

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**

DATE:	May 15, 2017	DEPT. NO.:	24
JUDGE:	HON. SHELLYANNE W. L. CHANG	CLERK:	E. HIGGINBOTHAM
TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, a California nonprofit corporation, Petitioner, v. CALIFORNIA AIR RESOURCES BOARD, an agency of the State of California, and DOES 1 - 10, inclusive, Respondents.		Case No.: 34-2014-80001974	
Nature of Proceedings:		RULING ON SUBMITTED MATTER AND ORDER: PETITION FOR WRIT OF MANDATE	

On March 16, 2017, the Court issued a tentative ruling denying the petition for writ of mandate. On March 17, 2017, the parties appeared for oral argument, and were represented by counsel, as stated on the record. After oral argument, the Court took the matter under submission. The Court now rules as follows:

Petitioner Transportation Solutions Defense and Education Fund (TRANSDEF) seeks a writ of mandate directing Respondent California Air Resources Board (ARB) to set aside and vacate its approval of the 2014 Update to the Scoping Plan (Scoping Plan Update) and its certification of the Environmental Analysis (EA) for the Scoping Plan Update. The Court must deny the Petition.

I. BACKGROUND

a. Factual Background

TRANSDEF challenges ARB's 2014 adoption of the Scoping Plan Update and its certification of the EA therefor. In particular, TRANSDEF argues that the Scoping Plan Update did not consider changed circumstances regarding the High Speed Rail (HSR) Project, and that consequently, the Scoping Plan Update's analysis of the Greenhouse Gas (GHG) emissions from construction of the HSR Project was flawed. TRANSDEF also argues that the EA for the Scoping Plan Update was similarly flawed and failed to comply with the California Environmental Quality Act (CEQA).

ARB must adopt and update the Scoping Plan, pursuant to the California Global Warming Solutions Act or Assembly Bill 32 (AB 32). AB 32 is "groundbreaking

legislation” compelling California to reduce its GHG emissions. (*Association of Irrigated Residents v. State Air Res. Bd.* (2012) 206 Cal.App. 4th 1487, 1489-1490 [discussing AB 32 and ARB’s duties].) Generally, AB 32 requires the State to reduce GHG emissions to 1990 levels by 2020. (*Id.*, at p. 1490 [citing Health & Saf. Code, § 38550].)

Significant here, AB 32 charges ARB with continuing to reduce GHG emissions beyond 2020. (Health & Saf. Code, § 38551. Indeed, the Court of Appeal has noted that “the goal that the [Scoping Plan] sets for 2020 is but a step towards achieving a longer term climate goal” and that the ARB seeks to define in its Scoping Plan “measures that will permit the state to reach goals that are attainable by 2020, as a step toward the ultimate objective by 2050.” *Association of Irrigated Residents v. State Air Res. Bd.*, *supra*, 206 Cal.App. 4th at p. 1496.) This “ultimate objective” is reflected in Executive Order S-3-05, which Governor Schwarzenegger adopted prior to AB 32’s passage. That order directed the State to reduce GHG emissions to 80 percent below 1990 levels by 2050 (*Ibid.*; ARB Request for Judicial Notice (RJN), Exh. 1.) The Legislature has also recognized the 2050 GHG emissions target by passing Senate Bill 32 in September 2016, establishing a “mid-term goal” of reducing GHG emissions to 40 percent below 1990 levels by 2030. (ARB RJN, Exh. 3.)

To implement the goal of reducing GHG emissions, AB 32 charges ARB with monitoring and regulating GHG emissions and requires ARB to prepare, approve, and update the Climate Change Scoping Plan to achieve the maximum technologically feasible and cost-effective reduction of GHG emissions. This Scoping Plan is a “blueprint” preceding ARB’s promulgation of regulatory measures to reduce GHG emissions, which will involve separate rulemaking procedures and environmental review. The Scoping Plan must be updated no less than every five years. (*Association of Irrigated Residents*, *supra*, 206 Cal.App. 4th a pp. 1489-1505.) It is this update that TRANSDEF challenges.

b. Procedural Background

After an “extensive and rigorous process,” ARB adopted the initial Scoping Plan in 2008 (*Association of Irrigated Residents v. State Air Res. Bd.*, *supra*, 206 Cal.App. 4th 1487, 1492), and the Scoping Plan was reapproved in 2011. (13 AR 06987.) The Scoping Plan recommended a mix of measures¹ to reduce emissions to achieve the 2020 target and continue toward the 2050 target. (1 AR 00 468.) ARB’s initial adoption of the 2008 Scoping Plan, and in particular, the Scoping Plan’s cap-and-trade program recommendation, was challenged in court. (*Association of Irrigated Residents v. State Air Res. Bd.*, *supra*, 206 Cal.App. 4th 1487.) The Court of Appeal held that the Scoping Plan satisfied AB 32’s goal of achieving GHG emissions reductions. (*Ibid.*)

¹ The 2008 Scoping Plan set forth 18 categories of GHG emissions reduction measures, including, among other measures, a cap-and-trade program, fuel and vehicle efficiency standards, energy efficiency, and high speed rail. (*Association of Irrigated Residents v. State Air Res. Bd.*, *supra*, 206 Cal.App. 4th at 1492; 1 AR, 476-513.)

ARB began updating the 2008 Scoping Plan.² On February 10, 2014, ARB released a draft Proposed Scoping Plan Update. (13 AR 06992.) On March 14, 2014, ARB released its draft environmental analysis of the Scoping Plan Update. (Id.) ARB received and responded to comments for the Scoping Plan Update and EA therefor. (12 AR 06218-06220, 13 AR 06992.) On May 22, 2015, after a public hearing, ARB approved the 2014 Scoping Plan Update and certified the EA. (1 AR 00001-00008.)

TRANSDEF filed this Petition challenging the Scoping Plan Update and EA in the Superior Court for Fresno County in June 2014. The matter was transferred to this Court shortly thereafter.

Only in 2016 did the parties challenge the pleadings. In 2016, ARB demurred to the Fourth Cause of Action (violation of AB 32) in the Petition; ARB and then-real party in interest,³ the High Speed Rail Authority, demurred to the Fifth Cause of Action in the Petition (challenge to Legislature's appropriation of funds for programs not in properly approved Scoping Plan). The High Speed Rail Authority also moved to strike portions of the Petition.

On August 24, 2016, the Court issued a detailed ruling on ARB's and the High Speed Rail Authority's demurrers, sustaining demurrers to both causes of action with leave to amend.⁴ TRANSDEF has amended its Petition. It removed the Legislative appropriation cause of action from the Petition, but the CEQA causes of action and the AB 32 cause of action remain.

The Court now considers the merits of the litigation.

II. DISCUSSION

a. Requests for Judicial Notice

TRANSDEF's request for judicial notice (RJN) is **GRANTED**. ARB's RJN in support of its Opposition Brief is **GRANTED** as to Exhibits 1-4, and 6 and **DENIED** as to Exhibit 5. As noted in TRANSDEF's objection to ARB's RJN, Exhibit 5 is a letter from TRANSDEF to the California High Speed Rail Authority, which is not in the

² Also in 2008, the High Speed Rail Authority certified a program Environmental Impact Report (EIR) for the portion of the HSR route from the Bay Area to the Central Valley, which TRANSDEF and other petitioners challenged. That program EIR analyzed the environmental impacts associated with the route for the HSR. Analysis of more specific environmental effects associated with actual construction of the HSR, would be considered at the project-level stage of environmental review. (*See Town of Atherton v. California High Speed Rail Authority* (2014) 228 Cal.App.4th 314.)

³ TRANSDEF initially named the State Controller as a Respondent and the High Speed Rail Authority as a real party in interest. TRANSDEF has subsequently dismissed these parties, leaving ARB as the remaining party.

⁴ The Court sustained the ARB's demurrer to the Fifth Cause of Action without leave to amend as to ARB, but sustained the High Speed Rail Authority's demurrer to the Fifth Cause of Action with leave to amend.

administrative record and could not have been before ARB at the time ARB made its decision. (*Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559, 573 n.4.) TRANSDEF's Supplemental RJN submitted with its Reply brief is **DENIED**. TRANSDEF seeks judicial notice of a Revised 2012 Business Plan prepared by the High Speed Rail Authority to show that construction of the HSR is significantly delayed compared to the timeline when the 2008 Scoping Plan was prepared. TRANSDEF could have, but did not, include this in its initial RJN, depriving ARB of the opportunity to respond to it.

b. Petitioner's Motion to Strike Portions of ARB's Opposition Brief

TRANSDEF moves to strike portions of ARB's Opposition Brief that refer to TRANSDEF's comments regarding the EIR for the portion of the HSR from Fresno to Bakersfield. A court may strike any irrelevant, false, or improper matter in a pleading, or strike all or a part of any pleading not drawn or filed in conformity with the law. (Code Civ. Proc., § 436.) As briefs are not "pleadings," TRANSDEF's motion to strike is **DENIED**. (Code Civ. Proc., § 420, 422.10.)

c. Petitioner Has Not Shown that ARB Abused its Discretion in Certifying the EA for the Scoping Plan Update

i. Standard of Review for Certified Regulatory Program

ARB was required to conduct an analysis of the environmental impacts of the Scoping Plan Update. Here, the Scoping Plan was prepared according to ARB's certified regulatory program.⁵ Pursuant to a certified regulatory program, an administrative agency is exempted from some—but not all—CEQA requirements governing environmental review, including the preparation of initial studies, negative declarations and EIRs. (*POET, LLC v. State Air Res. Bd.* (2013) 218 Cal.App.4th 681, 710.) Instead of an Environmental Impact Report (EIR), ARB conducted its environmental analysis by preparing an EA for the Scoping Plan Update.

However, the EA for the Scoping Plan Update is "essentially the equivalent of an [EIR]" that agencies prepare to analyze potentially significant environmental effects of projects, pursuant to CEQA. (*Association of Irrigated Residents v. State Air Res. Bd.*, *supra*, 206 Cal.App. 4th at p. 1491, fn.5; *Conway v. State Water Res. Control Bd.* (2015) 235 Cal.App.4th 671, 680.) Under ARB's certified regulatory program, ARB must identify significant adverse environmental impacts and consider feasible mitigation measures or feasible alternatives and respond to comments "which raise significant environmental issues associated with the proposed action." (17 Cal. Code Regs., §§ 60005-60007.)

ARB's approval of the Scoping Plan is a quasi-legislative action, and judicial review of that action for compliance with CEQA extends to whether there was a prejudicial abuse of discretion. (*POET, LLC v. State Air Res. Bd.*, *supra*, 218 Cal.App.4th at p. 710 [citing

⁵ ARB's regulatory program is contained in sections 60005, 60006 and 60007 of title 17 of the California Code of Regulations.

Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova (2007) 40 Cal.4th 412, 426].)

Abuse of discretion is established if the decision was (1) not based on substantial evidence in the record or (2) if the agency did not proceed in the manner required by law in approving the environmental document. (*POET, LLC v. State Air Res. Bd.*, *supra*, 218 Cal.App.4th at p. 710-711.) Each type of error is subject to a different standard of review. (*Id.* at p. 711.) As to legal error—such as whether ARB proceeded in a manner required by law—the Court conducts an independent review. Alternatively, when reviewing ARB’s factual determinations for error, the Court applies the more deferential substantial evidence standard. (*Ibid.*)

As petitioner, TRANSDEF bears the burden to show that ARB violated CEQA or the requirements of the certified regulatory program. (*See Center for Biological Diversity v. Department of Forestry & Fire Prot.* (2014) 232 Cal.App.4th 931, 948.) In the absence of contrary evidence in the record, the Court will assume that ARB complied with its official duties under the certified regulatory program. (*City of Sacramento v. State Water Res. Control Bd.* (1992) 2 Cal.App.4th 960, 976 [citing Evid. Code, § 664].)

ii. TRANSDEF Has Not Exhausted its Administrative Remedies as to Many CEQA Challenges

ARB argues that TRANSDEF has not exhausted its administrative remedies as to most of its CEQA challenges to the Scoping Plan Update’s EA. The Court agrees.

TRANSDEF argues that the Scoping Plan EA was required to, but did not, consider the delay in implementing the HSR. TRANSDEF contends that this delay amounts to a potentially significant environmental impact in that ARB failed to consider violations of CEQA: TRANSDEF argues that changes and delays to the proposed construction and operation of the HSR have taken place since the initial 2008 Scoping Plan, which would create a short-term increase in the release of GHG emissions from constructing the HSR, and this GHG emissions increase was a significant impact required to be considered in the EA. As a result of this failure, TRANSDEF contends in its Opening Brief that (1) the EA was required to consider feasible mitigation measures to reduce the GHG emissions impact from HSR construction, (2) the EA was required to consider a reasonable range of feasible alternatives to avoid the significant impact of GHG emissions from construction, (3) that ARB was required to recirculate the EA after receiving TRANSDEF’s comments about this impact, (4) and, that these project changes required preparation of a supplemental environmental review document.⁶

TRANSDEF did not raise these comments before ARB. Consequently, TRANSDEF has not exhausted its administrative remedies as to these claims.

⁶ Although the Petition challenges the project description and cumulative impacts analysis, TRANSDEF has not briefed these claims. (Petition, Counts 1, 3.) Consequently, the Court does not address these challenges.

To satisfy the exhaustion doctrine, an issue must be fairly presented to the agency to allow it to respond. (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 521.)

“To advance the exhaustion doctrine’s purpose ‘[t]he “exact issue” must have been presented to the administrative agency’ [Citation.] While ‘ “less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding” because, ... parties in such proceedings generally are not represented by counsel’ [citation]’ [citation], ‘generalized environmental comments at public hearings,’ ‘relatively ... bland and general references to environmental matters’ [citation], or ‘isolated and unelaborated comment[s]’ [citation] will not suffice. The same is true for ‘[g]eneral objections to project approval’ [Citations.]’ [Citation.] ‘[T]he objections must be sufficiently specific so that the agency has the opportunity to evaluate and respond to them.’” (*Citizens for Responsible Equitable Environmental Development, supra*, 196 Cal.App.4th 515, 521 [quoting *Sierra Club v. City of Orange* (2008) 163 Cal.App. 4th 523, 535-536].)

The Court has reviewed TRANSDEF’s comments to ARB. TRANSDEF submitted a letter dated April 5, 2014,⁷ and an August 2, 2013 letter, and commented at the ARB hearing prior to adoption of the Scoping Plan. TRANSDEF made general objections criticizing the HSR project’s inclusion in the Scoping Plan because the HSR’s GHG emissions from construction would make HSR a net emitter of GHGs for decades. (57 AR 32321.) However, nowhere did TRANSDEF make the specific arguments as to mitigation measures, alternatives, recirculation, or preparation of a supplemental document. Indeed, as discussed later in this ruling, the April 2014 letter was directed at the Scoping Plan, not the EA for it. Accordingly, the Court concludes that TRANSDEF has not exhausted its administrative remedies as to these claims.

At the hearing, TRANSDEF argued that it did exhaust its administrative remedies by appending an article (the Chester and Horvath article on the High Speed Rail Project) to its August 2013 letter. The Court disagrees. This August 2013 letter was not directed to the EA for the Scoping Plan, but to the Scoping Plan itself. Further, during the comment period for the EA, TRANSDEF submitted a letter, appending the August 2013 letter and the article to it, without any reference to the specific CEQA challenges it raises. When documentary evidence is submitted to an agency by an objecting party, the evidence must be accompanied by an explanation sufficient to inform the agency of the specific issues the evidence relates to. (*Citizens for Responsible Equitable Environmental Dev., supra*, 196 Cal.App.4th 528.) Therefore, the re-submission of the August 2013 letter with the Chester and Horvath article did not exhaust TRANSDEF’s CEQA claims.

iii. TRANSDEF Has Not Shown the Existence of a Significant Impact

However, even if the Court were to consider the merits of the CEQA claims raised by TRANSDEF, they would fail. This is because TRANSDEF has failed to show the

⁷ TRANSDEF refers to this letter as the April 7, 2014 letter.

existence of a significant impact associated with the delays in construction of the HSR project. As TRANSDEF has not shown the existence of a significant impact, it cannot show that ARB abused its discretion by (1) failing to consider feasible mitigation measures, (2) failing to consider a reasonable range of feasible alternatives, (3) failing to recirculate the EA after receiving TRANSDEF's comments about this impact, (4) failing to prepare a supplemental environmental review document in light of the changes to the HSR's construction and operation.

TRANSDEF argues that changes and delays to the proposed construction and operation HSR have taken place since the initial Scoping Plan was adopted in 2008. TRANSDEF argues that the 2008 Scoping Plan assumed the HSR project would be operational by 2020, and delays and changes have pushed back the operational date to 2029. Specifically, TRANSDEF notes that the Initial Operating Segment of the HSR (IOS) is now scheduled for completion in 2022—after the 2020 date set forth in AB 32, and that the Phase I of the HSR has been scaled back to a “blended system” where high-speed rail trains would share the tracks with Caltrain commuter trains and freight trains.⁸ (Opening Brief, 10:3-15.)

TRANSDEF contends that because construction of the HSR will create GHG emissions, any GHG emissions reduction by the HSR's operation will not occur by 2020, as envisioned in the original 2008 Scoping Plan. TRANSDEF argues that these delays have created a significant impact that the Scoping Plan Update EA was required to address. TRANSDEF has simply not shown that these delays create a significant impact.⁹

TRANSDEF makes very little attempt in this litigation to quantify the increase in GHG emissions associated with the delays in construction and operation of the HSR project.

For example, only in its Reply Brief does TRANSDEF contend that “high speed rail construction would result in” approximately eight billion kilograms of CO₂, which is slightly less than California's annual production of nine billion kilograms of CO₂ from cement production, and would create a significant environmental impact. (Reply, 7:10-15.)

More significantly, the construction and operation of HSR is but *one* of many measures in the Scoping Plan Update that ARB proposes to reduce GHG emissions. For example, the initial 2008 Scoping Plan identified the cap-and-trade program as “cover[ing] about 85 percent of [GHG] emissions throughout California's economy.” (1AR 00468; 13 AR 07072 [noting that cap-and-trade program established declining cap on approximately 85 percent of GHG emissions statewide].) TRANSDEF makes no attempt to quantify the

⁸ The Scoping Plan Update notes these delays recited by TRANSDEF. It puts forth a timeline for construction and operation of the HSR, and states that the Initial Operating Segment is scheduled for completion in 2022, and that HSR is planned to run from San Francisco to Los Angeles in 2029. (13 AR 07081.)

⁹ The parties devote much argument as to whether CEQA requires ARB to perform a “lifecycle analysis” of GHG emissions. As TRANSDEF has not shown the existence of a significant impact, the Court does not address whether ARB abused its discretion in this regard.

HSR project's proposed GHG emissions and its relationship to the other measures in the Scoping Plan.

Finally, TRANSDEF's argument that a significant impact will exist assumes that HSR construction would occur all at once. In fact, the HSR will be constructed in several segments, each of which will undergo its own project-level environmental review. Indeed, TRANSDEF has admitted that as of this date, only one construction contract for the HSR project has been executed in 2013. (Opening Brief, 14:3-4.) The Scoping Plan itself notes these delays, and the fact that HSR will not be constructed at all at once, but will be constructed in different phases. (13 AR 07081.)

TRANSDEF has simply not shown that the delays associated with the HSR project will create a significant impact.¹⁰ Consequently, TRANSDEF has not shown that ARB abused its discretion in failing to address the changes to the HSR project in its EA for the Scoping Plan. As TRANSDEF's other CEQA claims above are premised on the existence of a significant impact, they too, fail.

TRANSDEF also cannot show an abuse of discretion by ARB for preparing an EA that did not consider in detail the EA did not address in detail the changes and delays to specific projects like HSR project, which TRANSDEF argues result in a significant impact.¹¹ This is because ARB correctly prepared the EA for the Scoping Plan Update in a manner similar to a "program" EIR, which EIRs require only a very general analysis of potential environmental impacts.

Like the 2008 Scoping Plan, the Scoping Plan Update is a blueprint for identifying future regulatory or non-regulatory measures implemented by ARB to effectuate its mandate of reducing GHG emissions. The Scoping Plan Update's purpose is to identify the next steps for continuing to reduce GHG emissions beyond 2020, to meet ARB's goal of reducing GHG emissions to 80 percent below 1990 GHG emissions levels by 2050. (13 AR 06990.)

Consistent with this scope, "[t]he level of detail in [the] EA reflects that the project is a broad plan" and "does not provide the level of detail that will be provided in subsequent environmental documents prepared for specific regulatory actions that ARB or other agencies decide to pursue to reduce GHG emissions." (1 AR 00030 [citing 14 Cal. Code Regs., § 15152].) The "project" subject to ARB's environmental review is the Scoping Plan Update, specifically the numerous recommended measures to reduce GHGs to attain AB 32's long-term goals beyond 2020.

¹⁰ At the hearing, TRANSDEF raised new arguments that the increases in GHG emissions created a significant impact because increases in the near future could cause GHG emissions to reach a "point of no return." While this argument is compelling, TRANSDEF did not make it earlier in the litigation and the Court does not consider it. Additionally, this argument does not relieve TRANSDEF of its burden as Petitioner to quantify the increase in GHG emissions and demonstrate why such increase, in relationship to the other measures in the Scoping Plan, is a significant impact.

¹¹ As noted earlier, the Scoping Plan Update noted such delays. (13 AR07081.)

A program EIR "may be prepared on a series of actions that can be characterized as one large project and are related either: (1) Geographically, (2) As logical parts in the chain of contemplated actions, (3) **In connection with issuance of rules, regulations, plans, or 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 which can be mitigated in similar ways." (14 Cal. Code Regs., § 15168, subd. (a) [emphasis added]; *Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 399, n.8.) In contrast, a "project" EIR examines the environmental impacts of a specific development project and all phases of the project including planning, construction and operation. (14 Cal. Code Regs., § 15161.)

Program EIRs for planning documents analyze environmental effects at the "first-tier" of review and need not provide detailed, project-specific analyses. (*See Town of Atherton, supra*, 228 Cal.App.4th at p. 344, 347.) Where program EIRs are focused on this "first-tier" review and the agency explicitly indicates that future, project-specific environmental review will be conducted, the court's review is limited to a more general assessment of the program's secondary effects, mitigation measures, and alternatives. (*Rio Vista Farm Bureau Ctr. v. County of Solano* (1992) 5 Cal.App.4th 351, 373-375, 377-379 [program EIR appropriate for hazardous waste management plan that would be updated and reviewed periodically].) As a result, a "first-tier EIR may defer for future study specific impacts of individual projects that will be evaluated in subsequent second-tier EIRs." (*Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29, 37.)

The EA identifies overall impacts, mitigation, and alternatives regarding the various recommended measures in the 2014 Scoping Plan Update, but defers specific analysis of project-level impacts, mitigation measures, and alternatives to subsequent project EIRs. (1 AR 00010-11, 00030-31, 00064-287.) The Court agrees with ARB's decision to provide a generalized analysis of the impacts, mitigation measures, and alternatives associated with the Scoping Plan, particularly, as later environmental analysis of particular projects in the Scoping Plan or regulatory measures will necessarily follow. (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1172-1173.)

Accordingly, TRANSDEF has shown no abuse of discretion by ARB's failure to address the changes and delays in the HSR project in its EA for the Scoping Plan.

iv. TRANSDEF Has Not Demonstrated that ARB Abused its Discretion in Not Responding to its Comment

TRANSDEF argues that ARB abused its discretion because it did not respond to its comments or take other action, such as recirculating the EA. TRANSDEF has shown no abuse of discretion here.

ARB's certified regulatory program requires it to respond to comments that raise significant environmental issues:

(a) If comments are received during the evaluation process which raise significant environmental issues associated with the proposed action, the staff shall summarize and respond to the comments either orally or in a supplemental written report. Prior to taking final action on any proposal for which significant environmental issues have been raised, the decision maker shall approve a written response to each such issue.

(17 Cal. Code Regs., § 60007.) Here, ARB received 118 comment letters through the two comment period dockets for the Scoping Plan Update and EA therefor. ARB staff determined that seven of those 118 comments “mentioned or raised an issue related to the EA or an environmental issue related to the Update addressed in the EA.” (12 AR 6220.) However, although ARB did not provide written responses to the remaining comments, “all public comments were considered by staff and provided to the [ARB] Board members for their consideration.” (Id.)

TRANSDEF has shown no prejudicial abuse of discretion—e.g., that ARB failed to proceed in a manner required by law—when ARB failed to respond to *its* comment.

As a preliminary matter, TRANSDEF has not reiterated its argument in its Reply brief, appearing to abandon this argument.

Although an agency operating pursuant to a certified regulatory program is not exempted from certain procedural requirements of CEQA, it is not necessarily bound to comply with every procedural requirement of CEQA. (*See San Joaquin River Exch. Contractors Water Author. v. State Water Res. Control Bd.* (2010) 183 Cal.App.4th 1110, 1134.)

In this case, ARB’s certified regulatory program requires it to respond to comments “which raise significant environmental issues associated with the proposed action.” (17 Cal. Code Regs., § 60007.) In contrast, CEQA requires that an EIR include written responses to comments submitted during the public comment period for the draft EIR. (Public Resources Code, § 21091; 14 Cal. Code Regs., § 15088.) “The requirement of a detailed written response to comments helps to ensure that the lead agency will fully consider the environmental consequences of a decision before it is made, that the decision is well informed and open to public scrutiny, and that public participation in the environmental review process is meaningful.” (*Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1567 [citations and quotations omitted].) However, CEQA does not require an agency to respond to every comment submitted by the public. (*See Environmental Protection Information Center v. California Dep’t of Forestry & Fire Prot.* (2008) 44 Cal.4th 459, 484-487.) Additionally, a petitioner must demonstrate that the agency failed to consider its comments, and that such failure was prejudicial. (*Ibid.*)

TRANSDEF has not shown that ARB abused its discretion by not responding to its comments.

Here, ARB could have determined that the comments were directed at the Scoping Plan, itself, and not the EA.

The administrative record indicates that TRANSDEF submitted a letter to ARB on August 2, 2013, which included attachments, including an article prepared by Mikhail Chester and Arpad Horvath. (57 AR, 32324-32350.) The Administrative Record also shows that TRANSDEF submitted an April 7, 2014 letter to CARB during the comment period for the Scoping Plan EA. The April 2014 letter, titled "Proposed First Update to Climate Change Scoping Plan," stated that the Scoping Plan Update had not established a causal connection between the first Scoping Plan and reduction in GHG emissions. The letter then listed a variety of areas that the Scoping Plan Update should address, including the HSR project and TRANSDEF's contention that the HSR's construction emissions would make the HSR project a net GHG emitter for two or more decades. (57 AR 32319-32323.)

The April 2014 letter was directed to the Scoping Plan Update. First, the letter did not ever mention the EA therefor. Second, the letter noted that the "Update had excellent copy editing" and referred to the earlier August 2, 2013 letter with more detailed suggestions on "improving the Scoping Plan Update." (57 AR 32323.) In fact, TRANSDEF concedes that its April 2014 comment letter was not explicitly identified as a comment letter on the EA. (Opening Brief, 17: 20-23.) Given the fact that the letter was directed to the Scoping Plan, and the fact that TRANSDEF concedes as much, ARB did not abuse its discretion in determining that the letter was not a comment on the EA for which it was required to provide a written response.

Additionally, TRANSDEF has not demonstrated a *prejudicial* abuse of discretion. Even if ARB did not respond in writing to TRANSDEF's comments, the administrative record indicates that ARB staff *considered* all public comments and provided such comments to the Board members for their consideration. (12 AR 6220.) (*Environmental Protection Information Center, supra*, 44 Cal.4th at 487-488.) The Court "presumes that an official duty has been performed unless the record affirmatively shows otherwise; the record here does not show otherwise." (*San Joaquin River Exch. Contractors Water Auth., supra*, 183 Cal.App.4th at 1135 [citing Evid. Code, § 664].)

TRANSDEF has not shown that ARB abused its discretion in failing to provide a written response to its comments.

v. ARB's EA Findings Are Adequate

TRANSDEF briefly argues that ARB's Findings in its EA are inadequate, because they do not mention the HSR project. Where a CEQA project has potentially significant impacts, the agency must make written findings for each of these effects, accompanied by a brief rationale for each finding. (Public Resources Code, § 21081, 14 Cal. Code Regs., § 15091.) As TRANSDEF has failed to show that the changes to the HSR project resulted in a potentially significant impact that the EA for the Scoping Plan Update was required to consider, TRANSDEF cannot show that the EA's findings are deficient because the failed to address the HSR project.

d. ARB's Approval of the Scoping Plan Update did Not Violate AB 32

TRANSDEF argues that ARB's approval of the Scoping Plan violated AB 32 because the Scoping Plan's inclusion of the HSR would actually increase GHG emissions by 2020, and GHG emissions from the HSR's construction would not be offset by its operations by 2020.

ARB first argues that this cause of action was not properly pleaded, and that it was not put on notice that ARB exceeded its authority under AB 32. ARB challenged this cause of action in its earlier demurrer, arguing that as the Scoping Plan was not a "regulation," and that TRANSDEF could not challenge the Scoping Plan Update's adoption pursuant to Health & Safety Code section 38562. TRANSDEF responded that the Court should construe its challenge as an alleged violation of Health & Safety Code section 38561, which pertains to the preparation of a Scoping Plan. The Court granted TRANSDEF leave to amend the Petition to allege whether it challenged the Scoping Plan under the latter or both theories. TRANSDEF failed to amend the Petition, but argues that it adequately pleaded the cause of action.

As courts prefer to resolve issues on the merits, the Court will dispose of this issue here. (*Stoltenberg v. Ampton Investments, Inc.* (2013) 215 Cal.App.4th 1225, 1231 [citation omitted].) TRANSDEF has shown no violation of AB 32.

ARB's adoption of the Scoping Plan Update is a quasi-legislative administrative action, and entitled to judicial deference upon review. (*Association of Irrigated Residents v. State Air Res. Bd.*, *supra*, 206 Cal.App.4th 1494.) The court determines if the administrative action is within the bounds of the statutory mandate. If this is true, as it is here, the Court next inquires if the action is reasonably necessary to effectuate the purpose of the statute, "which requires the court to determine only whether the Board exercised its discretion arbitrarily and capriciously, without substantial evidentiary support." (*Ibid.*)

Under Health & Safety Code section 38561, ARB must prepare and approve a Scoping Plan "for achieving the maximum technologically feasible and cost-effective reductions in greenhouse gas emissions from sources or categories of sources of greenhouse gases by 2020 under this division." ARB must update the Scoping Plan every five years. (*Ibid.*) The text of AB 32 itself contemplates that ARB continue to reduce GHG emissions beyond 2020. (Health & Saf. Code, § 38551; *see also Association of Irrigated Residents v. State Air Res. Bd.*, *supra*, 206 Cal.App.4th 1496.) For this reason, TRANSDEF has shown no violation.

Additionally, Executive Order S-3-05 directed the State to reduce GHG emissions to 80 percent below 1990 levels by 2050, and a central purpose of the Scoping Plan Update is to achieve this goal. (ARB Request for Judicial Notice (RJN), Exh. 1.) Finally, the Legislature passed Senate Bill 32, in 2015, establishing a "mid-term goal" of reducing GHG emissions to 40 percent below 1990 levels by 2030. (ARB RJN, Exh. 3.) Although this Legislative action does not moot TRANSDEF's challenge, it is relevant to show that

the Legislature intends for ARB to continue to aim to reduce GHG emissions well beyond 2020.

The fact that TRANSDEF alleges that one component of the measures approved in the Scoping Plan—the HSR project—will increase GHG emissions in the short term, is not a violation of AB 32. It is undisputed that construction and operation of the HSR will lower GHG emissions over time. The fact that components of the HSR system's construction and operation are delayed, does not demonstrate that ARB violated AB 32 in approving the Scoping Plan Update.

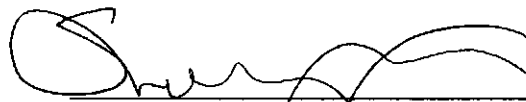
III. DISPOSITION

TRANSDEF has failed to demonstrate that ARB abused its discretion in adopting the Scoping Plan Update or certifying the EA therefor. The Petition is **DENIED**.

The Court is sympathetic to TRANSDEF's concerns. However, the Court emphasizes that its judicial review is limited to determining whether ARB's actions in adopting the Scoping Plan were arbitrary and capricious, and whether ARB prejudicially abused its discretion in certifying the EA therefor. In conducting its review, the Court does not question ARB's policy choices, and the Court may not set aside ARB's decisions simply because it disagrees with ARB. Because TRANSDEF has not demonstrated that ARB abused its discretion or acted arbitrarily and capriciously, the Court must deny the Petition.

Counsel for ARB is directed to prepare a formal order, and separate judgment, each incorporating the Court's ruling as an exhibit thereto, submit them to counsel for the parties for approval as to form, and thereafter submit them to the Court for signature, in accordance with California Rules of Court, Rule 3.1312.

Date: May 15, 2017



Shelleyanne W. L. Chang
Judge of the Superior Court of California
County of Sacramento

Declaration of Mailing

I hereby certify that I am not a party to the within action and that I deposited a copy of this document in sealed envelopes with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California.

Dated: May 16, 2017

E. Higginbotham, Deputy Clerk /s/ E. Higginbotham

A handwritten signature in black ink, appearing to be 'E. Higginbotham', written over the printed name and underlined text.

Stuart M. Flashman
Law Offices of Stuart M. Flashman
5626 Ocean View Drive
Oakland, CA 94618

Kavita P. Lesser
Office of the Attorney General
300 S. Spring Street
Los Angeles, CA 90013

Mark Poole
Office of the Attorney General
P.O. Box 70550
Oakland, CA 94612