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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

CENTRAL DIVISION

CLEVELAND NATIONAL FOREST FOUNDATION, Petitioner, v. CALIFORNIA DEPARTMENT OF TRANSPORTATION; and DOES 1 through 20, inclusive. Respondents.	Case No. 37-2013-00078391-CU-TT-CTL **IMAGED FILE** **Petitioner's Reply Brief** Judge: Hon. Katherine Bacal Dept.: C-69 Date: October 9, 2015 Time: 1:30 p.m. Action Filed: December 4, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

State Statutes

State Regulations

PRELIMINARY STATEMENT

Caltrans' opposition brief does not seriously dispute the shortcomings of the EIR for the I-5 widening project ("Project"). It concedes, either expressly or through its silence, that the EIR: (1) compares Project impacts against a hypothetical future baseline, an approach that—as the Cleveland National Forest Foundation ("CNFF") shows—minimizes the Project's contribution to climate change; (2) provides no analysis of the Project's inconsistency with the state's long-term climate policies; (3) omits any assessment of the Project's significant effects on human health due to air pollution; (4) employs a narrow "study area" that precludes analysis of the Project's potential to induce growth in nearby rural areas; and (5) omits mitigation, requested by the community, for the Project's most serious effects, including its impacts on climate, air quality and noise.

Confronted with these glaring deficiencies, Caltrans presents a series of excuses and procedural ploys, each of which is unavailing. First, the agency claims that Senate Bill 468 ("SB 468")[1] exempted Caltrans from CEQA compliance for the Project—and thus that its preparation of the EIR was unnecessary. Advancing this argument for the first time in litigation, Caltrans seizes on a provision of SB 468 allowing the California Coastal Commission to streamline its review of multiple improvements along the North Coast Corridor. Respondent's Brief on the Merits ("RB") at 6 (citing § 103(d)(3)). But nothing in that provision exempts Caltrans from its separate duty under CEQA to analyze the environmental impacts of the I-5 highway widening Project. Indeed, SB 468 expressly references Caltrans' preparation of an "environmental impact report" for this Project. § 103(c)(3). Furthermore, Caltrans' own EIR acknowledges, "SB 468 is not intended to eliminate project-specific California Environmental Quality Act (CEQA) or National Environmental Policy Act (NEPA) reviews; rather, it provides for integrated regulatory review by the California Coastal Commission." Administrative Record ("AR") 6480-81. Caltrans' claim of exemption is specious.

Next, Caltrans asserts that the massive expansion of I-5, which will add four new lanes to the freeway, will cause no increases in vehicle trips or associated greenhouse gas ("GHG") emissions. RB

[1] The relevant portion of SB 468 is codified at section 103 of the California Streets and Highways Code (hereinafter "section 103").

at 11-13. But this stance—which Caltrans fails to support with any evidence—contradicts evidence from the agency's own economic report showing that the Project will cause nearly 3 million more visitors to drive to the region every year. It will also induce economic and industrial growth, further increasing GHG emissions. The agency's continuing refrain that the huge freeway expansion will *reduce* emissions strains credulity.

Caltrans argues that it need not analyze the Project's inconsistency with relevant state climate polices because it has discretion to set thresholds of significance. RB at 16. But an agency cannot use a "significance threshold" to foreclose consideration of significant effects or otherwise produce a misleading analysis. *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109. Here, the EIR fails to disclose the Project's stark conflict with California's goals to sharply reduce GHG emissions by 2050.

Caltrans' explanation for omitting any analysis of the Project's health impacts fares no better. It labels any such analysis "speculative" (RB at 22), but the record is to the contrary. In fact, Caltrans has performed analyses of health risks for other highways, and both its staff and the U.S. EPA strongly urged the agency to conduct a proper study here. No evidence in the record supports Caltrans' refusal, which resulted in the omission of any mitigation addressing these serious impacts.

Caltrans attempts to excuse the tiny study area for the EIR's assessment of growth-inducing impacts by speculating that some drivers in the rural areas excluded from the study will use the I-15 freeway rather than the I-5. RB at 24. However, a quick look at a map shows that several of the excluded areas—for example, significant portions of San Marco and Vista—are closer to the I-5. Caltrans' own economic study also concludes that widening the I-5 will affect travel patterns and cause growth in an area much larger than the EIR's study area. Given this evidence, CEQA requires Caltrans to analyze the environmental impacts of that growth. *Napa Citizens for Honest Gov. v Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 368-70.

Caltrans seeks to defend its faulty noise analysis by claiming that the Project complies with federal noise standards. RB at 26-28. But compliance with federal law offers no excuse for ignoring CEQA's mandates, which are more protective. Caltrans violated state law by discounting the already-noisy freeway conditions when evaluating noise increases from the Project (*Gray v. County of Madera*

(2008) 167 Cal.App.4th 1099, 1122-23), and by refusing to consider all feasible mitigation for the Project's significant noise impacts (Pub. Res. Code § 21081)[2].

Unable to justify the EIR's omissions and analytic flaws, Caltrans seeks refuge in the standard of review, arguing that substantial evidence supports the EIR's conclusions. RB at 8-10. But the "substantial evidence test" does not apply to CNFF's *legal* claims that the EIR omits fundamental information about the Project's impacts, uses an incorrect baseline, and fails to identify mitigation for the Project's significant effects. *See* Petitioners' Opening Brief ("POB") at 10. Caltrans never even attempts to distinguish CNFF's cited cases, which hold that the court must decide these claims *de novo*. *See, e.g., Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 428.

Caltrans asserts, in passing, that SB 468 requires application of the substantial evidence test (RB at 9), but it again misreads the statute. The cited provision, section 103(d)(4), reads:

> A permitting agency's decision to review and approve a public works plan, a plan amendment, or related notice of impending development, make a consistency determination, or issue a permit for the north coast corridor project shall be reviewed under the substantial evidence standard.

The agency decision challenged here—Caltrans' approval of the I-5 widening—is not a "public works plan," "plan amendment," "notice," "consistency determination" or "permit" for purposes of section 103(d)(4). Tellingly, Caltrans never explains how its approval might fit the statutory criteria, let alone cite any pertinent record document. *See* RB at 9.

In any event, application of the substantial evidence test does not assist Caltrans.[3] The CEQA Guidelines clarify that "[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate . . . does not constitute substantial evidence." Guidelines § 15384.[4] Here, Caltrans does not defend the EIR's conclusions with solid, credible evidence. Instead, it relies on arguments that are unsupported in the record, or on information that is erroneous or largely irrelevant.

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[2] Except as otherwise noted, all further statutory references are to the Public Resources Code.

[3] As CNFF explained (POB at 10), the substantial evidence test applies to certain of its factual claims, such as its challenge to Caltrans' determination that some mitigation is infeasible.

[4] The CEQA Guidelines, Cal. Code Regs., tit. 14 § 15000 *et seq.*, are referred to herein as "Guidelines."

Finally, Caltrans argues in passing that CNFF failed to lay out evidence favorable to Caltrans and show why it is lacking. RB at 9-10. Caltrans is wrong. CNFF's opening brief painstakingly rebuts Caltrans' justifications for the EIR's deficient analysis. POB at 12-13, 17, 19-20, 22-23 (climate); 26-29 (public health); 31-33 (growth-inducement); 35-36, 39-40 (noise). Instead, it is Caltrans' brief that fails to address the vast majority of CNFF's claims.

In sum, Caltrans cannot justify its failure to analyze and mitigate the Project's significant effects. This court should issue a writ of mandate directing the agency to rescind its approval.

ARGUMENT

I. SB 468 Does Not Exempt the Project from CEQA.

Caltrans claims that the Project is exempt from CEQA under SB 468, and that it simply "elected" to prepare an EIR on a voluntary basis. RB at 7. Caltrans is wrong. Far from exempting the Project from CEQA review, SB 468 specifically provides that Caltrans will complete an EIR for the I-5 widening. § 103(c)(3). Moreover, Caltrans' litigation position comes as an abrupt about-face; previously, the agency expressly rejected the reading of SB 468 that it now urges upon the Court.[5]

Caltrans' interpretation of SB 468 also conflicts with the purpose and context of that statute. Rather than exempting *Caltrans'* approval of the Project from CEQA, as Caltrans argues, SB 468 was intended to streamline procedures for separate, *Coastal Commission* decisions on plans and projects for the North Coast Corridor.

A. The Coastal Commission's Certified Regulatory Program Applies Only to Certain of Its Approvals Under the Coastal Act, Not to Caltrans' Separate Approval of Transportation Projects.

To give context for SB 468, we first briefly explain the Coastal Act and the Commission's certified regulatory program under CEQA. The California Coastal Act of 1976, Public Resources Code section 30000 et seq., governs land use planning in California's "coastal zone." The Coastal Act provides for the adoption by cities and counties of local coastal programs ("LCPs"), which the Coastal Commission certifies as consistent with Coastal Act policies. §§ 30108.5 to 30108.6, 30500, 30511. In

[5] Caltrans also never pleaded this argument as an affirmative defense in an answer or demurrer. In fact, Caltrans has never filed any responsive pleading in this case.

addition, the Act generally requires a coastal development permit ("CDP") for all development in the coastal zone. § 30600(a). Local governments with certified LCPs issue CDPs, and the Commission hears appeals of certain CDP determinations. §§ 30600, 30602, 30603.

Critically for this case, state law also allows a single, "umbrella" Commission approval for some multi-jurisdictional projects in the coastal zone that would otherwise require several approvals or LCP consistency determinations. §§ 30605, 30606. Among the activities eligible for this programmatic review by the Commission are "long-range development plans" and "public works" plans. § 30605. Once the Commission issues an umbrella approval for such a plan, the Commission's review of individual implementing projects is limited. §§ 30605, 30606. By streamlining coastal projects spanning several jurisdictions, this programmatic approach "promote[s] greater efficiency for the planning of any public works" projects. § 30605.

Because the Commission's issuance of CDPs and other approvals are actions "significantly affecting the environment," they normally would be subject to CEQA. *See City of Coronado v. California Coastal Zone Conservation Com.* (1977) 69 Cal.App.3d 570, 580-81. However, state law provides a CEQA exemption for state agency regulatory programs, such as the Commission's, where the Natural Resources Agency has certified the program as a "functional equivalent" to CEQA. § 21080.5. The Natural Resources Agency has certified the Coastal Commission's regulatory programs for: (1) considering and granting Coastal Development Permits (Guidelines § 15251(c)); and (2) preparing, approving, and certifying Local Coastal Programs (Guidelines § 15251(f)). The Legislature has also provided that the Coastal Commission may consider and approve "long range land use development plans" pursuant to its certified regulatory program. § 21080.9.

The Natural Resources Agency has not certified any regulatory programs operated by Caltrans. *See* Guidelines § 15251. Accordingly, Caltrans' approval of the Project is not exempt from CEQA under a certified regulatory program.

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B. SB 468 Established a "Public Works Plan" to Streamline Coastal Commission Approvals in the North Coast Corridor But Did Not Relieve Caltrans of Its Obligations Under CEQA.

1. Caltrans Has Recognized that SB 468 Expedites Only Coastal Commission Review of Certain Projects.

The primary purpose of SB 468 was to streamline the Coastal Commission's approval of various, related projects on the North Coast Corridor, including rail lines, lagoon crossings, and the I-5 widening.[6] To achieve this purpose, SB 468 established a "Public Works Plan" for the Corridor, encompassing numerous individual projects that will take place there. *See* § 103(b) (requiring Public Works Plan to provide a process for obtaining coastal development permits, to identify specific project elements, and to establish mitigation measures); *see also* AR 7509-11 (Public Works Plan describing SB 468's provisions).

Thus, with the establishment of the Public Works Plan, SB 468 "allow[ed] for an integrated regulatory review by the California Coastal Commission rather than a project-by-project approval approach." § 103(a)(4). The legislation provided the Coastal Commission with the ability to perform consolidated Coastal Act consistency review for projects in the North Coast Corridor, rather than leaving the necessary CDPs to be approved individually by local jurisdictions along the coast. *See* § 103(d)(1) (finding "California Coastal Commission's role [is] to apply a regional or statewide perspective to land use debates where the use in question is of greater than local significance"); AR 7509 (Public Works Plan describing how SB 468 authorizes the Commission to oversee necessary LCP amendments). In addition, SB 468 specified that the new Public Works Plan would fall within the Commission's certified regulatory program; thus, the Commission would conduct environmental review for the Plan pursuant to its regulatory program rather than CEQA. § 103(d)(3)).

Critically, however, while SB 468 streamlined review by the Coastal Commission, the legislation did not affect other agencies' obligations to comply with CEQA. As the Coastal Commission emphasized in the Public Works Plan itself,

[6] SB 468 also imposed limits on the size of the Project and required that construction of lagoon crossings in the North Coast Corridor occur concurrently with the freeway widening. § 103(c)(3)-(4).

> [t]he Coastal Commission PWP [Public Works Plan] review and approval process is not intended to supplant the review processes required by the California Environmental Quality Act (CEQA), National Environmental Policy Act (NEPA) or other regulatory schemes; compliance with the CEQA, NEPA and/or other regulatory schemes are addressed at the project level, such as . . . the I-5 Highway Improvements Environmental Impact Statement/Environmental Impact Report.

AR 7506, fn. 1.[7] Indeed, the Public Works Plan requires agencies such as Caltrans to demonstrate that they have completed CEQA review before the Coastal Commission will review those agencies' projects for consistency with the Plan and the Coastal Act. AR 8230-31 (implementing projects must have "been reviewed in compliance with the CEQA . . . and all conditions and/or mitigation measures identified in those CEQA . . . documents have been incorporated").

Responding to public comments in the Final EIR for the Project challenged in this litigation, Caltrans likewise directly acknowledged its duty to comply with CEQA for the Project: "SB 468 is not intended to eliminate project-specific California Environmental Quality Act (CEQA) or National Environmental Policy Act (NEPA) reviews; rather, it provides for integrated regulatory review by the California Coastal Commission." AR 6480-81. As Caltrans explained, the Project EIR and Public Works Plan "respond to different legal mandates, and have different purposes." AR 2507.

Accordingly, as Caltrans' EIR admits, SB 468 did not absolve Caltrans of its obligation to analyze the Project's environmental effects under CEQA. It simply provided an expedited method for the Coastal Commission to conduct its own, separate environmental review and Coastal Act consistency analysis for projects contained in the Public Works Plan. AR 7516 (Public Works Plan stating that Coastal Commission would conduct its own independent environmental review for its approval, which may draw on facts from the draft EIR for the I-5 Project, but will not rely on that EIR's certification).

2. SB 468 Expressly Contemplates that Caltrans Will Conduct Project-Level CEQA Review, and Caltrans' New Interpretation Renders Important Parts of the Statute Superfluous.

To support its new-found exemption argument, Caltrans focuses on subsection 103(d)(3) of SB 468. *See* RB at 6. But that subsection provides only that the "Public Works Plan" is subject to the

[7] The administrative record contains the final administrative draft version of the Public Works Plan. *See* AR 7501-8320. The version ultimately adopted by the Coastal Commission—which is not in the record because it was adopted six months after Caltrans approved the Project—contains the same language cited above. *See* at http://www.dot.ca.gov/dist11/Env_docs/I-5PWP/Ch1Introduction.pdf at 1.2, fn. 1.

Coastal Commission's certified regulatory program. § 103(d)(3). It does not state that Caltrans' *Project* is subject to the Commission's certified regulatory program or that agencies other than the Coastal Commission are exempt from CEQA. The statutory language on its face does not support Caltrans' argument.

Moreover, Caltrans ignores other portions of SB 468 plainly indicating that the statute contemplates CEQA review by agencies other than the Coastal Commission. For example, subsection 103(c)(3) refers expressly to Caltrans' preparation of an EIR for the Project: "[t]he determination of the preferred alternative [for the I-5 Project] shall be made by the department [of Transportation][8] and the Federal Highway Administration *in their environmental impact report or environmental impact statement* . . . ." (emphasis added).

In addition, subsection (e) of 103 refers to the suspension of "notices of determination" for certain North Coast Corridor projects until it is determined that the projects' environmental documents are consistent with section 103. The statute's use of the term "notice of determination" demonstrates that the Legislature contemplated that CEQA applies to project approvals in the Corridor by agencies other than the Coastal Commission. According to Guidelines section 15373, "'[n]otice of determination' means a brief notice to be filed by a public agency after it approves or determines to carry out a project *which is subject to the requirements of CEQA*" (emphasis added).[9] Public Resources Code section 21108 requires these notices, and Section 21108 is part of the very Chapter from which Caltrans now claims the Project is exempt. Notably, the Coastal Act neither requires nor refers to notices of determination.

Caltrans' proposed interpretation of SB 468 would render these provisions superfluous. The Legislature would not have required Caltrans' EIR to include a specific project alternative if Caltrans

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[8] SB 468 frequently refers to the Department of Transportation, Caltrans' parent agency, rather than Caltrans itself. The distinction is not material here.

[9] Agencies also sometimes issue notices of determination when they conclude that projects are *not* subject to CEQA. § 21108(b). However, SB 468 affects Caltrans' issuance of notices of determination for projects where the agency prepared "environmental documents." § 103(e). Thus, the law clearly contemplates that Caltrans has, and will continue to, conduct CEQA review and issue notices of determination after completing those environmental review documents.

did not have to prepare an EIR in the first place. Likewise, temporarily suspending notices of determination would be senseless if SB 468 had exempted agencies such as Caltrans from conducting CEQA review or issuing notices of determination. Courts, of course, avoid constructions such as this one that render any part of a statute meaningless or extraneous. *Woosley v. State of California* (1992) 3 Cal.4th 758, 775-76. Rather, statutes must be construed as a whole. *Stafford v. Realty Bond Service Corp.* (1952) 39 Cal.2d 797, 805 ("[E]very statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect."). When section 103's component parts are considered as a whole, Caltrans' interpretation immediately collapses.

If section 103 did contain any ambiguity—which it does not—SB 468's legislative findings and declarations would settle the matter. *See County of Madera v. Superior Court* (1974) 39 Cal.App.3d 665, 669 (relying on ordinance's findings and recitals to determine Legislative intent); *Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354, 1365 ("legislative findings are given great weight and will be upheld unless they are found to be unreasonable and arbitrary"). The findings expressly state: "The Department of Transportation (department) and the Federal Highway Administration are responsible for developing an environmental document and constructing improvements to State Highway Route 5 . . . ." SB 468, § 1(h). This language could not be any more plain. The Legislature intended that Caltrans would be responsible for preparing an EIR for the Project, notwithstanding the passage of SB 468.

3. SB 468 Provides No Express or Implied CEQA Exemption for Caltrans' Project.

Caltrans cites to no language in SB 468 stating that the Project is exempt from CEQA; indeed, there is no such language. Subsection 103(d)(3) makes the *Public Works Plan* subject to the Coastal Commission's certified regulatory program. However, neither this nor any other provision of the bill states that individual projects within the North Coast Corridor, which other agencies such as Caltrans approve, are also subject to the Commission's certified regulatory program. *Id.* Caltrans therefore must be attempting to read an *implied* statutory exemption into SB 468. But that effort must fail, as case precedent does not countenance implied exemptions from CEQA.

Where CEQA provides certain exceptions to a general rule, other exceptions are necessarily excluded. *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195-96 (rejecting argument that California Fish and Game Commission was subject to an implied exemption from CEQA) (disapproved on other grounds); *see also Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1230-31. As the Supreme Court has explained, "the Legislature knows how to create such an exception when one is intended." *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 116 (rejecting argument that the California Endangered Species Act created an implied statutory exemption to CEQA for delisting decisions).

Notably, the Legislature has created some exemptions for other transportation projects. For example, the construction of high-occupancy vehicle lanes on the I-805 in San Diego County, as well as various other specific highway improvement projects, are exempt from CEQA. §§ 21080.42. Subsection 103(d)(3), in contrast, provides no such exemption for the Project.

In sum, while SB 468 streamlined the Coastal Commission's review of North Coast Corridor projects, the statute did not excuse Caltrans from conducting environmental review for its own, related approvals. The Coastal Commission, in the Public Works Plan, agrees with this interpretation, as did Caltrans—until it filed its opposition brief. The Court should reject Caltrans' new, eleventh hour defense.

II. Caltrans Fails to Demonstrate that Its EIR Properly Analyzes the Project's Climate Impacts.

A. Caltrans Does Not Even Address, Much Less Rebut, the Evidence that the Project Will Cause Additional Vehicle Trips and Associated GHG Emissions.

Defending the EIR's flawed climate analysis, Caltrans boldly asserts that "Petitioner cannot argue the project will *cause* GHG emissions." RB at 12 (emphasis in original). But Caltrans completely ignores the four pages of CNFF's opening brief showing how the Project *will* cause increased emissions due to induced demand. *See* POB at 12-15. Like its EIR, Caltrans' brief cites no evidence supporting its statement that the Project will not cause new vehicle trips and resultant emissions.

Caltrans' omission is telling. CNFF cited voluminous evidence demonstrating that the Project will induce more vehicle trips and thereby cause increased GHG emissions. *See, e.g.*, POB at 12-15; AR 39087, 2645, 3816-18, 4073; *Sierra Club v. U.S. Dept. of Transportation* (N.D. Il., 1997) 962

F.Supp.1037, 1043. Even Caltrans' own economic study for the Project acknowledges that people drive more as road conditions improve, and drive less if they are congested. AR 11621 ("research has demonstrated that . . . a 10% increase in travel times results in a 10% decrease in traffic volumes"). The study documents how expanding I-5 will cause 2.9 million more visitors to drive from Los Angeles and Orange County to the region every year. AR 11624.

Caltrans never responds to CNFF's showing of induced demand and therefore has forfeited the argument. *Brown v. Professional Community Management, Inc*. (2005) 127 Cal.App.4th 532, 537 (party forfeits a claim by failing to offer argument or citation to support it). Because the EIR bases its climate analysis on a demonstrably false premise—that the Project will not cause new vehicle trips—it fails to pass muster under CEQA. Guidelines § 15064(f) (EIR's conclusions must be supported by substantial evidence).

Caltrans also ignores CNFF's argument that the agency failed to adequately respond to comments regarding induced demand. *See* POB at 13-14. The agency has therefore failed to provide any substantial evidence demonstrating that its responses to comments comply with CEQA and by its silence has forfeited this argument as well.

Instead of addressing the issue of induced demand, Caltrans veers off in another direction. The agency admits that "GHG emissions are expected to rise regionally as compared to the existing conditions" (RB at 12), but it claims that increased population, and not the Project, will cause this growth in emissions (RB at 11-12). However, while population growth will cause some increases in GHG emissions, the evidence shows that the Project will also cause new emissions. As described above, the widening of a major highway will induce new trips that will emit more climate pollutants. *See, e.g*., AR 3702, 3715, 2645, 3816-17. It will also induce economic and industrial growth, including in the trucking industry, which in turn may cause greater GHG emissions. *See* AR 11610-11. The administrative record flatly contradicts Caltrans' conclusory statements that the Project will not cause any increase in GHG emissions.

Caltrans' discussion of population growth also highlights yet another flaw that CNFF identified and the agency ignored. The EIR concludes that the Project will reduce GHG emissions in 2030 but fails to acknowledge that the Project may cause emissions increases in earlier and later years. *See* POB

at 18, 20. Prior to 2030, the Project's lengthy construction phase will include lane closures (AR 1446-47, 2852) that will cause congestion and thus higher GHG emissions (AR 48725). After 2030, population and traffic volumes will grow, thereby causing congestion and higher GHG emissions. AR 1076 ("population growth . . . will continue over the next 40 years"), 48724 (GHG emissions from induced demand erase any congestion relief benefits within 10 years). By failing to analyze the Project's short- and long-term climate impacts, the EIR presents an incomplete and misleading analysis, in violation of CEQA. *Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439, 455 ("*Neighbors*") (EIR must analyze short-term impacts even when a project may have long-term benefits); Guidelines § 15126.2(a) (EIRs must analyze short- and long-term impacts).

Finally, Caltrans relies on *Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1092-93 for the proposition that an EIR need only discuss a project's own impacts; it need not demonstrate that the project will rectify preexisting environmental issues such as climate change. RB at 12-13. But the case is inapposite. There, a general plan amendment allowed new development that would obtain water from a depleted aquifer, but the project included robust water conservation measures and offset new water usage by converting irrigated farmland. *Watsonville Pilots Assn.,* 183 Cal.App.4th at 1091-93. Under these circumstances, the court held that the EIR was not required to "pinpoint a solution to the overdraft problem" because the aquifer's depletion "will not be exacerbated by the proposed project." *Id*. at 1094.

Here, in contrast, the Project *will* exacerbate the existing problem of climate change. The Project will cause new GHG emissions due to induced growth in vehicle travel. Further, even if the Project simply maintains existing emissions levels, it will exacerbate climate change because the science shows that an 80 percent *reduction* from 1990 GHG emissions levels is needed just to preserve existing climatic conditions. AR 49511, 49845. Far from helping achieve these emissions reductions, the Project will allow GHG emissions levels to increase by 42 percent between now and 2030. AR 2067.

Additionally, the general plan amendment at issue in *Watsonville Pilots Association* apparently did not conflict with any plan to correct the aquifer overdraft problem, and the city was not legally obligated to help solve the problem. *See* 183 Cal.App.4th at 1091-94. Here, in contrast, Caltrans is legally required to address the problem of climate change. Specifically, Governor Schwarzenegger's

Executive Order required Caltrans, like all state agencies, to reduce its emissions of GHGs to 80 percent below 1990 levels by 2050. AR 49511. The Legislature has also specifically directed Caltrans to develop a plan to reduce emissions to meet the 2050 target. Gov. Code § 65072.2.

B. SB 468's Legislative Findings Do Not Assist Caltrans.

Caltrans next argues that SB 468's legislative findings support the agency's conclusion that the Project will reduce regional GHG emissions. RB at 14. But those findings merely state that the Project will cause "less exhaust emissions *per vehicle*" and "help reduce emissions *per traveler and per trip*." RB at 14 (citation omitted) (emphases added). The findings say nothing about whether the Project will induce more demand, thereby causing overall, increased GHG emissions. Nor do they address whether the Project will cause greater emissions in the long-term, after the I-5's additional capacity becomes clogged with traffic. *See* AR 48724 (study describing how emissions from induced demand erase any gains from highway widening).

At most, the findings suggest that the Public Works Plan as a whole may help the state achieve the shorter-term GHG reduction goals of SB 375 and AB 32. SB 468, § 1(n). However, they do not address the consistency with the state's GHG reduction goal for 2050. *Id*. Indeed, the legislation contemplates that Caltrans will conduct environmental review of the Project to analyze this and other issues. *See id. at* § 1(h) (Caltrans is "responsible for developing an environmental document [for] . . . State Highway Route 5"); § 103(c)(3) (Caltrans must prepare EIR for I-5 Project).

C. Caltrans Offers No Evidence that Its EIR Properly Analyzed the Project's Consistency with State Climate Policy and Laws.

Continuing its pattern of avoidance, Caltrans ignores much of CNFF's argument that the EIR fails to analyze the Project's consistency with the state's GHG reduction plans and policies, such as consistency with AB 32 and the Scoping Plan. It also ignores *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, even though that decision overturned an EIR with the same mistakes found in the Project EIR.

Similarly, Caltrans offers no evidence that its EIR analyzes the Project's consistency with the Executive Order's policy to sharply reduce GHG emissions by 2050. Instead, the agency responds with a non-sequitur involving an entirely separate agency and different project: the California Air Resources

Board found that *SANDAG's* Regional Transportation Plan/Sustainable Communities Strategy ("RTP/SCS") met the Executive Order's reduction goals. RB at 16. Caltrans' response is not only irrelevant, but also incorrect. The Air Resources Board analyzed only the RTP/SCS's consistency with SB 375's reduction targets for 2020 and 2035; it did not consider whether that transportation plan was consistent with the Executive Order's target for 2050. AR 36113-14, 36167. Furthermore, Caltrans' attempt to rely on the environmental analysis performed for SANDAG's RTP/SCS contradicts its position taken elsewhere that this litigation has nothing to do with SANDAG's transportation plan. RB at 1 (the Project EIR "does not 'tier' from" SANDAG's prior EIR), 30 ("This is Not the SANDAG RTP Litigation").[10]

Caltrans also asserts that it made a "good faith effort" at discussing the "regulatory setting associated with GHG emissions" and that it "reference[d] various Executive Orders." RB at 15. Once again, this assertion is irrelevant. CNFF does not claim that the EIR fails to describe the regulatory setting; it argues that the EIR fails to analyze the Project's *inconsistency* with these regulations and policies.

Caltrans next touts its discretion to select appropriate thresholds for measuring the Project's impacts. RB at 16. However, while agencies possess some discretion in selecting thresholds of significance, they lack discretion to misapply these thresholds or prepare a misleading analysis. *See Protect the Historic Amador Waterways,* 116 Cal.App.4th at 1109 (agencies must consider all evidence that project may have significant impacts, notwithstanding compliance with a particular threshold); *Neighbors,* 57 Cal.4th at 455 (agency discretion limited by requirement that EIRs must present "the most accurate information on project impacts practically possible."). Agencies also lack discretion to ignore CEQA's mandatory provisions. Here, Caltrans' GHG analysis fails to disclose the Project's

[10] Caltrans objects to CNFF's request for judicial notice of the Court of Appeal decision in the SANDAG litigation, claiming that California Rule of Court 8.1115 precludes judicial notice of unpublished decisions. *See* Objection to Petitioner's Request for Judicial Notice. Caltrans' objection ignores case law cited by CNFF that directly contradicts the agency's position. *See Gilbert v. Master Washer & Stamping Co., Inc*. (2001) 87 Cal.App.4th 212, 217, fn. 14 (allowing judicial notice of unpublished court of appeal decision).

direct conflict with state goals designed to reduce GHG emissions by 2050, a disclosure required by CEQA. Guidelines § 15125(d).

Finally, Caltrans repeats its mantra that the Project will not cause GHG emissions but will "usher[] in GHG emissions reductions," implying that there was no need to consider the Project's consistency with state climate policy. RB at 17. This argument fails for the reasons described above; namely, that the EIR (1) erroneously assumes that capacity-enhancing freeway projects do not induce new vehicle trips and (2) does not analyze the Project's short- and long-term climate impacts.

In short, Caltrans presents no convincing justification for omitting a meaningful analysis of the Project's inconsistency with the state's plans and policies for combating climate change. Given that Caltrans is a state agency subject to the Executive Order, this omission is fatal

D. Caltrans' Defense of the EIR Baseline Ignores Both Controlling Supreme Court Precedent and the CEQA Guidelines.

The law regarding CEQA baselines is crystal clear. Normally, agencies must determine the significance of a project's impacts by comparing future conditions (with the project in place) to existing conditions. *Neighbors*, 57 Cal.4th at 448. Alternatively, if the agency demonstrates that use of this existing conditions baseline for environmental analysis would be misleading or without informational value, it may compare future conditions with the project to future conditions without the project. *Id*. Notably, in the context of analyzing climate impacts, the Guidelines specifically state that agencies should analyze the "extent to which the project may increase or reduce greenhouse gas emissions *as compared to the existing environmental setting*." Guidelines § 15064.4(b)(1) (emphasis added).

Caltrans does not dispute these requirements, ignores *Neighbors'* holding, and offers no evidence that its EIR complied with CEQA's rules on baselines. Indeed, Caltrans frankly admits that its EIR does not use an existing conditions baseline. RB at 12 (acknowledging its EIR's conclusion that "*when compared to a future 'no build'*, the project will be expected to provide net benefits to GHG emissions."), ("the project will assist in the net reduction of GHG emissions *when compared to what is otherwise expected*.") (emphases added). At the same time, Caltrans cites no statement in the EIR explaining that an existing conditions baseline would be misleading or without informational value.

Floundering in the face of clear error, Caltrans offers a series of ineffectual, contradictory excuses. First, it implies that CNFF somehow acknowledged the importance of comparing future conditions with and without the Project. RB at 18. Caltrans is wrong. The cited passage in CNFF's brief faults the EIR for failing to disclose the crucial fact that the Project will allow GHG emissions to rise by 42 percent *over existing conditions*.[11]

Second, Caltrans claims that there is no reason to compare Project impacts against existing conditions because the Project will take decades to build. RB at 18 (chiding CNFF for "fail[ing] to understand [that] the Project will not be built in a day"). But Caltrans ignores *Neighbors*, which is directly on point. There, the Court acknowledged that use of an existing conditions baseline "assume[s], counterfactually, that the project exists and is in full operation at the time the environmental analysis is conducted." 57 Cal.4th at 452. Nevertheless, the court went on to explain why this analysis "serves CEQA's goals in important ways." *Id*. at 455. For example, an EIR that compares a project's long-term impacts only against predicted future conditions will not alert the public to the Project's near-term impacts. Even if a large project may improve conditions in the long term, "decision makers and members of the public are entitled under CEQA to know the short- and medium-term environmental costs of achieving that desirable improvement." *Id*. Likewise, use of existing conditions avoids using predictive models, which carry inherent uncertainty. *Id*. It also "makes the analysis more accessible to decision makers and especially to members of the public, who may be familiar with the existing environment but not technically equipped to assess a projection into the distant future." *Id*.

Third, after arguing that an existing conditions analysis was unnecessary, Caltrans then suggests that the EIR *does* compare the Project's impacts to existing conditions. RB at 18 (claiming that the EIR discloses "GHG emissions information from the existing condition . . . and [future] operations"). Specifically, because the EIR provides quantitative estimates of existing and future GHG emissions, Caltrans implies that the public could have used this data to decipher the Project's climate impacts compared to existing conditions. *Id*. However, this raw data does not cure the baseline error. Under

[11] While Caltrans cites CNFF's Petition at page 19, line 24, it apparently meant to cite CNFF's opening brief. CNFF's Petition does not have 19 pages.

CEQA, an EIR must do more than simply *describe* existing conditions; rather, existing conditions "constitute the baseline physical conditions *by which a Lead Agency determines whether an impact is significant*." Guidelines § 15125(a) (emphasis added); *see also Neighbors*, 57 Cal.4th at 457 ("agencies normally must do what Guidelines section 15125(a) expressly requires—compare the project's impacts to existing environmental conditions . . . to determine their significance"). Here, Caltrans admits that its EIR does not gauge the significance of the Project's impacts by comparing them to existing conditions. RB at 12 (Project will reduce GHG emissions "when compared to a future 'no build'" scenario).

Furthermore, an agency cannot simply present raw data and expect the public to interpret it themselves. An EIR that requires readers to "do the math" falls short of a good-faith effort at full disclosure. *See, e.g., Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442 ("data in an EIR . . . must be presented in a manner calculated to adequately inform the public and decision makers"); *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale* (2010) 190 Cal.App.4th 1351, 1390-91 (members of the public "are not required to . . . make their own deductions regarding whether the project would significantly affect the existing environment") (disapproved on other grounds).

In sum, Caltrans cannot justify its failure to assess the Project's climate impacts against existing conditions. Caltrans' use of an improper baseline is legal error requiring invalidation of the EIR. *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 326-27 (invalidating EIR that utilized improper baseline).

E. Caltrans Presents No Credible Excuse for Omitting Feasible Mitigation for the Project's Significant Climate Impacts.

Caltrans does not dispute the feasibility of mitigation measures suggested by commenters and described in CNFF's opening brief. *See* RB at 19; POB at 21-24. Instead, it disclaims any need for mitigation because the Project allegedly will not have significant climate impacts. RB at 19. As described above, this conclusion is wrong. One of an EIR's primary goals is to identify ways to avoid or minimize such significant impacts by adopting mitigation measures (or alternatives). §§ 21002.1(a), 21061. Caltrans' failure to consider and adopt all feasible mitigation for the Project's significant climate

impacts constitutes prejudicial error. § 21081(a)(1), (3); *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 95.

III. Caltrans Fails to Justify the EIR's Faulty Air Quality Analysis.

Caltrans admits that the Project will cause emissions of some air pollutants to rise. RB at 20 (recognizing 11-12 percent increase in two mobile source air toxics ("MSAT")). It also acknowledges that the EIR does not analyze Project-specific health effects from these emissions. RB at 21. Caltrans justifies this omission in various ways, none of which have merit.

Caltrans first claims that the emissions increases are of no moment because it properly determined that "no meaningful differences in MSAT emissions were observed amongst alternatives and thus no mitigation measures are required." RB at 21 (citing AR 3828). Rather than assisting Caltrans, however, this claim demonstrates that the EIR once again uses an improper baseline to gauge the Project's impacts. Instead of comparing the Project's future emissions against existing baseline conditions, as CEQA requires (*Neighbors*, 57 Cal.4th at 448), the EIR compares the relative impacts of various Project alternatives. Then, compounding the error, the EIR bases its decision whether to require mitigation on this improper analysis. AR 3828.

Caltrans next asserts that the increased emission of various, specific air pollutants is minor in relation to the Project's overall, expected reduction of other air pollutants. RB at 20. However, as shown above, the EIR's air quality analysis does not account for the Project's induced demand and therefore understates the Project's emissions. Nor does it analyze how the Project may increase some residents' exposure to MSATs by routing the I-5 closer to their homes. AR 1690, 38907-08. Further, CEQA requires agencies to analyze whether "any aspect of the project . . . may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial." Guidelines § 15063(b)(1); POB at 29.

Next, Caltrans protests that it was too difficult to analyze Project-specific health impacts. RB at 21-22 (noting that CEQA does not require agencies to engage in "speculation"). But Caltrans readily admits that it and other agencies have previously conducted health risk assessments for other highway projects. RB at 22; AR 37186 (risk assessment for bridge project), 35770 (risk assessment for I-710 project), 35782 (fn. 2: Caltrans was lead agency for I-710 project). Caltrans tries to dismiss this fact,

claiming that "[j]ust because health risk assessments have been prepared in the past does not make them, *ipso facto*, reliable." RB at 23. However, it offers no reason why the other projects' assessments were unreliable, or why Caltrans and other agencies went to the effort and expense of conducting them if they were untrustworthy. Nor can Caltrans explain away the U.S. EPA and Caltrans staff's vehement disagreement with the agency's refusal to analyze the Project's health impacts. AR 6364-65, 38907-08, 41128-29. In the face of this evidence, Caltrans' generic statements about the uncertainty of health risk analyses (RB at 22) offer no defense.

Contrary to Caltrans' assertion (RB at 23), *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs*. (2001) 91 Cal.App.4th 1344 ("*Berkeley Jets*"), which invalidated an EIR for an airport expansion project, is directly analogous. In both cases the agency refused to analyze how the project's emission of air pollutants would cause health impacts. *Id*. at 1367-68; AR 2463-64, 6366. In both cases commenters suggested how the agency could meaningfully analyze these impacts even if it could not precisely quantify them. *Berkeley Jets*, 91 Cal.App.4th at 1367-70; AR 6365, 49216. Because Caltrans, like the agency in *Berkeley Jets*, failed to substantively respond to these comments and never conducted any meaningful health analysis, its EIR is inadequate under CEQA. *Berkeley Jets*, 91 Cal.App.4th at 1369-71. Rather than "find[ing] out and disclos[ing] all that it reasonably can," as required by law (Guidelines § 15144), Caltrans unlawfully chose to summarily "note the conclusion [that health risks were speculative] and terminate the discussion" (RB at 23).

Notably, Caltrans does not even attempt to distinguish *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184. *See* POB at 26. That case, which struck down an EIR that failed to correlate a project's air emissions with resultant health impacts, is also on point and controlling. *Id*. at 1219-20.

Finally, because the EIR concludes that the public health impacts related to the Project's air pollution will be insignificant, Caltrans did not adopt all feasible mitigation to address these impacts. AR 2040. As noted above, however, the Project will actually cause significant health impacts, triggering CEQA's requirement to adopt all feasible mitigation. § 21081. Critically, members of the public and Caltrans' own staff described many ways in which the agency could feasibly mitigate the Project's air quality-related health impacts. AR 38907-08, 48533-34, 42105. Because Caltrans refused

to consider these measures—such as design changes and installation of ventilation and air filters in nearby, affected buildings—the Project creates an unnecessary health risk for the public. Failure to mitigate this risk violates CEQA. *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1028-31.

IV. Caltrans Cannot Excuse the EIR's Inadequate Growth-Inducing Impacts Analysis.

Caltrans does little to defend the EIR's flawed analysis of the Project's potential to induce regional growth. Here again, Caltrans disregards many of CNFF's claims, cites no law to support its position, and fails to address CNFF's cited case law.

To begin with, Caltrans ignores settled law holding that zoning and land use controls do not necessarily limit growth, as the Project EIR assumes. *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 157; AR 2455, 3893; POB at 31-32. It also does not dispute that the EIR is internally inconsistent, acknowledging that there are "outlying rural areas not currently planned for development" yet asserting that the Project will not affect growth in these areas because growth is already planned there. AR 4028; POB at 33. These errors alone render the EIR inadequate.

Caltrans also cannot justify the EIR's very narrow study area in which it analyzes growth impacts. Caltrans' brief speculates that the Project will not induce growth by improving accessibility to Vista and other less urbanized areas because these communities are purportedly closer to the I-15 than the I-5. RB at 24. But the record shows that significant portions of Vista, San Marcos and other more rural communities are as close or closer to the I-5 than the I-15. AR 7523. The brief's unsubstantiated opinion does not constitute substantial evidence. § 21080(e)(2) ("Substantial evidence is not [] speculation [or] unsubstantiated opinion.").

Caltrans also cannot explain away its own economic analysis, which indicates that the Project will spur growth in the region. This study demonstrates that the Project's congestion benefits will cause millions more people to visit the area from as far away as Los Angeles and Orange County (AR 11619, 11624) and will cause freight businesses to grow (AR 11610-11). Caltrans asserts that its study is inapposite because it analyzes the benefits of rail and other improvements in addition to the Project. Caltrans is wrong. However, while portions of the study analyze a wider set of transportation projects, it also specifically describes how freeway widening projects induce significant economic and population

growth on their own. AR 11633-41 (describing growth-related effects of similar highway projects in other states), 11629-30 (analyzing increase in visitors and spending solely caused by widening I-5). Because Caltrans' own economic study predicts that the Project will cause regional growth, the EIR should have analyzed the environmental impacts associated with that growth. *Stanislaus Audubon Society, Inc.*, 33 Cal.App.4th at 158.

Finally, Caltrans argues that its analysis of growth-inducing impacts suffices because "the corridor would experience moderate growth even without the project." RB at 24. Once again, however, Caltrans unlawfully compares the Project's impacts with what may occur if the Project is not built, rather than with existing conditions. *Neighbors,* 57 Cal.4th at 454; Guidelines §§ 15125(a), 15126.6(e)(2), (3)(c).

Caltrans has cited no substantial evidence supporting the EIR's conclusion that the Project will not induce growth in the region.

V. Caltrans Fails to Justify the EIR's Faulty Analysis and Mitigation of Noise Impacts.

Caltrans does not dispute the validity of one of CNFF's noise-related claims but attempts to rebut the others. These efforts fail.

First, Caltrans does not dispute CNFF's claim that the agency reached inconsistent conclusions about the significance of the Project's noise impacts. POB at 36-37. While the EIR concludes that noise impacts will be *less* than significant after mitigation (RB at 25 [citing AR 2076]), Caltrans adopted a statement of overriding considerations concluding that noise impacts "have been identified as *significant* and not fully mitigable in the . . . EIR" (AR 50) (emphasis added). Caltrans offers no justification for certifying an EIR and adopting findings that reach opposite conclusions about noise impacts. These contradictory conclusions violate CEQA. *See Communities for a Better Environment,* 48 Cal.4th at 322 (analysis that misleads public as to nature of impacts contravenes CEQA).

Next, Caltrans attempts to defend the EIR's conclusion that many receptors experiencing noise increases of 3 to 6 decibels will not be significantly impacted. The agency concedes that "even minor increases" in noise may be significant when existing noise levels already exceed relevant noise thresholds. RB at 26 (citing *Gray,* 167 Cal.App.4th at 1122-23 and *L.A. Unified School Dist.,* 58

Cal.App.4th 1019). However, it claims that the EIR properly accounts for existing, noisy conditions when analyzing the significance of the Project's noise impacts. RB at 26-27. Caltrans is wrong.

Far from acknowledging that 3 to 6 decibel noise increases may be significant in already-noisy locations, the EIR declares that increases up to 6 decibels "would *not* significantly contribute to the existing noise levels [because n]oise levels . . . are *currently loud and would remain loud*." AR 2044 (finding 6 decibel increase in Segment 5 to be insignificant) (emphasis added); *see also, e.g.,* AR 2047-48 (same for 6 decibel increase in Segment 12), 2043 (same for 4 decibel increase in Segment 1). Notably, many of these increases will occur in locations that already exceed applicable noise criteria or that will exceed them with Project construction.[12] Caltrans' claim that existing, noisy conditions somehow minimize the significance of the Project's noise impacts violates CEQA. *L.A. Unified School Dist.*, 58 Cal.App.4th at 1025-26.

Additionally, Caltrans emphasizes that it conducted a separate analysis under federal law considering whether modest noise increases may be significant in already noisy locations. RB at 26-27. This analysis assesses whether the Project will cause noise levels to approach or exceed federal noise abatement criteria, regardless whether the Project contributes only a modest amount of new noise. AR 1707-08; *see also, e.g*., AR 1714, 1718, 1722. This federal analysis does not cure the EIR's CEQA errors for two reasons. First, as described above, the EIR concludes that noise increases of 6 decibels or less are categorically insignificant for purposes of CEQA, *regardless* whether the Project will cause noise levels to exceed relevant criteria. This approach flatly contravenes *Gray*, 167 Cal.App.4th at 1122-23 and *L.A. Unified School Dist.,* 58 Cal.App.4th 1025-26.

Second, Caltrans' reliance on the federal analysis caused the agency to overlook potentially feasible mitigation required by CEQA. In its federal analysis, the EIR considers whether sound walls can feasibly mitigate noise impacts in locations where noise levels will approach federal criteria—

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[12] AR 1730-31 (Receptor R5.14 in Segment 5 will have a 6 decibel increase over existing conditions, with future noise levels that exceed federal noise abatement criteria—or NAC—of 67 decibels), *id.* (Receptors R5.10, R5.22 and R5.23 in Segment 5 will have 4 to 5 decibel increases in areas where noise levels already exceed NAC), 1714 (Receptors R1.5 and R1.6 in Segment 1 will have 4 decibel increases with future noise levels that approach or exceed NAC), 1765 (Receptors 12.34 and 12.48 in Segment 12 will have 6 decibel increases in areas where noise levels already approach or exceed NAC).

generally 67 decibels. AR 1707-08. It also recommends installing insulation or other sound attenuation measures in locations where sound walls are infeasible and receptors will experience "severe" noise impacts—i.e., an increase of 30 decibels or an overall noise level of 75 decibels or greater. AR 1709; *see also, e.g.*, AR 1724 (Receptor R4.11), 1725 (Receptor R4.23), 1732 (Receptor R6.12A). Crucially, Caltrans never considered whether sound insulation or other mitigation could feasibly mitigate impacts at the numerous receptors that will experience substantial (but less than "severe") noise impacts and where sound walls are infeasible due to cost or technical considerations.[13]

As one example among many, the Project will cause 7 decibel noise increases and overall noise levels of 67-71 decibels at various residences in Carlsbad. AR 1790 (Receptors R18.8, R18.9, and R18.27). Because the topography around these homes makes it infeasible to construct sound walls (AR 1789), CEQA required Caltrans to analyze whether other types of sound mitigation were feasible. § 21081(a)(1), (3) (CEQA requires Caltrans to analyze and adopt *all* feasible mitigation for *all* significant noise impacts). However, because the overall noise levels did not meet federal criteria for "severe" noise impacts, Caltrans failed to do so. AR 1789-90. The agency's failure to identify such mitigation was prejudicial error. § 21081(a)(1), (3); *Berkeley Jets,* 91 Cal.App.4th at 1380-82 (rejecting CEQA noise analysis that relied solely on federal standards).

Last, Caltrans provides no tenable justification for refusing either to adopt quiet pavement or to find that this mitigation is infeasible. Caltrans admits that it did not expressly reject this measure as infeasible due to "[s]pecific economic, legal, social, technological, or other considerations," as CEQA requires. § 21081(a)(3). Rather, it posits an "implicit finding" of infeasibility. RB at 30. The agency's failure to follow CEQA's procedural requirement to make express infeasibility findings "is in direct contravention of the law." *Village Laguna of Laguna Beach, Inc. v. Orange County Bd. of Supervisors* (1982) 134 Cal.App.3d 1022, 1034 (CEQA requires express findings of infeasibility).

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[13] AR 2054 (acknowledging that Receptors R6.6, R6.7, R9.2, R9.3, R9.4, R9.4A, R9.14, R9.15, R9.15A, R10.6, R13.8, R14.6, R18.1, R18.8, R18.9 and R18.27 will have significant noise impacts under CEQA that are not mitigated by sound walls), 2044-52 (not imposing any mitigation for these impacts beyond what is required by federal law). As explained above, the EIR also erroneously determines that noise increases up to 6 decibels are insignificant, and therefore also fails to consider mitigation for them. AR 2043-53 (Segments 1-5, 7, 10, 12, 15, 16, 21 and 22).

Although the substantial evidence standard does not apply to this claim (*cf*. RB at 29-30)[14], if it did, no substantial evidence supports Caltrans' "implicit" finding. Caltrans asserts that it may not use federal funds to pay for quiet pavement, which it claims is more expensive and shorter-lasting than traditional pavement. RB at 29; AR 36231. However, Caltrans' own guidance recognizes that the agency may use *State-only* funds to pay for quiet pavement. AR 36231. Caltrans also cites no evidence that it has actually analyzed the cost or other feasibility factors for quiet pavement; on the contrary, it admits that "[a] conclusion has not been made about practicality and effectiveness" of quiet pavement. RB at 29 (citing AR 3881). Caltrans committed prejudicial error by indefinitely delaying consideration of this measure, rather than either adopting it or finding it infeasible. *See* POB at 39-40.

In sum, Caltrans' confusing and inaccurate analysis of the Project's noise impacts, and its refusal to identify feasible mitigation, resulted in a legally deficient EIR.

CONCLUSION

Caltrans erred in certifying an EIR for the Project that fails to properly analyze or mitigate significant environmental impacts under CEQA. CNFF respectfully requests the Court to issue a writ directing Caltrans to rescind both its Project approval and EIR certification, and to enjoin the Project's implementation until such time as Caltrans complies with CEQA.

DATED: July 20, 2015

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By: _____

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[14] *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 351 and *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1265, 1269, are inapposite. Unlike the present case, the agencies there *had* specifically rejected mitigation as infeasible, and the courts therefore reviewed the infeasibility determinations for substantial evidence. *Id*.

PROOF OF SERVICE

Cleveland National Forest Foundation v. California Department of Transportation
Case No. 37-2013-00078391-CU-TT-CTL
Superior Court of California, County of San Diego

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, CA 94102.

On July 20, 2015, I served true copies of the following document(s) described as:

PETITIONER'S REPLY BRIEF

on the parties in this action as follows:

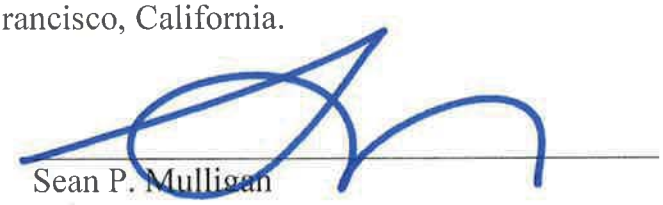
SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from e-mail address Mulligan@smwlaw.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on July 20, 2015, at San Francisco, California.



Sean P. Mulligan

SERVICE LIST
Cleveland National Forest Foundation v. California Department of Transportation
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Superior Court of California, County of San Diego

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