CASE NO. D063288

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

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

Petitioners, Respondents, and Cross-Appellants

v.

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

Respondents and Appellants.

PEOPLE OF THE STATE OF CALIFORNIA,

Intervener, Respondent, and Cross-Appellant.

Appeal from the Superior Court of California
County of San Diego-Central Division
37-2011-00101593-CU-TT-CTL
(Consolidated with Case No.: 37-2011-00101660-CU-TT-CTL)
Honorable Timothy B. Taylor

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND PROPOSED BRIEF OF CALIFORNIA ASSOCIATION OF COUNCILS OF GOVERNMENTS, SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS, SACRAMENTO AREA COUNCIL OF GOVERNMENTS, METROPOLITAN TRANSPORTATION COMMISSION, LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, SAN DIEGO COUNTY AIR POLLUTION CONTROL DISTRICT, AND THE SELF-HELP COUNTIES COALITION

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APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF APPELLANTS SAN DIEGO ASSOCIATION OF GOVERNMENTS AND SAN DIEGO ASSOCIATION OF GOVERNMENTS BOARD OF DIRECTORS

Pursuant to Rule 8.200, subdivision (c), of the California Rules of Court, the California Association of Councils of Governments (CALCOG), the Southern California Association of Governments (SCAG), the Sacramento Area Council of Governments (SACOG), the Metropolitan Transportation Commission (MTC), the League of California Cities (League), the California State Association of Counties (CSAC), the San Diego County Air Pollution Control District (SDAPCD), and the Self-Help Counties Coalition (SHCC) submit this application to file an *Amici Curiae* Brief in support of the position of Appellants San Diego Association of Governments (SANDAG) and the SANDAG Board of Directors in this matter.

CALCOG is an association of 34 California Councils of Governments (COGs), including all 18 Metropolitan Planning Organizations (MPOs) in California that are responsible for adopting the Regional Transportation Plans (RTPs) at issue in this case. In addition, CALCOG represents many transportation authorities and commissions that have programming responsibilities under RTPs, or are otherwise directly affected by RTPs.

SCAG, SACOG, and MTC are the only other MPOs to date that, in addition to SANDAG, have adopted an RTP that includes a Sustainable Communities Strategy (SCS) as authorized under Government Code section 65080, as amended by the California Legislature in 2008 by Senate Bill 375 (SB 375). SCAG represents 191 cities and six counties in California. SACOG represents 22 cities and six counties in California. MTC represents 100 municipalities, eight counties, and one city and county in the greater San Francisco Bay Area.

The League is an association of 467 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide significance. The Committee has concluded that this case has statewide significance.

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

The Committee has determined that this case raises important issues that affect all counties.

SDAPCD is one of 35 local air districts in California. Pursuant to California Health and Safety Code section 40000 et. seq., SDAPCD has primary responsibility for the control of air pollution from all sources within San Diego County, other than emissions from motor vehicles. As such, SDAPCD regulates emissions from stationary sources, and adopts air quality plans pursuant to state and federal law to achieve air quality standards. SDAPCD has determined that the issues raised in this case, especially those addressed in sections 2 and 3 of the attached *Amici Curiae* brief, have particular significance for its ongoing planning efforts.

SHCC is an organization of 20 local county transportation agencies that receive funding from local sales tax measures dedicated to transportation that were approved by a super-majority. Almost two-thirds of all transportation investments in California come from local sales tax investments. SHCC works to develop sound policies for the transportation and infrastructure investments that are included by MPOs in their RTPs.

Like other MPOs, SCAG, SACOG and MTC must adopt a new RTP every four years and they have already started to plan for the adoption of new RTPs beginning in 2016. They join as amicus here to provide depth and context to the points made in the accompanying *Amici Curiae* brief as three agencies that have participated in the same process that SANDAG

undertook, and that is now challenged in this lawsuit. SCAG, SACOG and MTC also have an abiding and continuing interest in the implementation of SB 375 and serve as "lead agencies" under the California Environmental Quality Act (CEQA). SCAG, SACOG, and MTC have direct and deep experience regarding the interplay between CEQA, SB 375, and Federal and State law governing the preparation of RTPs.

CALCOG, SCAG, SACOG, MTC, the League, CSAC, SDAPCD, and SHCC have identified this case as having particular significance to their organizations, as well as to the cities and counties in California. All MPOs have a compelling interest in this case because it is the first to involve a challenge to the adequacy of an environmental impact report (EIR) prepared for an RTP/SCS. All cities and counties in California have a compelling interest in this case because of its potential for improperly intruding on the exercise of discretion over local planning decisions and determinations of thresholds of significance.

Our purpose in filing this brief is to provide the Court with our perspective regarding how the long-range requirements and planning objectives embodied in an RTP, along with the regulatory structure of greenhouse gas reduction requirements and other "smart growth principles" embodied in an SCS, interrelate with the environmental review process required by CEQA. This effort necessarily involves striking a balance between complex and sometimes competing goals. Any decision that does

not account fully for this complexity could have unintended consequences, cause inefficient environmental review, waste public resources, deprive COGs and MPOs of the discretion they must retain in order to make difficult policy decisions about how their communities should grow and evolve in the coming decades, and improperly interfere with the discretion of local elected officials to make local land-use decisions.

No party or counsel for a party in this case authored any part of the accompanying *amicus curiae* brief. No party or party's counsel made any monetary contribution to fund the preparation of the brief. This brief has been prepared "pro bono" solely on behalf of Amici Curiae.

Amici Curiae respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: January 22, 2014 REMY MOOSE MANLEY, LLP

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AMICI CURIAE BRIEF

INTRODUCTION

In attacking the Environmental Impact Report (EIR) prepared by the San Diego Association of Governments (SANDAG) for its Regional Transportation Plan / Sustainable Communities Strategy (RTP/SCS), petitioners Cleveland National Forest Foundation and the Center for Biological Diversity (collectively, CNFF) and intervener the California Attorney General (AG) significantly misapprehend the requirements of the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). The Trial Court's Ruling reflects these same errors.

These arguments, if accepted, would have implications not only for SANDAG, but for other agencies involved in the RTP/SCS process, as well as those agencies that perform planning functions under a myriad of other programs. The California Association of Councils of Governments (CALCOG), the Southern California Association of Governments (SCAG), the Sacramento Area Council of Governments (SACOG), the Metropolitan Transportation Commission (MTC), the League of California Cities (League), the California State Association of Counties (CSAC), the San Diego County Air Pollution Control District (SDAPCD), and the Self-Help Counties Coalition (SHCC) file this brief in order to offer their own perspective on these issues. The issues addressed in this brief are: (1) the lead agency's discretion to balance environmental concerns against other

legitimate goals, policies and obligations, particularly those established by other Federal and State statutes; (2) the nature of the lead agency's discretion to fashion a standard or threshold for determining whether a project will have significant cumulative impacts with respect to greenhouse gas emissions; and (3) the suitability of preparing a program EIR for an RTP/SCS, and the standards governing the adequacy of such a document. [1]

ARGUMENT

1. The lead agency has discretion to balance environmental concerns against other, potentially competing goals and objectives; CEQA does not demand that environmental concerns trump all others.

The Trial Court's Ruling and the briefs filed by CNFF and the AG focus almost exclusively on the obligations of SANDAG under CEQA. They devote little attention to the other Federal and State laws governing the preparation of Regional Transportation Plans (RTPs) and Sustainable Communities Strategies (SCSs) by SANDAG and other Metropolitan Planning Organizations (MPOs) under Federal law.

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[1] / Amici Curiae CALCOG, SCAG, SACOG, and MTC sought leave to file an amicus brief with the trial court. The Trial Court denied the application and refused to consider the briefs filed by CALCOG, SCAG, SACOG, MTC and others. (Joint Appendix, JA 000772 [September 25, 2012 minute order].)

In its ruling, the Trial Court stated that SANDAG had "recruited" Amici. (Joint Appendix, JA 001047-48 [Trial Court's Ruling, pp. 2-3].) This statement is false. Amici were not "recruited" by SANDAG, or by anyone else. Amici took the initiative to participate at the trial court level in view of the importance of the issues raised in the litigation.

The League, CSAC, SDAPCD, and SHCC were not involved in the trial court application, but they have since joined as additional Amici.

CEQA does apply to decision-making by California MPOs that may affect the environment. But CEQA is only one of many laws that MPOs must apply. And, although the Trial Court's Ruling suggests otherwise, CEQA does not trump the rest.

a. The nature of MPOs

MPOs are organizations required by federal law to coordinate land-use and transportation policy across a metropolitan region. They thus occupy the space between federal, state, and local government. Each MPO [2] consists of local elected officials from cities and counties, representatives from "public agencies that administer or operate major modes of transportation in the metropolitan area," and certain State officials. (23 U.S.C. § 134(d)(2).) Because MPOs are planning organizations covering broad metropolitan areas with numerous local agencies as members, they are well-situated to consider, on a region-wide basis, transportation and planning issues. (See 23 U.S.C. § 134(d).) MPOs thus reflect the reality that transportation networks do not stop at the city limits, and that transportation policy is often best addressed in a coordinated, region-wide manner.

But MPOs are not designed to operate in isolation. They are not regional overlords. In fact, each MPO is encouraged "to consult with" local officials regarding local planning activities and relevant issues of "land use

[2] / Some MPOs operate as councils of governments (COGs), while others are freestanding entities.

management, natural resources, environmental protection, conservation, and historic preservation." (23 U.S.C. § 134(g)(3)(A), (i)(5)(A).) Thus, an MPO's planning process must be coordinated with local policies and activities, "including State and local planned growth, economic development, environmental protection, airport operations, and freight movements." (23 U.S.C. § 134(g)(3)(A).)

Furthermore, Federal law does not delegate to MPOs broad authority over cities and counties. (See, e.g., 23 U.S.C. § 134(d)(3), (o).) Rather, MPOs are mandated to "'provide for consideration of projects and strategies that' serve a variety of goals, including (1) supporting regional 'economic vitality'. . . ." (*Darensburg v. Metropolitan Transp. Com.* (9th Cir. 2011) 636 F.3d 511, 516-17; see 23 U.S.C. § 134(h)(1).)

b. Policies applicable to MPOs

SANDAG is one of 18 federally designated MPOs in California. SANDAG, like other MPOs, must address a variety of roles and responsibilities under both State and Federal law in developing an RTP.

MPOs serve as the primary forum where the California Department of Transportation, transit providers, local agencies, and the public develop plans and programs to address regional and local transportation needs (an RTP is sometimes referred to as a metropolitan transportation plan, or MTP, under federal law). As a result, the RTP must balance a host of policy objectives in addition to those specifically identified in CEQA. (See

generally California Transportation Commission, *Regional Transportation Plan Guidelines* (April 2010) (RTP Guidelines), Appendix C -- Regional Transportation Plan Checklist.) [3] The RTP must address the following issues:

- ***Must Plan for an Intermodal System Plan.*** The RTP must provide for the development, management, and operation of transportation systems (including accessible pedestrian and bicycle facilities) that will function as an intermodal transportation system. (23 U.S.C. § 134(c).) [4] The RTP must be developed in coordination with agencies responsible for local planning activities, and shall consider the related planning activities within each jurisdiction. (23 U.S.C. § 134(g)(3); 23 C.F.R. § 450.316(b).) [5]
- ***Must Address Specific Planning Factors.*** Planning factors that must be considered include: (1) supporting economic vitality; (2) increasing safety and security; (3) increasing accessibility and mobility of people and freight; (4) protecting and enhancing the environment and quality of life, promoting energy conservation and

[3] / The CTC's RTP Guidelines appear in the record of proceedings at pages AR 017674-017927.
[4] / The citation "23 U.S.C. § 134(c)" refers to Title 23 of the United States Code at section 134, subdivision (c). This same citation format is used throughout this brief to refer to federal statutes.
[5] / The citation "23 C.F.R. § 450.316(b)" refers to Title 23 of the Code of Federal Regulations at section 450.316, subdivision (b). This same citation format is used throughout this brief to refer to federal regulations.

consistency between transportation improvements and State and local planned growth and economic development patterns; (5) enhancing the integration and connectivity of transportation; (6) promoting efficiency; and (7) emphasizing the preservation of the existing system. (23 U.S.C. § 134(h); 23 C.F.R. § 450.306(a).)

- ***Must Include a Planning Baseline.*** MPOs must use the latest estimates and assumptions for population, land use, travel, employment, congestion, and economic activity. (23 C.F.R. § 450.322(e).) This information includes: (1) the projected transportation demand of persons and goods; (2) existing and proposed facilities (including major roadways, transit, multimodal and intermodal facilities, pedestrian walkways and bicycle facilities, and intermodal connectors) that should function as an integrated system; (3) operational and management strategies to improve performance of transportation facilities to relieve congestion and maximize safety and mobility; (4) consideration of the results of the congestion management process; (5) assessment of capital investments and other strategies to preserve the existing and projected infrastructure; (6) detailed design concepts and scope descriptions for existing and proposed facilities, (7) a discussion of potential mitigation; (8) pedestrian and bicycle facilities; (9) transportation and transit enhancement activities; and (10) a

financial plan. (23 C.F.R. § 450.322(f); see also Gov. Code, § 14522.1;RTP Guidelines, p. 35.)

- ***Must Be Consistent with Other Plans.*** The RTP must be consistent with the California Transportation Plan, transportation plans of adjacent regions, short-range transit plans, air quality plans, airport plans, and plans for intelligent transportation systems. (23 C.F.R. § 450.306; Gov. Code, § 65081.1 (primary carrier airports); RTP Guidelines, § 2.5, p. 22.) In addition, MPOs must consider and incorporate the transportation plans of cities, counties, districts, private organizations, and state and federal agencies. (Gov. Code, § 65080, subd. (a).) The plan must also be consistent with the public transit-human services transportation plan. (49 U.S.C. §§ 5310, 5316, 5317; 23 C.F.R. § 450.306(g).)
- ***Must Be Based on Public Participation Plan that Includes Strategies for Underserved Communities.*** The RTP must implement a public participation plan that provides individual citizens, as well as representatives of public interest groups including public transportation employees, freight shippers, private transportation providers, public transportation users, pedestrian walkways and bicycle transportation facilities users, persons with disabilities, and other interested parties with a "reasonable opportunity" to comment on the RTP. (23 C.F.R. § 450.316.) The plan must also describe

explicit procedures, strategies and desired outcomes for seeking out and considering the needs of those traditionally underserved by existing transportation systems, such as low-income and minority households, who may face challenges accessing employment and other services. (23 C.F.R. § 450.316(a)(1)(vii); see also Title VI of the federal Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.); Gov. Code, § 11135; Cal. Executive Order 12898.)

- ***Must Include Other State and Federal Agency Consultation.*** The RTP must be coordinated with all transportation providers, facility operators such as airports, appropriate federal, state, local agencies, Tribal Governments, environmental resource agencies, air districts, pedestrian and bicycle representatives, and adjoining MPOs or Regional Transportation Planning Agencies (RTPAs). The RTP must reflect consultation with resource and permit agencies (CTC's RTP Guidelines identify a minimum of 25 agencies) to ensure early coordination with environmental resource protection and management plans. (23 C.F.R. § 450.322(g)(1), (2); RTP Guidelines, § 4.9.)
- ***Must Meet Air Conformity Requirement***. The Federal Clean Air Act requires RTPs in nonattainment areas to be coordinated with the development of transportation control measures in the State Implementation Plan (SIP), and the RTP is subject to an air quality

conformity determination by the MPO and United States Department of Transportation. (23 U.S.C. § 134(i)(3); 40 C.F.R. § 93.106(a); see generally 42 U.S.C. § 7504(b); 40 C.F.R. Parts 51 and 93.) Conformity to an implementation plan means (A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and (B) that such activities will not (i) cause or contribute to any new violation of any standard in any area; (ii) increase the frequency or severity of any existing violation in any area; or (iii) delay timely attainment of any standard or required interim emission reductions or other milestones in any area. (40 U.S.C. § 7506 (c).) Conformity must be demonstrated for all motor-vehicle related pollutants for which the area is designated as "nonattainment" or has a maintenance plan, which may include ozone, carbon monoxide, nitrogen dioxide, particulate matter (PM_{10}) and fine particulate matter ($PM_{2.5}$). (40 C.F.R. § 93.102). The MPO in these areas must use reasonable land development assumptions that are consistent with the future transportation system alternatives for which emissions are estimated. (RTP Guidelines, p. 44, citing 40 C.F.R. § 93.122(b)(1)(iv).) Nonattainment regions must also use a capacity-sensitive methodology that can differentiate between peak- and off-

peak volumes and speeds on each roadway segment represented in the network-based travel model. (RTP Guidelines, p. 45, citing 40 C.F.R. § 93.122 (b)(2).)

- ***Must be Consistent with Financial Programming Documents***. The RTP is the long term plan that identifies improvements for the Federal Transportation Improvement Program (or "FTIP," the financially constrained four year program listing of all federally funded and regionally significant projects in the region), the State Transportation Improvement Program (or "STIP," a biennial program adopted by the California Transportation Commission), the Regional Transportation Improvement Program (or "RTIP," a five year program of transportation projects usually adopted on a county basis), the Interregional Transportation Plan (or "ITIP," a five-year list of projects prepared by the Department of Transportation), and the Overall Work Program (or "OWP," a listing of transportation planning studies and tasks to be performed by the MPO for the next year). (RTP Guidelines, § 2.4.)
- ***Must Respond to Changing Circumstances through Frequent Updates***. While the RTP is a long term plan, the plan is required to undergo continuing updates and refinements to account for changes in funding and forecasted needs. (Gov. Code, § 65080, subd. (d) [requiring updated regional transportation plans to be submitted to

the California Transportation Commission and the Department of Transportation every four to five years].) Similarly, "the regional greenhouse gas emission reduction targets [must be updated] every eight years consistent with each metropolitan planning organization's timeframe for updating its regional transportation plan under federal law until 2050." (*Id*. § 65080, subd. (b)(2)(A)(iv).) Therefore, between today and the year 2050, SANDAG's RTP will be updated approximately nine times and the greenhouse gas targets will be updated four times.

- ***Must Include Congestion Management Process in Urbanized Areas.*** Urbanized areas with a population over 200,000—called Transportation Management Areas or TMAs—must develop a Congestion Management Process (CMP) as part of the regional planning process. The CMP represents a systematic process for managing traffic congestion, designed to provide for the safe and effective management and operation of new and existing transportation facilities, and information on transportation system performance. In TMAs designated as ozone or carbon monoxide non-attainment areas, the Federal guidelines prohibit projects that increase capacity for single occupant vehicles unless the project comes from a CMP. (23 C.F.R. § 450.320(c).)

- ***Must Include a Sustainable Communities Strategy (SCS).*** The SCS must: (i) identify the general location of uses, residential densities, and building intensities within the region; (ii) identify areas within the region sufficient to house all the population of the region, including all economic segments of the population, over the course of the planning period of the regional transportation plan taking into account net migration into the region, population growth, household formation and employment growth; (iii) identify areas within the region sufficient to house an eight-year projection of the regional housing need for the region pursuant to Government Code Section 65584; (iv) identify a transportation network to service the transportation needs of the region; (v) gather and consider the best practically available scientific information regarding resource areas and farmland in the region as defined in Government Code section 65080.01, subdivisions (a) and (b); (vi) consider the state housing goals specified in Government Code sections 65580 and 65581; (vii) set forth a forecasted development pattern for the region, which, when integrated with the transportation network, and other transportation measures and policies, will reduce the greenhouse gas (GHG) emissions from automobiles and light trucks to achieve, if feasible, the GHG emission reduction target approved for the region by the California Air Resources Board (CARB); and (viii) allow the

RTP to comply with Section 176 of the Federal Clean Air Act (42 U.S.C. § 7506). (Gov. Code, § 65080 (b)(2)(B).) In preparing the SCS, an MPO must "utilize the most recent planning assumptions considering local general plans and other factors." (*Ibid*.) After an SCS is adopted, CARB must review the adopted SCS to confirm and accept the MPO's determination that the SCS would meet regional GHG targets. (Gov. Code, § 65080 (J)(ii), (iii).) If the combination of measures in the SCS would not meet the regional targets, the MPO must prepare a separate "alternative planning strategy" (APS) to meet the targets. (Gov. Code, § 65080 (I).)

- ***Must Be Fiscally Constrained*.** RTPs are also financially constrained. The MPO must show in its financial plan that it is reasonable to assume that funds will be available to pay for the projects included in the plan. Federal and state laws require that the RTP/SCS must constrain its budget by only including revenues that can reasonably be expected.[6] Therefore, the revenue assumptions contained in this plan assume that current sources of revenue will continue into the future at rates of growth consistent with historical

[6] / One of SANDAG's revenue sources for transportation projects, for example, is TransNet. TransNet is a half-cent sales tax for local transportation projects that was first approved by voters in 1988, and then extended in 2004 for another 40 years, each time by a two-thirds majority. SANDAG selected the 2050 horizon date for its RTP, in part, because the TransNet Extension expires in 2048.

trends and projected future economic conditions. A Financial Plan shall demonstrate how an adopted RTP can be implemented, indicate resources that can reasonably be expected to be available to carry out the plan, and recommend any additional financing strategies for needed projects and programs. Total dollar amount for projects must take into account a projected rate of inflation. The MPO, transit operators and state shall cooperatively develop estimates of funds that will be available to support plan implementation. (23 C.F.R. § 450.322(f)(10).)

c. CEQA requires that policy decisions be informed by environmental considerations, not that environmental considerations trump all other policy issues.

As the above summary makes clear, the preparation of an RTP/SCS involves striking a balance between a wide range of concerns. Many of these concerns focus on environmental considerations: air quality, GHG emissions, transportation levels of service, identifying areas sufficient to house the next eight years of population growth, energy efficiency, and the like. Still other concerns are not purely environmental in character, but are no less important: financial feasibility, efficiency, economic vitality, accessibility, reliability, and so forth. Suffice to say that an RTP/SCS is a complex document with numerous, and often competing, policy considerations.

In this case, SANDAG adopted an RTP (including an SCS), and its environmental impact report (EIR) was designed to provide a programmatic analysis of the environmental impacts of taking those actions. (AR 000253.)

CNFF and the AG exalt just one duty: SANDAG's obligation under CEQA to disclose the project's environmental impacts, and to identify and adopt feasible mitigation measures or alternatives to address those impacts. They virtually ignore the rest. Moreover, even as to CEQA, their argument mischaracterizes SANDAG's discretion to make determinations about whether and how to mitigate a project's impacts, and how to strike a balance between those impacts and other policy considerations. [7]

Under CEQA, an agency must avoid or substantially lessen the significant environmental impacts of a project when it is feasible to do so. (Pub. Resources Code, §§ 21001, subd. (c), 21002, 21002.1, subd. (b), 21081, subd. (a).) This duty, however, is tempered by CEQA's recognition that an agency has discretion to approve a project notwithstanding its environmental impacts, if the agency determines it is infeasible to lessen or

[7] / Amici do not know how the Trial Court felt about this issue. The Trial Court ruled that SANDAG violated CEQA by failing to analyze the project using the 2050 emission targets established by Executive Order S-3-05, and by adopting inadequate mitigation measures to address GHG emissions. (Joint Appendix, JA 001058 [Trial Court Ruling, p. 13].) Although the Legislature has directed the courts to address all issues raised in a CEQA challenge (Pub. Resources Code, § 21005, subd. (c)), the Trial Court declined to do so.

avoid those significant effects (Pub. Resources Code, §§ 21002, 21081, subd. (a)(3)), and the project's identified benefits outweigh the unavoidable, significant environmental impacts. (Pub. Resources Code, §§ 21002.1, subd. (c), 21081, subd. (b); see *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553.)

"There is no requirement that adverse impacts of a project be avoided completely or reduced to a level of insignificance . . . if such would render the project unfeasible." (*Las Virgenes Homeowners Federation, Inc. v. County of Los Angeles* (1986) 177 Cal.App.3d 300, 309.) Thus, CEQA provides an agency with express discretion to approve a project, despite its significant environmental effects, by adopting a "statement of overriding considerations." This statement focuses the "larger, more general reasons for approving the project, such as the need to create new jobs, provide housing, generate taxes, and the like." (*Concerned Citizens of South Central Los Angeles v. Los Angeles Unified School District* (1994) 24 Cal.App.4th 826, 847; see *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222-1224, overruled on other grounds in *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 529.)

"CEQA specifically provides that it is *the public agency*, not the EIR, that bears responsibility for making 'findings' as to whether . . . there are 'specific overriding economic, legal, social, technological, or other

benefits of the project' that 'outweigh the significant effects on the environment.' ([Pub. Resources Code,] §§ 21002.1, subds. (b), (c), 21081.)" (*San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 690 (italics in original).) Thus, an EIR need not address the possible benefits that may justify project approval despite significant environmental effects.

In approving a project with significant environmental effects, an agency may reject mitigation measures and alternatives, and adopt a statement of overriding considerations, based on the agency's policy objectives. In *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, for example, a city certified an EIR and approved a master plan for a city-owned greenbelt. The plan authorized construction of a multi-use trail across the property. The trail would have significant impacts on a sensitive plant species. The city rejected alternatives, however, because none of them would succeed in constructing a multi-use trail across the property. The Court upheld the city's decision to reject alternatives and to approve the plan based on the city's policy objective of improving the accessibility of open space, particularly for disabled persons. Although the petitioners attacked that decision, ultimately that attack merely reflected a policy disagreement with the balance struck by the city council in making its policy decision. (*Id*. at pp. 1000-1003; see also *Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503, 530-531 [county did not

abuse its discretion in approving solar farm based on policy determination that project benefits – jobs, revenue, and advancing renewable energy goals – outweighed project's environmental impacts]; *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1307-1308 [upholding statement of overriding considerations citing benefits to city associated with, among other things, obtaining commitment to implement traffic mitigation in exchange for providing water to support expansion of university]; *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 353-359 [city did not violate CEQA in approving project with significant impacts on agricultural land, and rejecting smaller alternatives, in view of city's goal of increasing number and diversity of available housing]; *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 714-716 [city did not abuse its discretion in rejecting down-sized alternative in light of city's housing goals]; *Towards Responsibility in Planning v. City Council* (1988) 200 Cal.App.3d 671, 683-685 [upholding city's decision to approve industrial park on agricultural land in view of city's policy goal of increasing supply of land available for high technology business parks].)

In this case, SANDAG adopted extensive findings addressing the alternatives set forth in the EIR, as well as mitigation measures and alternatives proposed by those who submitted comments on the EIR. (AR 000131-000173.) SANDAG also adopted a "statement of overriding

considerations" setting forth the benefits of the RTP/SCS that, in SANDAG's view, justified approving the project despite its significant environmental impacts. (AR 000179-000181.)

The policy considerations and project benefits described in SANDAG's statement of overriding considerations are numerous and wide-ranging. (*Ibid.*) SANDAG found that the RTP/SCS would accommodate long-range population, housing, and employment growth, while also improving access to employment, shopping, and services in all parts of the region and for all income levels. (AR 000180.) SANDAG also cited improved transit times, better access to different types of transit services, and the addition of new bicycle, pedestrian, and transit projects throughout the metropolitan area. (AR 000180-181.) Other cited benefits include congestion relief, enhanced safety, advancing statewide and regional goals, economic benefits attributable to improved access to jobs and to the creation of new jobs, additional housing, and the preservation of open space. (AR 000179-181.) SANDAG determined that each of these benefits, and all of them collectively, outweighed the significant environmental impacts that the RTP/SCS would cause. (*Ibid.*) The Trial Court erred by failing to give those findings the deference they deserve. (See *California Native Plant Society v. City of Santa Cruz*, *supra*, 177 Cal.App.4th at pp. 1000-1003; *Save Panoche Valley v. San Benito County*, *supra*, 217 Cal.App.4th at pp. 530-531.)

SANDAG adopted these findings against a regulatory and policy landscape of unusual sweep and complexity. Under CEQA, SANDAG's decision is entitled to deference. The briefs filed by CNFF and the AG appear to reflect an effort to focus exclusively on the "duty to mitigate" under CEQA, and thus to second guess the manner in which SANDAG exercised its discretion. Such policy differences, however sincere, do not constitute a violation of CEQA.

2. Under CEQA, the lead agency has broad discretion to identify and rely upon appropriate standards or thresholds to determine whether a project's impacts will be significant; that discretion extends to significance thresholds for a project's greenhouse gas emissions.

CNFF criticizes SANDAG for failing to use Executive Order S-3-05 as a "significance threshold" to determine whether the RTP/SCS would have a significant impact with respect to GHG emissions. (Respondent and Cross-Appellant CNFF's Opening Brief [CNFF's Opening Brief], pp. 36-39, 43-45.) The Trial Court agreed with this argument. (Joint Appendix, JA 001056-57 [Trial Court Ruling, pp. 11-12].)

The Trial Court erred by failing to recognize the extent to which CEQA delegates to lead agencies the discretion to establish "significance thresholds" used to assess a project's environmental effects.

CEQA Guidelines section 15064.7 states public agencies are "encouraged to develop and publish thresholds." CEQA does not, however, require the adopting of formal thresholds. (*Oakland Heritage Alliance v.*

City of Oakland (2011) 195 Cal.App.4th 884, 896 (2011) [agency has discretion to rely on adopted standards to serve as significance thresholds for a particular project].). A lead agency may also appropriately use existing environmental standards—like the region-specific greenhouse gas reduction targets established under SB 375—to determine a project's significant impacts. (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 111.) Even the decision not to adopt a formal threshold and use existing standards is an exercise of discretion. (*Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1068 [formal adoption of project-specific threshold was not required].)

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

> The determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data. An ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting. For example, an activity which may not be significant in an urban area may be significant in a rural area.
>
> (CEQA Guidelines, § 15064, subd. (b).)

The Courts also recognize that differentiating between significant and insignificant impacts necessarily involves agency discretion, and that

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

As the Governor's Office of Planning and Research aptly summarized these principles:

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

Act (CEQA) Review (June 19, 2008) (OPR, *CEQA and Climate Change*), p. 4.) [8]

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

In adopting SB 375, the Legislature expressly found that improved land use and transportation systems are needed to achieve AB 32's 2020 greenhouse gas emissions reduction target. (Stats 2008, ch. 728, § 1(c).) To this end, SB 375 requires MPOs to devise an SCS that would achieve reduction targets established by CARB. (Gov. Code, § 65080, subd. (b).) Thus, although the Legislature drew a direct link between the SB 375 emission reduction targets and AB 32, the Legislature did not require that

[8] / OPR, *CEQA and Climate Change* appears at Exhibit A to the Declaration of Christopher L. Stiles in Support of Request for Judicial Notice (Stiles Declaration) filed along with this brief.

an RTP/SCS meet the Executive Order's 2050 goals. [9] Rather, through SB 375 the Legislature established a separate target setting process for GHG emissions reductions to be used in the development of an RTP/SCS.

In this case, the Trial Court found, and CNFF argues, that SANDAG erred by failing to rely upon Governor Schwarzenegger's 2005 Executive Order S-3-05 establishing 2050 goals for reducing GHG emissions. (See Joint Appendix, JA 001056-57 [Trial Court's Ruling, pp. 11-12].) In 2008, however, the Schwarzenegger administration issued guidance regarding this issue; that guidance stated that the adoption of appropriate significance thresholds was a matter of discretion for the lead agency. The guidance stated:

> "[T]he global nature of climate change warrants investigation of a statewide threshold of significance for GHG emissions. To this end, OPR has asked ARB technical staff to recommend a method for setting thresholds which will encourage consistency and uniformity in the CEQA analysis of GHG emissions throughout the state. Until such time as state guidance is available on thresholds of significance for GHG emissions, we recommend the following approach to your CEQA analysis."
>
> . . .
>
> **Determine Significance**
>
> - When assessing a project's GHG emissions, lead agencies must describe the existing environmental conditions or setting, without the project, which normally constitutes the

[9] / Because Executive Order S-03-05 was issued prior to SB 375, the Legislature could have referred to the Executive Order had it wanted to make the 2050 goals part of SB 375. The Legislature chose not to do so.

baseline physical conditions for determining whether a project's impacts are significant.

- As with any environmental impact, lead agencies must determine what constitutes a significant impact. In the absence of regulatory standards for GHG emissions or other scientific data to clearly define what constitutes a "significant impact", individual lead agencies may undertake a project-by-project analysis, consistent with available guidance and current CEQA practice.

- The potential effects of a project may be individually limited but cumulatively considerable. Lead agencies should not dismiss a proposed project's direct and/or indirect climate change impacts without careful consideration, supported by substantial evidence. Documentation of available information and analysis should be provided for any project that may significantly contribute new GHG emissions, either individually or cumulatively, directly or indirectly (e.g., transportation impacts).

- Although climate change is ultimately a cumulative impact, not every individual project that emits GHGs must necessarily be found to contribute to a significant cumulative impact on the environment. CEQA authorizes reliance on previously approved plans and mitigation programs that have adequately analyzed and mitigated GHG emissions to a less than significant level as a means to avoid or substantially reduce the cumulative impact of a project.

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

Thus, OPR did not state that Executive Order S-3-05 had to be used as a significance threshold under CEQA. Rather, OPR recognized that, until CARB establishes a state-wide standard, selecting an appropriate threshold was within the discretion of the lead agency.

At the time SANDAG approved the RTP/SCS, CARB had not adopted a state-wide threshold to determine whether GHG emissions are significant for purposes of CEQA. In fact, CARB still has not adopted such a threshold. The issue was, and remains, a matter of discretion for the lead agency.

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

> (a) The determination of the significance of greenhouse gas emissions calls for a careful judgment by the lead agency consistent with the provisions in section 15064. A lead agency should make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project. . . .
>
> (b) A lead agency should consider the following factors, among others, when assessing the significance of impacts from greenhouse gas emissions on the environment:
>
> (1) The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting;
>
> (2) Whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project.

> (3) The extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions. Such requirements must be adopted by the relevant public agency through a public review process and must reduce or mitigate the project's incremental contribution of greenhouse gas emissions. If there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding compliance with the adopted regulations or requirements, an EIR must be prepared for the project.

Nothing in CEQA Guideline section 15064.5 states, or implies, that agencies had to use the emissions reductions goals in Executive Order S-3-05 as "significance thresholds" for CEQA purposes. Thus, CNFF reads into the executive order a meaning that even the Schwarzenegger administration did not intend.

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

considered other recognized thresholds as well. In rejecting this argument, the Court stated:

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

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

But the Trial Court erred in an even more fundamental way. The Trial Court's ruling is premised on the notion that an executive order could

establish state-wide policy binding even on local agencies. This premise expands the Governor's authority beyond its constitutional bounds and raises serious separation of powers concerns. The Governor, as the state's "supreme executive," generally has the authority to issue executive orders regarding the actions of the various subdivisions of the executive branch of government. (Cal. Const. art. V, § 1.) The Governor may also issue executive orders as specifically provided by statute that allows executive discretion over a particular matter. But the Governor has no authority to issue executive orders beyond what is provided in the Constitution or by statute. Moreover, under the separation of powers clause, the Governor cannot issue orders regarding actions of the legislative or judicial branches of government, unless specifically allowed by the Constitution. (Cal. Const. art. III, § 3.) Article IV, Section 1, vests legislative power in the California Legislature. (Cal. Const. art. IV, § 1.) Executive Order S-03-05 is not legislation. It was not adopted by the Legislature. It was not adopted under authority delegated to the Governor by the Legislature under SB 375 or any other statute. (See *Lukens v. Nye* (1909) 156 Cal. 498, 503.) Nevertheless, the Trial Court's Ruling, without any reference to statutory authority, applies Executive Order S-03-05 to local governments and MPOs. (Joint Appendix, JA 001056-57 [Trial Court's Ruling, pp. 11-12].) Allowing the Governor to invade the province of the Legislature violates the California Constitution. (Cal. Const. art. III, § 3.)

To the extent the Trial Court's Ruling turns an executive order into a state regulation of broad-based application, it also runs afoul of the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.). Unless expressly or specifically exempted, all state agencies not in the legislative or judicial branches must comply with APA rulemaking requirements when engaged in quasi-legislative activities. (*Winzler & Kelly v. Dept. of Industrial Relations* (1981) 121 Cal.App.3d 120, 125-28.) While the Governor has the power to adopt executive orders applicable to State agencies, that power stops where, as here, the Executive Order meets the definition of a broadly applicable regulation under the APA. (See Gov. Code, § 11342.600.)

None of this suggests some other agency would be prohibited from relying on Executive Order S-3-05 as a significance threshold for GHG emissions. Perhaps another MPO or local agency would decide that the order should be relied upon in that manner. That decision, too, would be entitled to deference. The point is not whether this order is or is not the "right threshold." Instead, the fundamental point is that one size does not fit all. Each local agency, like SANDAG, has discretion to adopt an appropriate threshold. Here, SANDAG exercised that discretion, and explained in detail its thinking. (AR 003768-003770.) That was enough. [10]

[10] / The trial court's ruling also implies that SANDAG was required to use the Executive Order as a threshold of significance simply because

3. CEQA authorizes agencies to prepare "program EIRs" for plans like the RTP/SCS, and SANDAG's approach is characteristic of Program EIRs.

The Trial Court found, and CNFF and the AG argue, that SANDAG's approach impermissibly pushes the analysis of impacts and the development of mitigation measures into the future. (Joint Appendix, JA 001056-58[Trial Court's Ruling, pp. 11-13]; CNFF's Opening Brief, pp. 49, 53-59, 115-123; AG's Combined Respondent's Brief and Cross-Appellant's Opening Brief [AG's Opening Brief], pp. 43-44, 75-77.) This argument does not recognize the programmatic nature of SANDAG's analysis. This argument also does not recognize limits under SB 375 on an MPO's ability to impose its will on local land-use agencies.

a. The RTP/SCS EIR is a Program EIR, and therefore is subject to CEQA's rules regarding programmatic analysis.

To be legally adequate, an EIR must "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.) At the same time, however, an EIR need only contain information that is "reasonably feasible" to include. (*Ibid.*) The degree of specificity required in an EIR

SANDAG chose to develop its RTP/SCS for the 2050 planning horizon rather than 2035. (Joint Appendix, JA 001057 [Trial Court's Ruling, p. 12].) Not so. As discussed above, and as SANDAG explained in the EIR, there is no legal requirement that SANDAG use the Executive Order as a threshold of significance. (See AR003769.) This remains true regardless of whether the RTP/SCS was for 2035, 2050, or for any other year.

should "correspond" to the "degree of specificity involved in the underlying activity which is described in the EIR." (CEQA Guidelines, § 15146.) Thus, an EIR for a construction project will necessarily be more detailed than an EIR prepared for a regional plan, "because the effects of the construction can be predicted with greater accuracy." (CEQA Guidelines, § 15146, subd. (a).)

Notably, the cases cited by CNFF and the AG in support of their "deferred mitigation" argument involve project-specific review of particular development projects. (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70 [EIR for retrofit of existing refinery]; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645 [EIR for expansion of aggregate mine].) The cases recognize the general principle that an agency violates CEQA when it defers the development of mitigation measures that are necessary to avoid the significant environmental effects that a specific project will cause. (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308.)

None of these cases involved a plan, much less a long-range plan, as opposed to a specific development proposal. None involved a program EIR.

An RTP/SCS, by contrast, establishes plans and policies covering a wide geographic area and applying decades into the future. (See Gov. Code, § 65080, subd. (a) [RTP must consider both short- and long-term future, and provide policy guidance regarding regional transportation system], (b)

[SCS must take into account policies set forth in general plans adopted by jurisdictions within planning area, and use same planning horizon as RTP].) As SANDAG's RTP/SCS EIR states on its first page, "[t]he 2050 Regional Transportation Plan/Sustainable Communities Strategy (2050 RTP/SCS or 'the Plan') is the blueprint for a regional transportation system, serving existing and projected residents and workers within the San Diego region (Figure 2.0-1) over the next 40 years."[11] (AR 000253.) Simply put, an RTP/SCS is not a gravel mine or a Wal-Mart.

The rules governing program EIRs – including rules regarding mitigation measures – differ from those applicable to EIRs for gravel mines or Wal-Marts. "Where individual projects are, or a phased project is, to be undertaken and where the total undertaking comprises a project with significant environmental effect, the lead agency shall prepare a single program EIR for the ultimate project as described in [CEQA Guidelines] section 15168." (CEQA Guidelines, § 15165; see also Pub. Resources Code, § 21093, subd. (b) [EIRs "shall be tiered whenever feasible"].)

The CEQA Guidelines use the term "program" to mean "a series of actions that can be characterized as one large project" and can be "related either: (1) geographically; (2) as logical parts in the chain of contemplated actions; (3) in connection with the issuance of rules, regulations, plans, or

[11] / While the RTP is a blueprint for the next 40 years, it is an evolving blueprint that must be updated every four years. (Gov. Code, § 65080, subd. (d).)

other general criteria to govern the conduct of a continuing program; or (4) as individual activities carried out under the same authorizing statutory or regulatory authority and having generally similar environmental effects that can be mitigated in similar ways." (CEQA Guidelines, § 15168, subd. (a).)

As the leading California Supreme Court decision addressing program EIRs explains:

> A program EIR … is "an EIR which may be prepared on a series of actions that can be characterized as one large project" and are related in specified ways. (Cal. Code Regs., tit. 14, § 15168, subd. (a).) An advantage of using a program EIR is that it can "[a]llow the lead agency to consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts." (*Id.*, § 15168, subd. (b)(4).) Accordingly, a *program* EIR is distinct from a *project* EIR, which is prepared for a specific project and must examine in detail site-specific considerations. (*Id.*, § 15161.)
>
> Program EIR's are commonly used in conjunction with the process of tiering. (See *Laurel Heights Improvement Assn. v. Regents of the University of California*, [(1988) 47 Cal.3d 376] at p. 399, fn. 8.) Tiering is "the coverage of general matters in broader EIRs (such as on general plans or policy statements) with subsequent narrower EIRs … ." (Cal. Code Regs., tit. 14, § 15385.) Tiering is proper "when it helps a public agency to focus upon the issues ripe for decision at each level of environmental review and in order to exclude duplicative analysis of environmental effects examined in previous environmental impact reports." (Pub. Resources Code, § 21093, subd. (a); see also Cal. Code Regs., tit. 14, § 15385, subd. (b).)
>
> In addressing the appropriate amount of detail required at different stages in the tiering process, the CEQA Guidelines state that "[w]here a lead agency is using the tiering process in connection with an EIR for a large-scale planning approval, such as a general plan or component thereof … , the

> development of detailed, site-specific information may not be feasible but can be deferred, in many instances, until such time as the lead agency prepares a future environmental document in connection with a project of a more limited geographic scale, as long as deferral does not prevent adequate identification of significant effects of the planning approval at hand." (Cal. Code Regs., tit. 14, § 15152, subd. (c).) This court has explained that "[t]iering is properly used to defer analysis of environmental impacts and mitigation measures to later phases when the impacts or mitigation measures are not determined by the first-tier approval decision but are specific to the later phases." [Citation.]
>
> (*In re Bay-Delta Programmatic Environmental Impact Report* (2008) 43 Cal.4th 1143, 1169-1170 (emphasis in original).)

The project at issue in that case consisted of the "CALFED" program -- a comprehensive program to improve water quality and reliability, while also improving habitat within the Sacramento / San Joaquin River Delta. The program required, among other things, securing additional water supplies in order to achieve its aims. The EIR identified potential sources of water. These sources consisted of potential acquisition or transfers, or the development of new or expanded storage facilities. The EIR included an analysis, in "general terms," of the impacts of developing these supplies. In the words of the Court, "[t]his was sufficient." (Id. at p. 1171.)

In another leading case on program EIRs -- *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351 [12] -- the county certified a program EIR and approved a plan to manage hazardous waste.

[12] / Neither CNFF nor the AG cites this case.

The petitioners argued the EIR did not contain enough information about the plan, its impacts, mitigation measures, or alternatives. The Court of Appeal disagreed, stating: "The flaw in appellant's argument is that the Plan makes no commitment to future facilities other than furnishing siting criteria and designating generally acceptable locations. While the Plan suggests that new facilities may be needed by the County, no siting decisions are made; the Plan does not even determine that future facilities will ever be built." (*Id*. at p. 371.) "Where, as here, an EIR cannot provide meaningful information about a speculative future project, deferral of an environmental assessment does not violate CEQA." (*Id*. at p. 373.) "Considering the speculative nature of any secondary effects from an uncertain future facility, which will be subject to its own separate environmental review, we conclude that no further findings on environmental impacts or the rationale for such findings was reasonably required from the [final EIR]." (*Id*. at p. 375;see also *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729 [upholding first-tier EIR prepared for amendments to Port Master Plan, and rejecting claims that the EIR contained insufficient analysis of alternatives and cumulative impacts]; *California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 280-283 [university properly tiered off analysis of biological impacts set forth in program EIR

for long-term expansion plan in analyzing impacts of project carried out under that plan].)

Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova (2007) 40 Cal.4th 412 (*Vineyard Area Citizens*) demonstrates there are limits regarding the extent to which analysis or mitigation measures can be deferred to the future, even in the context of a program EIR. That case focused on the water supply analysis in an EIR for a large, mixed-use, phased development project. According to the Court:

> While proper tiering of environmental review allows an agency to defer analysis of certain details of later phases of long-term linked or complex projects until those phases are up for approval, CEQA's demand for meaningful information "is not satisfied by simply stating information will be provided in the future." [Citation.] As the CEQA Guidelines explain: "Tiering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR or negative declaration." (Cal. Code Regs., tit. 14, § 15152, subd. (b).) Tiering is properly used to defer analysis of environmental impacts and mitigation measures to later phases when the impacts or mitigation measures are not determined by the first-tier approval decision but are specific to the later phases. For example, to evaluate or formulate mitigation for "site specific effects such as aesthetics or parking" (*id.*, § 15152 [Discussion]) may be impractical when an entire large project is first approved; under some circumstances analysis of such impacts might be deferred to a later-tier EIR. But the future water sources for a large land use project and the impacts of exploiting those sources are not the type of information that can be deferred for future analysis. An EIR evaluating a planned land use project must assume that all phases of the project will eventually be built and will need water, and must analyze, to the extent reasonably possible, the impacts of providing water to the entire proposed project. [Citation.]

(*Id*. at p. 431.)

The Court went on to hold that the EIR did not contain sufficient information regarding long-term water supplies that would serve the project because the evidence showed there was a gap between expected supply and demand. (*Id*. at pp. 438-447.)

While the principles set forth in *Vineyard Area Citizens* are relevant to evaluation of the program EIR for the RTP/SCS, the holding is readily distinguishable. As explained in *In re Bay-Delta Programmatic Environmental Impact Report, supra*, *Vineyard Area Citizens* involved a program EIR for a 6,000-acre master planned community, which is not comparable to a program EIR for a "broad, general, multiobjective, policy-setting, geographically dispersed" program. (*In re Bay-Delta etc*., *supra*, 43 Cal.4th at p. 1171, fn. 10.) Like the CALFED program at issue in *In re Bay-Delta etc*., the RTP/SCS is a broad, general, multi-objective, policy-setting, geographically related planning document. In particular, SANDAG's RTP/SCS is a broad plan covering more than 4,200 square miles (or approximately 2.7 million acres) looking decades into the future that does not "regulate[] the use of land… [or] supersed[e] the exercise of the land use authority of cities and counties within the region." (Gov. Code, § 65080, subd. (b)(2)(J).)

Against this backdrop, two conclusions follow. First, an RTP/SCS is well-suited for a program EIR. Indeed, there is an argument that an agency

preparing an RTP/SCS *must* prepare a program EIR. (CEQA Guidelines, § 15165.) At a minimum, programmatic review of an RTP/SCS is, as a matter of State policy, recognized and encouraged. (CEQA Guidelines, § 15183.5.)

Second, at the first-tier, programmatic level, there is nothing wrong with adopting mitigation measures that call for further analysis at the second-tier, project-specific level of review. (See CEQA Guidelines, §§ 15168, subd. (c), 15183.5, subd. (b)(2).) That does not mean the EIR can point to such future studies as a basis for entirely side-stepping such analysis in the program EIR itself. Rather, it means that there is nothing wrong with performing broad-brush analysis at the program level, with project-specific analysis to follow.

b. SANDAG's approach to analysis of impacts and identification of mitigation measures exemplifies the rules governing Program EIRs.

In this case, SANDAG's approach fits comfortably within this scheme. The RTP/SCS EIR repeatedly notes that site-specific, project-level analysis will be performed for transportation improvement projects as they are proposed. (E.g., AR 002069, 002145, 002147, 003764-0037666 [master response on programmatic nature of EIR].) The EIR does not point to such future analysis alone, however, in lieu of programmatic analysis in this EIR. Instead, the EIR presents a region-wide assessment of the potential

impacts of the overall RTP/SCS, and it does so at a level of detail that is appropriate given the scale, duration and sweep of the plan.

The mitigation measures in the EIR rely in part on actions that can and should be taken by cities and counties to address these same impacts. The mitigation measure for diesel emissions and other toxic air contaminants states, for example, that cities and counties should perform health risk assessments as part of their consideration of proposed development projects, just as SANDAG will perform health risk assessments when it proposes transportation improvements. (AR 000072, 002012.)

CEQA expressly authorizes agencies to adopt findings that potential mitigation measures are within the jurisdiction of another agency. If an EIR concludes a project may have significant environmental effects, then under CEQA the agency cannot approve the project without adopting specific findings. (Pub. Resources Code, § 21081, subd. (a).) One such finding is that changes or alterations are available "which mitigate or avoid the significant effects on the environment," and "[t]hose changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency." (Pub.

Resources Code, § 21081, subds. (a)(1), (a)(2).) [13] That is the finding SANDAG adopted here. (AR 000091-000092.)

Such a finding was within SANDAG's discretion. *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439 is on point. In that case, the agencies adopted a series of measures proposed by the EIR to address the risk that communities would be overwhelmed by people using on-street parking near light-rail stations. The measures committed the agencies to monitor on-street parking, and to work with local jurisdictions to address parking problems as they arose. The Court found that, while the agencies "cannot guarantee local governments will cooperate to implement permit parking programs or other parking restrictions," the record supported the conclusion that local municipalities "can and should" cooperate. (*Id*. at pp. 465-466.)

Nevertheless, CNFF and the AG argue that, in this case, SANDAG had an obligation to adopt additional, site-specific mitigation measures to address the RTP/SCS' impacts with respect to diesel emissions and GHG emissions. (CNFF's Opening Brief, pp. 68-73, 78; AG's Opening Brief, pp. 40, 75-76.)

SANDAG did, however, adopt mitigation measures with respect to both of these impacts. (AR 000072, 002012 [mitigation for toxic air contaminant emissions for transportation projects], 000087-00090, 002027-

[13] / Neither CNFF nor the AG cites this provision.

002029 [mitigation for GHG emissions].) And SANDAG's approach to analyzing and mitigating air quality impacts was consistent with the programmatic nature of the analysis.

For example, the EIR acknowledges that sensitive populations located close to transportation corridors may be exposed to unhealthy levels of diesel exhaust or other toxic air contaminants. The EIR identifies and analyzes these risks. (E.g., AR 002250-002264, 004422-004425.) As the EIR summarizes, "[t]he level of exposure of sensitive receptors to localized pollutant concentrations, including diesel particulates, can only be determined through project-level analysis once facility designs of individual projects are available. Therefore, at the program level of this EIR, the localized pollutant concentration impact would be considered significant." (AR 002258; see also AR 002255 ["health risks to specific communities from specific projects can be determined only through project-specific analysis"], 002262, 002264 [risk of TAC exposure in future horizon years]; see also AR 004424 [performing a health risk assessment is necessarily a site-specific analysis; "health risks to specific communities from specific projects can be most accurately determined only through project-specific analysis."], 003815-3816 [master response on TAC analysis of transportation projects].) Thus, the EIR explains why project-specific analysis of TACs is infeasible at the level of the Program EIR. (CEQA Guidelines, §§ 15146, subd, (a), 15151.)

Having identified this potential impact, the EIR also sets forth the following mitigation measure:

> During project specific design and CEQA review, SANDAG shall and other implementing agencies can and should require, where warranted, the completion of health risk assessments using dispersion modeling. A health risk assessment (HRA) is the quantitative evaluation of the risk of cancer (and sometimes non-cancer health effects) that may result from human exposure to pollutants such as toxic air pollutants. HRAs are complex and typically involve emissions quantification, air dispersion modeling, and risk modeling. Dispersion modeling is a modeling tool capable of predicting concentrations of pollutants in air in the vicinity of the pollutant sources. It is typically used to predict PM concentrations at receptor locations around a source of PM. AERMOD and CALPUFF are two of several dispersion modeling tools.
>
> (AR 002273.)

Thus, health risk assessments will be performed as specific improvements to the transportation system are proposed. The EIR states that, at the programmatic level of review, no further mitigation is feasible. (AR 002273, 003815-003817.) CEQA case law has also held that deferral of the specifics of mitigation is permissible where the lead agency commits itself to mitigation and, in the mitigation measure, either describes performance standards to be met in the future mitigation or provides a menu of alternative mitigation measures to be selected from in the future. (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 620.) The above mitigation demonstrates that this is exactly what SANDAG did in its EIR.

This is not to say that other MPOs analyzing toxic air contaminants, or devising appropriate mitigation measures, will necessarily take the exact same approach as SANDAG. Rather, the point is that SANDAG's analysis of toxic air contaminants illustrates the ways in which a program EIR for an RTP/SCS differs from a project-specific EIR for a gravel mine or a Wal-Mart. The Trial Court erred by failing to acknowledge this fact.

c. SANDAG's mitigation measures adopted to address GHG emissions recognize that an MPO cannot make land use decisions.

There is a second, related problem with the Trial Court's Ruling, and the attack by CNFF and the AG, on the mitigation measures adopted by SANDAG. With respect to GHG emissions, the EIR estimates those emissions in multiple horizon years, using a range of criteria. The EIR concludes that, for some of these horizon years and criteria, the RTP/SCS will have a potentially significant impact with respect to GHG emissions. (AR 002567- 002588.) The EIR identifies mitigation measures to address these impacts, although they remain significant and unavoidable. (AR 002588-2590.) These measures provide, among other things, that local jurisdictions in San Diego County "can and should" adopt Climate Action Plans as authorized under CEQA Guidelines section 15183.5. The measure sets forth in detail the contents of Climate Action Plans, and the policies that local agencies should incorporate into their land-use plans and local decision-making processes. SANDAG commits to assist local agencies in

developing these plans and policies. (*Ibid*.) The Trial Court ruled that SANDAG's mitigation strategy for GHG impacts was inadequate because it was not "a legally enforceable mitigation commitment." (Joint Appendix , JA 001057 [Trial Court's Ruling, p. 12] .) The Court's ruling, however, overstates SANDAG's ability to dictate local decision-making by means of dispersing Transnet funding, and discounts the fact that SANDAG (like all MPOs) has no authority to usurp land-use decision-making at the local level. (See SANDAG Opening Brief, pp. 45-47.) For example, although SANDAG might be able to exert some level of "purse string control" by deciding how to allocate Transnet funds, until a local government agrees to accept the funds with the strings attached, there is no guarantee that a Climate Action Plan would ever be developed. In other words, there is no way that SANDAG could *require* all local jurisdictions to prepare and adopt Climate Action Plans as enforceable mitigation for the RTP/SCS. The mitigation described in the EIR was therefore appropriate in light of the limits on SANDAG's authority. (See *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*, *supra*, 57 Cal.4th at pp. 465-466.)

The general duty to mitigate does not translate into the authority to do so. CEQA does not provide an agency extra powers, independent of those granted by other laws. (Pub. Resources Code, § 21004.) In other words, an agency does not have authority to adopt or impose mitigation

measures simply by virtue of CEQA; rather, the agency must have that intrinsic authority based on its police power or on other laws, independent of CEQA. (*Sierra Club v. California Coastal Com*. (2005) 35 Cal.4th 839, 859 [CEQA did not provide Coastal Commission with authority to deny permit based on impacts of development occurring outside coastal zone]; *Mountain Lion Foundation v. Fish & Game Com*. (1997) 16 Cal.4th 105, 117 [agency's authority to impose mitigation "may be constrained by the substantive provisions of the law governing the public agency."]; *Kenneth Mebane Ranches v. Superior Court of Kern County* (1992) 10 Cal.App.4th 276, 290-292 [CEQA did not provide district with authority to condemn land outside its boundaries]; 68 Ops. Cal. Atty. Gen. 225 (1985) [fire district could not require payment of a mitigation fee because underlying State law did not support the imposition of such fees].) As one Court succinctly stated, "CEQA is not an independent source of public agency power." (*Corona-Norco Unified Sch. Dist. v. City of Corona* (1993) 13 Cal.App.4th 1577, 1587.)

City of Marina v. Board of Trustees of California State University (2006) 39 Cal.4th 341 recognizes this limitation. In that case, the university refused to provide funding for off-site infrastructure that its expansion plans would need, based on the determination that the university lacked the legal authority to contribute these funds. The Court held the university's determination was incorrect, that the university did, in fact, have such

authority, and that the university had to reconsider its refusal because it was based on an incorrect legal premise. (*Id*. at pp. 356-363.) The Court cited Public Resources Code section 21004 in noting that CEQA did not expand on the university's authority to impose mitigation on those beyond its statutory control. (*Id*. at p. 367.)

In this case, SB 375 expressly prohibits an MPO from infringing on city or county land use authority. SB 375 states: "[n]either a sustainable communities strategy nor an alternative planning strategy regulates the use of land . . . . Nothing in a sustainable communities strategy shall be interpreted as superseding the exercise of the land use authority of cities and counties within the region. . . . Nothing in this section shall require a city's or county's land use policies and regulations, including its general plan, to be consistent with the regional transportation plan or an alternative planning strategy. . . ." (Gov. Code, § 65080, subd. (b)(2)(J); see also Sen. Transportation & Housing Com., Analysis of Sen. Bill No. 375 (2007-2008 Reg. Sess.) as amended Aug. 22, 2008, p. 4 ["an SCS or APS does not supersede or interfere with the land use authority of cities and counties, does not require a city or county's land use policies and regulations to be consistent with the SCS or APS, and does not limit ARB's authority under any other provision of law"]; Off. of Sen. Floor Analysis, analysis of Sen. Bill 375 (2007-2008 Reg. Sess.) as amended Aug. 22, 2008, p. 6 ["Nothing in an SCS or APS shall be interpreted as superseding or interfering with the

exercise of the land use authority of cities and counties within the region."]; Assembly Standing Com. Local Gov., Assembly Floor 3d reading analysis of Sen. Bill No. 375 (2007-2008 Reg. Sess.) as amended Aug. 22, 2008, p. 13 [reiterating "[s]everal safeguards in the bill are included to preserve local government land use authority"].) [14] This language could not be more emphatic. An MPO, like SANDAG, simply cannot dictate land-use policy to local jurisdictions. (AR 003774-003775; see AR 000091-000092 [SANDAG Board finding that land-use decision-making are within the control of counties and cities, rather than SANDAG].) [15] As such, while MPOs may suggest mitigation measures to be adopted by local jurisdictions, they have no authority to require that they implement such measures.

Furthermore, Article XI, section 7 of the California Constitution grants local governments broad authority to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const. art. XI, § 7.) Preemption of local legislation and regulations "'may not be found when the Legislature has

[14] / This legislative history appears at Exhibits B through D to the Stiles Declaration filed along with this brief.

[15] / CNFF argues that SANDAG has an independent authority to mitigate the project's GHG impacts, citing *Citizens for Quality Growth v. City of Mount Shasta* (1988) 198 Cal.App.3d 433, 442, fn. 8. (CNFF's Opening Brief, pp. 56-57.) That case is inapposite. In that case, the respondent agency was a city with general police powers. Here, SANDAG (like other MPOs) is subject to the statutory limit on its authority embodied in Government Code section 65080, subdivision (b)(2)(J).

expressed its intent to permit local regulations'" and "'should not be found when the statutory scheme recognizes local regulations.'" (*IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 94, & fn. 10.) Because the Legislature expressly deferred to local land use authority in SB 375, MPOs may not act in ways that deprive local cities and counties of their traditional powers. (See *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264, 276.) Pursuant to CEQA, the limitations imposed on an MPO, like SANDAG, must be considered in evaluating the adequacy of the RTP/SCS program EIR. Section 21004 of the Public Resources Code provides that "[i]n mitigating or avoiding a significant effect of a project on the environment, a public agency may exercise only those express or implied powers provided by law other than [CEQA]." In *Sierra Club v. California Coastal Com.* (2005) 35 Cal. 4th 839, explained further:

> [A]n uncodified section of the legislation that enacted [Section 21004], the Legislature explained that 'clarification' of CEQA's 'scope and meaning' had become 'necessary because of contentions that' its provisions, 'by themselves, confer on public agencies independent authority to … take … actions in order to comply with [CEQA's] general requirement … that significant effects on the environment be mitigated or avoided whenever it is feasible. …' (Stats. 1982, ch. 1438, § 4, p. 5484.) The Legislature went on to explain that section 21004 'clarif[ies]' that CEQA 'confer[s] no such independent authority. Rather, [its] provisions … are intended to be used in conjunction with discretionary powers granted to a public agency by other law in order to achieve the objective of mitigating or avoiding significant effects on the environment when it is feasible to do so. … In order to fulfill [CEQA's] requirement [that feasible mitigating actions be taken], a public agency is required to select from the various

> powers which have been conferred upon it by other law, those which it determines may be appropriately and legally exercised … .' (Stats. 1982, ch. 1438, § 4, p. 5484, italics added.) As these comments demonstrate, the Legislature passed section 21004 to preclude us from doing precisely what Sierra Club's now asks us to do: use CEQA as tool to expand the Commission's authority beyond the Coastal Act's express limits.
>
> (*Sierra Club v. California Coastal Com., supra,* 35 Cal.4th at p. 859.)

Because SANDAG lacks the authority to dictate land-use policy in adopting its RTP/SCS, as in *Sierra Club v. California Coastal Com.*, the Trial Court's Ruling requires SANDAG to adopt mitigation that it is not empowered to implement.

* * *

Amici Curiae respectfully request that the Court consider these arguments in ruling on the petitions.

Dated: January 22, 2014

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.520(c)(1)

I, Whitman F. Manley, declare as follows:

1. I am an attorney at law duly licensed to practice before the courts of the State of California, and am one of the attorneys for Amici Curiae

2. California Rules of Court, rule 8.520(c)(1), states that a brief produced on a computer must not exceed 14,000 words, including footnotes.

3. This Amici Curiae Brief was produced on a computer using a word processing program. This Amici Curiae Brief consists of 12,660 words, including footnotes but excluding the caption page, tables and this certificate, as counted by the word processing program.

Dated: January 22, 2014

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Cleveland National Forest, et al. v.
San Diego Association of Governments, et al.
Fourth Appellate District, Division One Case No.: D063288
(San Diego Court Superior Court Case No.: 37-2011-00101593-CU-TT-CTL; Consolidated with Case No.: 37-2011-001016600-CU-TT-CTL)

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

APPLICATION FOR LEAVE TO FILE AMICI CURIAE AND PROPOSED BRIEF

On January 22, 2014, I served the following:

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

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

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

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 22nd day of January, 2014, at Sacramento, California.

_____
Matthew C. Tabarangao

Cleveland National Forest, et al. v.
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SERVICE LIST
(*continued*)

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Cleveland National Forest, et al. v.
San Diego Association of Governments, et al.
Fourth Appellate District, Division One Case No.: D063288
(San Diego Court Superior Court Case No.: 37-2011-00101593-CU-TT-CTL; Consolidated with Case No.: 37-2011-001016600-CU-TT-CTL)

SERVICE LIST
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