostensible short-term consistency with specific aspects of climate policies or plans does not excuse the agency from determining whether that apparent consistency dissipates when viewed over the longer term. This is particularly true where the very authorities and documents on which SANDAG relies—the region's SB 375 targets, the AB 32 Scoping Plan, and SANDAG's own Climate Action Strategy—are grounded in the need to continually reduce emissions over the long term to achieve climate stabilization. (See, e.g., AR Supp. 344:30143 [SB 375 staff report]; AR 320(5):379977, 27848 [Scoping Plan]; *Assn. of Irritated Residents*, *supra*, 206 Cal.App.4th at p. 1496 [noting that 2020 limit is an interim goal]; AR 216:17627-17628, 17644 [Climate Action Strategy]; see also Opn. 21, fn. 11 [questioning SANDAG's conclusion that the 2050 Plan will not conflict with SANDAG's Climate Action Strategy].) As section 15064.4, subdivision (b)(3) itself states, an agency's analysis is not at an end where

[23] SANDAG contends that its discussion of whether the 2050 Plan "conflicts with" the 2008 Scoping Plan for the year 2020 or with SANDAG's own 2010 Climate Action Strategy follows the letter of CEQA Guidelines section 15064.4, subdivision (b)(3). (AOB 27-28; see AR 8a:2567, 2581-2588.) It is not clear that the Scoping Plan, as applied to SANDAG, or SANDAG's Climate Action Strategy, are the types of binding regulatory plans contemplated by section 15064.4, subdivision (b)(3). (See AR 319: 25852-26853 [SB 97 FSOR]; see also CEQA Guidelines, § 15183.5, subd. (b).) Still, an approach to determining significance that considers statewide, regional, or local climate policies and objectives is a reasonable and accepted approach fully consistent with the CEQA Guidelines. (See, e.g., CEQA Guidelines, §§ 15064, 15064.4, 15065.) And, in the circumstances of this case, discussion and consideration of the Scoping Plan and SANDAG's Climate Action Strategy are integral to a fully informed public process and decision.

"there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding compliance with the adopted regulations or requirements . . . ." (CEQA Guidelines, § 15064.4, subd. (b)(3); see also *id.*, § 15064, subd. (h)(3) [general provision authorizing lead agency to rely on plans that address cumulative environmental impacts in making significance determination].)

SANDAG's other arguments related to CEQA Guidelines section 15064.4 must be rejected. SANDAG states that the fact that section 15064.4 does not mention the Executive Order reflects an intent to exclude it. SANDAG points to Public Resources Code section 21083.05, which, while it provides that the Guidelines must be updated periodically to incorporate either new information or criteria established by the State Air Resources Board pursuant to Division 25.5 (AB 32) "does not require the Guidelines to include information or criteria from the [Executive] Order specifically or from the Governor generally." (AOB 24.) SANDAG's observation, while correct, is once again beside the point. The section is designed to ensure that the Guidelines continue to reflect evolving science and any regulations or requirements adopted by the Air Resources Board that could assist lead agencies in carrying out their CEQA obligations. (See AR 319:25836, 25917, 25930 [SB 97 FSOR].) Section 21083.05 cannot be read to suggest that the Legislature considered the science and state policy concerning climate stabilization to be irrelevant under CEQA.

SANDAG also states that "[t]hrough Guidelines section 15064.4, subdivision (b)(3), the Resources Agency implicitly rejected use of the Executive Order's broad, statewide targets as being technically sound for CEQA analysis." (AOB 31.) It is true that the section does not mention the Executive Order. Neither does it mention the Global Warming Solutions

Act (AB 32), the AB 32 Scoping Plan, or the Sustainable Communities Strategy law (SB 375).[24] Of necessity, there are numerous factors and considerations that may be relevant to a particular project that are not expressly listed in this provision. The Resources Agency did not attempt in section 15064.4 to set out an exhaustive list of considerations that could be relevant in analyzing the impacts for the wide variety of projects undertaken or permitted by the wide variety of entities that are lead agencies under CEQA.

And SANDAG's suggestion that the California Air Resources Board has "rejected use of the Executive Order" in conducting a significance determination under CEQA is wrong. (AOB 31-32.) To clarify, the Air Resources Board does not promulgate CEQA regulations that apply generally to lead agencies or set thresholds of significance. That is not in the Air Resources Board's mandate. In 2008, Air Resources Board staff commenced a project that was intended to lead to Board-issued recommendations to local governments for greenhouse gas emissions thresholds they might choose to adopt for use in considering a limited subset of projects, specifically, "industrial, residential, and commercial projects." (AR 320(3):27789 [2008 Preliminary Draft Staff Proposal].) This project ended without a formal recommendation by staff to the Air Resources Board, and without Board action. The preliminary staff report cited by SANDAG is thus of little assistance in determining SANDAG's obligations under CEQA. Moreover, contrary to SANDAG's assertions,

[24] The People note, however, that the Resources Agency in its Statement of Reasons cited the Executive Order and AB 32, and the findings they contain, for the proposition that "the Governor, Legislature and private sector have concluded that action to reduce greenhouse gas emissions is necessary and beneficial for the State." (AR 319:25834 [SB 97 FSOR].)

the preliminary staff report does cite the scientific basis of the declining emissions trajectory in the Executive Order (AR 320(3):27791-27792), and provides that its 2050 target may in some circumstances be relevant to determining significance (*id.* at 27799).

C. The EIR's Disclosure of 2050 Gross Emissions and Bare Mention of the Executive Order Are Not a Substitute for Good Faith, Reasoned Analysis

SANDAG suggests that the EIR was sufficiently forthcoming about long-term climate impacts because (1) the EIR provided that "greenhouse gas impacts for 2035 and 2050 would be significant, as emissions would increase due to regional population, housing, and employment growth" (AOB 2; *id.* at 26-27, 46); (2) a careful reader could figure out that the 2050 Plan was perhaps not wholly consistent with the State's 2050 emission reduction objectives (AOB 46-47); and (3) the EIR "did not neglect discussion of the Executive Order or its role in state climate strategy" (AOB 47). These arguments do not withstand scrutiny.

"[S]imply labeling the impact 'significant' without accompanying *analysis*" violates "the environmental assessment requirements of CEQA." (*Berkeley Keep Jets, supra*, 91 Cal.App.4th at p. 1371 [italics added].) SANDAG thus cannot rely on a "significant and unavoidable" determination to skip over the required step of explaining how and why the impact is significant. Moreover, quantification of greenhouse gas emissions in the context of this project is not an end in itself, but should serve to "inform[] the qualitative factors" in section 15064.4. (AR 319:25847 [SB 97 FSOR].) The effect of SANDAG's failure to put this long-term project's emissions into a long-term environmental context was to undermine the importance of the EIR's determination that the Plan's 2035 and 2050 gross emissions were significant. Any concern that might be engendered in the public or decision makers about the 2050 Plan's

increases in emissions over time is quickly assuaged by the EIR's discussion and findings under the two other significance criteria. The EIR assures the public and decision makers that the 2050 Plan complies with SB 375's emissions reduction targets and greenhouse gas reduction plans, and that the 2050 Plan's impacts under these apparently more informative standards are less than significant. (AR 8a:2030, 2567-2588.) And, as the Court of Appeal noted, the end result is misleading.

SANDAG's argument that a reader of the EIR could have constructed an analysis of whether the 2050 Plan's emissions are consistent or instead might interfere with the State's long-term climate stabilization objectives is wrong on two counts. This is not a matter of mere "arithmetic" (see AOB at p. 46) but requires some considered discussion, at least as detailed and as analytical as what SANDAG provided in examining whether the 2050 Plan conflicted with the 2008 Scoping Plan and its Climate Action Strategy. (See AR 8a:2581-2588.) Moreover, "[t]he data in an EIR must not only be sufficient in quantity, it must be presented in a manner calculated to adequately inform the public and decision makers . . . ." (*Vineyard*, *supra*, 40 Cal.4th at p. 442.) "[I]nformation scattered here and there in EIR appendices or a report buried in an appendix, is not a substitute for a good faith reasoned analysis." (*Ibid.*, internal quotations omitted.)

Finally, SANDAG's assertion that the EIR discussed the Executive Order "at length" is not supported by its record citations. (AOB 47.) At the pages cited, the EIR:

- Includes a one-sentence summary of the Executive Order among other instances of state action related to climate change (AR 8a:2651);

- States that SANDAG will not consider whether the 2050 Plan would conflict with the AB 32 Scoping Plan for any year beyond 2020, and that while Executive Order No. S-3-05 "sets a goal that statewide GHG emissions be reduced to 80 percent below

1990 levels by 2050," it "does not constitute a 'plan' for GHG reduction, and no state plan has been adopted to achieve the 2050 goal" (AR 8a:2581-2582);

- Opines that, for example, "[t]he Legislature declined to include the Executive Order's aspirational 2050 goal in AB 32" and that "SB 375 legislative findings do not mention achievement of the ambitious 2050 EO S-3-05 GHG emissions reductions target" (AR 8b:3766-3768 [master response to comment]; see also 8b:4436 [response to Attorney General's comments]);

- States that "SANDAG chose not to use the 2050 EO [Executive Order] emissions reduction target as a threshold of significance because the EO is not an adopted GHG reduction plan within the meaning of" CEQA Guidelines, § 15064.4, subd. (b)(2), and because "there is no legal requirement to use it as a threshold of significance" (AR 8b:3768-3770); and

- Summarily asserts, as an additional reason that it will not consider the longer-term reduction target, that "SANDAG's role in achieving this target is uncertain and likely small." (AR 8b:3769.)

On the last point, not only is the statement not supported by any citation or discussion, it misses the point of a cumulative impact analysis. As the 2008 Scoping Plan stated, "[i]n order to achieve the deep cuts in greenhouse gas emissions we will need beyond 2020 it will be necessary to significantly change California's current land use and transportation planning policies." (AR 320(5):27858.) The relevant question is not whether the SANDAG region is a relatively small contributor of greenhouse gases as judged against the scale of the problem, or whether SANDAG can "singlehandedly meet the Executive Order's long-term greenhouse gas reduction goals" (AOB 47), but whether the region's non-trivial and long-term contribution is cumulatively considerable given the state of the climate and the State's long-term climate stabilization objectives. (See *Kings County Farm Bur., supra*, 221 Cal.App.3d at p. 718

["relevant question to be addressed in the EIR is not the relative amount of [pollution] emitted by the project when compared with preexisting emissions" but whether project's "emissions should be considered significant in light of the serious nature" of the air pollution problems in the air basin]; see also *Massachusetts v. EPA* (2007) 549 U.S. 497, 524 [observing that "[a]gencies, like legislatures, do not generally resolve massive problems in one fell swoop"].)

In addition, SANDAG cites a SANDAG staff memorandum dated October 28, 2011, the day the EIR was certified and approved by SANDAG. (AOB 47.) The report informed the SANDAG Board that the Executive Order's 2050 target, if applied directly to SANDAG, would require the region's total emissions to be 5.02 million metric tons in 2050, and that the EIR identified total emissions in that year to be 33.65 million metric tons. (AR 14:4514.) This disclosure, if made earlier in the EIR process, could have formed part of a larger, informative discussion about the project's impacts, serving as a counterpoint to the assertions of compliance with applicable greenhouse gas emissions reductions plans. But this post-EIR document came too late and was too summary to serve any useful purpose in the CEQA process.

D. SANDAG's Post Hoc Attempts to Justify its Refusal to Consider the Science and State Policy Concerning Long-Term Climate Stabilization Should Be Rejected

As noted, SANDAG's contemporaneous justifications for refusing to consider the science and state policy concerning long-term climate stabilization were legal ones. Before this court, SANDAG attempts to assert additional justifications for its truncated analysis. Those reasons are not persuasive. SANDAG's assertions that the Resources Agency and the California Air Resources Board "rejected" any use of the Executive Order in determining significance as not "technically or legally sound"

mischaracterize the relevant documents, as discussed above. (AOB 31-32; see discussion above at pp. 44-45.) And while SANDAG is correct that the California Air Pollution Control Officers Association (CAPCOA), in its 2008 white paper, "CEQA and Climate Change," suggested that it may not be appropriate simply to apply the Executive Order's statewide 2050 target to sub-parts of the state or to individual development projects (AOB 32; see AR 319:26322, 26324-26325), CAPCOA did not suggest that the State's long-term climate stabilization objectives are irrelevant to the significance determination. (See, e.g., AR 319:26292 [stating that "[t]he first approach [explored in the white paper] is grounded in statute (AB 32) and executive order (EO S-3-05)"].)

SANDAG also asserts that "[i]t would be practically impossible for agencies to be accountable for accomplishing the Order's statewide goal for 2050 when the state has not figured out how to allocate that responsibility among its regions and the various emitters in those regions" and that discussing the Executive Order would be "speculative and potentially misleading . . . ." (AOB 36; see also *id.* at 23, 37-38, 47.) This assumes that the only way to consider climate science and long-term climate policy is to adopt the Executive Order's 2050 statewide reduction target as a regional target. But the People have never so argued. The point is that consideration of the need to reduce statewide greenhouse gas emissions over the longer term can inform that analysis, serving as a counterweight to assertions that the 2050 Plan complies with SB 375 and purportedly does not conflict with the Scoping Plan in 2020. (See AR 8b:4432 [SANDAG acknowledging that 2050 target "can inform the CEQA analysis"].)

More fundamentally, SANDAG never relied on any discussion of the Executive Order by the Resources Agency, Air Resources Board staff, or CAPCOA in declining to consider the science and the State's long-term climate objectives. SANDAG's cites are to the these entities' documents,

not to its own analysis, or anything in the EIR that purports to rely on these documents. (See AOB 31-32, 47.) And SANDAG never contended in the EIR that accounting for the longer term was impossible or would result in a misleading document, but only that neither the Legislature nor the Resources Agency had expressly directed such an analysis. SANDAG's counsel's post hoc attempts to shore up the 2011 EIR should be rejected as contrary to CEQA's purposes. As this court has explained, "[t]he audience to whom an EIR must communicate is not the reviewing court but the public and the government officials deciding on the project." (*Vineyard*, *supra*, 40 Cal.4th at p. 443.) A lead agency's arguments in its briefs are

> irrelevant, because the public and decision makers did not have the briefs available at the time the project was reviewed and approved. The question is therefore not whether the project's significant environmental effects *can* be clearly explained, but whether they *were*.

(*Ibid.*, italics in original) The 2050 Plan EIR, like the EIR at issue in *Vineyard*, "fails that test." (See *ibid.* [declining to supplement deficient EIR with counsel's arguments].)

If the court is nevertheless inclined to consider SANDAG's extra-record assertions that the requested analysis is impossible or ill-advised, the People ask the court to take judicial notice of the fact that SANDAG, in the draft EIR for its current 2050 Plan update, has added the following query to its list of "significance criteria": Whether the proposed Plan would be "[b]e inconsistent with the State's ability to achieve the Executive Order [Nos.] B-30-15 and S-3-05 goals of reducing California's GHG emissions to 40 percent below 1990 levels by 2030 and 80 percent below 1990 levels by 2050." (People's Decl., Ex. 1, p. 20; see also *id.* at p. 34.) This not only marks progress, but establishes that a remand to the agency, requiring it to make a good faith effort to disclose and analyze the impacts of the 2050 Plan in the context of state policy relating to long-term climate change will

assist in serving the public disclosure and informed decision making purposes of CEQA.

VI. THIS COURT SHOULD REMAND THE MATTER AND ALLOW SANDAG TO REMEDY THE 2011 ENVIRONMENTAL IMPACT REPORT'S DEFICIENCIES IN THE COURSE OF THE PENDING 2050 PLAN UPDATE

In the nearly four years since the Attorney General submitted her comment letter to SANDAG, science, law, and policy related to climate change have continued to evolve. The International Panel on Climate Change has issued another report informing the public and policy makers of the need for decisive action.[25] The Air Resources Board adopted an updated Scoping Plan.[26] The Governor recently issued a new Executive Order (No. B-30-15) setting a statewide 2030 emissions target marking the State's path toward 2050.[27] The state Senate is considering updates to AB 32 to guide the Air Resources Board in setting post-2020 targets.[28] And SANDAG, as it is required to do every four years, has moved on to its next regional transportation plan update and is circulating a new draft EIR for an updated 2050 Plan. (See SANDAG's regional transportation plan webpage at http://sandiegoforward.org/regionalplan.)

The fact that SANDAG is voluntarily analyzing long-term climate stabilization in the draft EIR for its pending 2050 Plan update does not

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[25] Available at <http://www.ipcc.ch/report/ar5/wg1/> [as of July 6, 2015].

[26] Available at <http://www.arb.ca.gov/cc/scopingplan/scopingplan.htm> [as of July 6, 2015].

[27] Available at <http://gov.ca.gov/news.php?id=18938>.

[28] See Senate Bill 32, available at http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_32&sess=CUR&house=B&author=pavley <pavley> [as of July 6, 2015].

render this case moot. As evidenced by SANDAG's opening brief, there remains a substantial need for this court to clarify for SANDAG, and potentially for other regional planning entities, that in the circumstances of a large-scale infrastructure and planning project with substantial long-term greenhouse gas emissions, a lead agency has a responsibility under CEQA either to address the science and state policy relating to long-term climate stabilization or explain why it cannot, supporting any such explanation with substantial evidence. The question presented in this case might otherwise evade review, given the relatively short period between regional transportation plan updates. (See *California Charter Schools Assn. v. Los Angeles Unified School Dist.* (2015) 60 Cal.4th 1221, 1233-1234 [case relating to allocation of facilities to charter schools for past school year not moot where issue is "likely to recur yet evade review because of the relatively short duration of the academic year"].)

In light of these developments and the time that has elapsed, rather than requiring SANDAG to revise or supplement the 2011 EIR to correct the deficiencies identified in this litigation, it would appear to be most efficient to focus the remedy on the pending EIR process—a result that is not precluded by CEQA's remedy provisions. (See § 21168.9, subd. (a).) Accordingly, the People request that SANDAG be ordered, in the course of preparing the pending 2050 Plan EIR, to take the corrective actions identified by this court should the People prevail, and, in addition, the specific corrective actions identified by the Court of Appeal (see Opn. at pp. 26-27 [greenhouse gas-related mitigation], 30 [project alternatives], 41 [air quality impacts and mitigation], 44 [agricultural impacts]).[29]

[29] The trial court did not order that specific activities approved under the 2050 Plan be suspended, and the People do not request any change to that aspect of the remedy.

CONCLUSION

The People respectfully request that the court hold that SANDAG abused its discretion in determining that in the EIR for the 2050 Plan—a large-scale, long-term transportation infrastructure and land use planning project—SANDAG had no obligation under CEQA to consider the science and state policy of long-term climate stabilization. It should further affirm the decision of the Court of Appeal that SANDAG's error was prejudicial, provide that SANDAG must decertify the deficient 2011 EIR, and remand the case for further proceedings consistent with this court's opinion.

Dated: July 10, 2015

Respectfully submitted,

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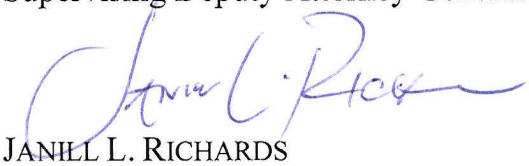

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CERTIFICATE OF COMPLIANCE

I certify that the attached **PEOPLE OF THE STATE OF CALIFORNIA'S ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 13,984 words.

Dated: July 10, 2015

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Attorney General of California

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DECLARATION OF SERVICE BY FIRST CLASS AND ELECTRONIC MAIL

Case Name: ***Cleveland National Forest Foundation; Sierra Club; Center for Biological Diversity; CREED-21; Affordable Housing Coalition of San Diego; People of the State of California v. San Diego Association of Governments; San Diego Association of Governments Board of Directors***

Case No.: S223603
(California Court of Appeal, Fourth Appellate District,
Division One, Case No. D063288;
San Diego County Superior Court,
Case No. 37-2011-00101593-CU-TT-CTL
[Consolidated with Case No. 37-2011-00101660-CU-TT-CTL])

I declare:

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

On **July 10, 2015**, I served the attached **PEOPLE OF THE STATE OF CALIFORNIA'S ANSWER BRIEF ON THE MERITS** by placing a true copy of this document enclosed in a sealed envelope as first class mail in the internal mail collection system at the Office of the Attorney General at [fill in address] , and by sending an electronic version of the same document, addressed as set out in the attachment.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **July 10, 2015**, at Oakland, California.

Debra Baldwin
Declarant

Debra Baldwin
Signature

SERVICE LIST

Cleveland National Forest Foundation, et al.
v. San Diego Association of Governments, et al.
(Case No. S223603)

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SERVICE LIST – Contd.

Cleveland National Forest Foundation, et al.
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