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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, a California nonprofit corporation, Petitioner vs. CALIFORNIA AIR RESOURCES BOARD, an agency of the State of California, and DOES 1-10, inclusive, Respondents	No. 34-2014-80001974-CU-WM-GDS Action under the California Environmental Quality Act Assigned for all purposes to Hon. Shelleyanne W. L. Chang, Dept. 24 PETITIONER'S REPLY BRIEF

Date:	March 17, 2017
Time:	10:00 AM
Dept.	24
Judge	Hon. Shelleyanne W.L. Chang
Case Filed:	June 23, 2014
Trial Date:	March 17, 2017

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INTRODUCTION

Petitioner Transportation Solutions Defense and Education Fund ("TRANSDEF" or "Petitioner") agrees with Respondent California Air Resources Board ("ARB") about the importance of climate change to California's, and indeed the world's, future. TRANSDEF also agrees with ARB that AB 32, California's most important legislative response to global climate change, is extremely important, both in itself and as a precedent for how other states, and indeed other countries, might want to address this problem.

It is precisely for that reason that TRANSDEF filed the present lawsuit. It has been said that the road to Hell is paved with good intentions. ARB had plenty of good intentions in preparing its 2014 Updated Scoping Plan. Indeed, as ARB points out in its brief (Respondent California Air Resources Board's Opposition Brief ("ARB Opposition") at p. 20: 21-24), TRANSDEF had many good things to say about the Updated Scoping Plan.

However, when it came to including the high-speed rail project as a "recommended measure" in the Scoping Plan, those good intentions were led astray by the incomplete and deceptive report that the California High-Speed Rail Authority ("CHSRA") submitted to the Legislature in 2013, and to ARB during the preparation of the Updated Scoping Plan. (21 AR 11656 et seq.). That report not only misrepresented the start date for high-speed rail commercial operation as 2022 (21 AR 11663, 11665; see also 27 AR 14783),[1] but represented that its analysis included "Upstream GHG Emissions from Materials" (21 AR 11664) when, in fact, those materials were not included in its analysis (*Id.* at p. 11669; see also *Id*. at p. 11673 [itemization of emissions included in construction emissions estimate].)[2]

TRANSDEF submitted a comment letter with attachments that demonstrated that designating the high-speed rail project, as a recommended measure, was totally inappropriate. Rather than reducing GHG emissions by 2020, as AB 32 mandated, the project would actually cause a net increase in GHG emissions well beyond AB 32's 2020 deadline. Unfortunately,

[1] Even in 2013, it was already clear that the 2022 target date for the beginning commercial operation on the Initial Operating Segment, from Merced to San Fernando, would not be met, as environmental review deadlines were being missed.

[2] In its brief, ARB states that "Construction began on the first high-speed rail segment in the Central Valley in August 2013." (ARB Opposition at p. 14:9-10.) In reality, that was when the first construction contract was signed (27 AR 14783). Nine months later, when the Updated Scoping Plan was approved, no construction had yet begun.

ARB brushed aside TRANSDEF's letter and ignored the rail project's significant secondary GHG emissions impact. These errors cry out for correction.

ARGUMENT

I. TRANSDEF ADEQUATELY EXHAUSTED ITS ADMINISTRATIVE REMEDIES, AND ANY FAILURE TO EXHAUST IS INCONSEQUENTIAL.

ARB argues that TRANSDEF failed to exhaust its administrative remedies on almost all of its CEQA claims. While exhaustion of remedies is a statutory prerequisite under CEQA, the exhaustion requirements are not stringent. (Public Resources Code § 21177; *Citizens Assn. For Sensible Development of Bishop Area v. County of Inyo ("Citizens")* (1985) 172 Cal.App.3d 151, 163; *see also, Santa Clarita Organization for Planning the Environment v. City of Santa Clarita ("SCOPE")* (2011) 197 Cal.App.4th 1042.)

A. TRANSDEF adequately exhausted its administrative remedies.

ARB cites *Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 894 to assert that, "the exact issue raised in the lawsuit must have been presented to the …agency." (Respondent California Air Resources Board's Opposition Brief ("ARB Opposition") at p. 20:7-8.) However, more recent cases have clarified that the standard is not that demanding.

> However, "less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding" because, although not the case here, parties in such proceedings generally are not represented by counsel. (*Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1395 [quoting from *Citizens, supra*, 172 Cal.App.3d at p. 163].)

More specifically, in *Gonzales v. City of Santa Ana* (1993) 12 Cal.App.4th 1335, 1348 fn. 17, the court noted that when the plaintiff raised the issue of displacement during the administrative process, that encompassed the issue of the adequacy of the housing plan involved. Similarly here, ARB acknowledges that TRANSDEF adequately raised the failure of ARB's environmental review to address the indirect GHG emissions impact from including the high-speed rail project's construction as a recommended greenhouse gas reduction measure. Yet the failure to address that issue necessarily included the failure to identify mitigation measures for the omitted impact, as well as the failure to consider alternatives that would avoid the impact. Also subsumed within TRANSDEF's objections to ARB not addressing the GHG emissions impact of including high-speed rail in the Updated Scoping Plan were the failure to adequately

respond to TRANSDEF's comment and the failure to recirculate in response to the new information provided by the comment.[3]

ARB argues that none of these inadequacies needed to be addressed because TRANSDEF's extensive written comment letter objected to the project, not ARB's environmental analysis.[4] (ARB Opposition at p. 20:26-21:2.) ARB is splitting hairs. Just as in *Gonzales, supra*, where the complaints about displacement pointed directly to the inadequacy of the housing plan, TRANSDEF's complaint about the high-speed rail project being a net emitter of greenhouse gases for more than twenty years after the start of commercial operation more than adequately raised the failure of ARB's environmental analysis to address this issue.

B. Any failure of TRANSDEF to exhaust administrative remedies is inconsequential.

Even if the Court were to find that TRANSDEF failed to exhaust its administrative remedies on one or more issues, that failure would be inconsequential. ARB concedes that TRANSDEF exhausted its remedy on the central CEQA violation – ARB's failure, in its Environmental Assessment for the Updated Scoping Plan, to acknowledge the potentially significant impact of the literally millions of tons of CO_2 that would be released as an indirect but very foreseeable result of high-speed rail construction's use of immense amounts of cement.

If the Court finds that the failure to address that impact violated CEQA, ARB will be required to revise and recirculate its Environmental Assessment.[5] That revision will also have to address ways in which the CO_2 emissions impact could either be mitigated or avoided through an alternative project. In short, if ARB violated CEQA in ignoring the indirect greenhouse gas emission impacts, it will have to address each of the other CEQA violations identified in TRANSDEF's petition, regardless of whether they are included in the Court's final judgment or not.

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[3] Among the issues for which ARB asserts TRANSDEF failed to exhaust its remedies are two where remedies were explicitly exhausted. Those are cumulative impacts and the inadequacy of the findings. TRANSDEF's oral comments at the final public hearing explicitly raised both issues. (55 AR 31150, 31151.)

[4] However, ARB also claims that it "evaluated all comment letter received on the two dockets and determined which raised significant environmental issues related to the 2014 Draft EA requiring a written response." (ARB Opposition at p. 13:12-14 [emphasis added].) Evidently, ARB felt that the indirect impact of releasing literally millions of metric tons of CO_2 was not significant.

[5] Under ARB's certified regulatory Program (Public Resources Code § 21080.5), an Environmental Assessment is the functional equivalent of an Environmental Impact Report.

II. ARB'S ENVIRONMENTAL ASSESSMENT OF THE UPDATED SCOPING PLAN, EVEN IF PROGRAMMATIC, WAS INADEQUATE IN FAILING TO ADDRESS THE PROJECT'S SIGNIFICANT INDIRECT GREENHOUSE GAS EMISSIONS IMPACT.

ARB argues that because its Environmental Assessment of the Updated Scoping Plan was programmatic, it did not need to address all of the impacts of the component projects included within it. That is true, up to a point. As the California Supreme Court case *In re Bay-Delta et al.* (2008) 43 Cal.4th 1143, 1169 explained:

> A program EIR, as noted, 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.)

That, however, does not end the analysis.

A. A program EIR does not excuse the failure to identify significant impacts where the available information makes them reasonably foreseeable.

Program EIRs are done to address a wide variety of decisions, ranging from general plans to large-scale master plans to long-range phased projects. In many cases, program EIRs are prepared, in part, to take advantage of CEQA's concept of "tiering," where a later detailed project-specific document is allowed to rely on the program EIR's analysis of a broadly defined impact, and that analysis remains unchanged at the project level. The environmental analysis for the Updated Scoping Plan was not, however, such a document.

The Scoping Plan is not like a general plan, where the same lead agency will later do project-level analyses for the projects included in it. Nor is it a multi-phase project like those at issue in *Town of Atherton et al. v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314 or *In re Bay-Delta, supra*. Rather, it looked at a hodgepodge of projects being proposed by a variety of agencies. Some of those projects still required project-level agency review; others only needed funding, and some, like the high-speed rail project, had completed their own program-level environmental review but had not yet fully completed project-level review. Thus ARB could not use the blanket excuse that detailed impact analysis would necessarily involve speculation about impacts whose scope would not be definable until project-level review was

initiated. (*See, e.g., Town of Atherton, supra,* [program-level analysis of noise and aesthetic impacts could put off more detailed analyses to the project level].) As was explained in *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511, 533-534:

> Designating an EIR as a program EIR also does not by itself decrease the level of analysis otherwise required in the EIR. "All EIR's must cover the same general content. (Guidelines, §§ 15120-15132.) The level of specificity of an EIR is determined by the nature of the project and the 'rule of reason' [citation], rather than any semantic label accorded to the EIR." [citation]
>
> In fact, the Guidelines do not specify the level of analysis to be performed in a program EIR. Similar to a first tier EIR, a program EIR is designed for analyzing program-wide effects, broad policy alternatives and mitigation measures, cumulative impacts and basic policy considerations, as opposed to specific projects within the program. (Guidelines, § 15168, subd. (b)). However, the Guidelines also state a program EIR "will be most helpful in dealing with subsequent activities if it deals with the effects of the program *as specifically and comprehensively as possible*. With a good and detailed analysis of the program, many subsequent activities could be found to be within the scope of the project described in the program EIR, and no further environmental documents would be required." (Guidelines, § 15168, subd. (c)(5).) [emphasis in original case, case citation omitted].)

Thus, regardless of the label on the environmental review as being "programmatic," ARB's Environmental Assessment needed to evaluate all impacts for which the available information made analysis feasible. That is particularly true when the programmatic analysis included a project like the high-speed rail system, where some project-level environmental review had already been completed. (1 AR 398 [Updated Scoping Plan notes that Project EIR for Fresno-Merced segment of high-speed rail system was certified in May 2012].)[6]

B. Analysis of impacts in an EIR includes indirect impacts, regardless of whether or not those impacts are identified through a "lifecycle" analysis.

ARB argues that information about indirect impacts of CHSRA's high-speed rail project derived from a "lifecycle" analysis of the project's component parts was unnecessary for an adequate analysis. (ARB's Opposition at p. 30.) ARB creates a "straw man" argument that TRANSDEF had insisted that a lifecycle analysis was mandatory under CEQA. ARB then

[6] Note that information included TRANSDEF's comment letter from the Chester & Horvath article did not become available until July 2012, after the Merced-Fresno EIR had already been certified.) (57 AR 32340 [article publication date].)

conflates lifecycle analysis with analysis of indirect impacts and argues that neither lifecycle analysis nor analysis of indirect impacts were needed at the program level.

1. While TRANDEF advocated for using "lifecycle" analysis to analyze indirect construction GHG emission impacts, it did not claim that lifecycle analysis was mandatory – only analysis of indirect impacts.

Nowhere in TRANSDEF's Second Amended Petition or in its Opening Brief did TRANSDEF assert that lifecycle analysis is required by CEQA. What TRANSDEF did point out is that lifecycle analysis is generally accepted as the preferred method for evaluating a project's GHG emissions. (Petitioner's Opening Brief at p. 15:18-24; see 42 AR 24218 *et seq*.)

Nevertheless, regardless of whether they are evaluated by lifecycle analysis or another method, CEQA requires, and ARB has in the past accepted, that indirect impacts must be identified and analyzed as part of an Environmental Assessment. (Public Resources Code § 21065.3 [project-specific impact includes direct or indirect environmental effects]; § 21083(b)(3) [CEQA Guidelines mandatory criteria of significance shall include when project will cause substantial adverse effects on human beings, either directly or indirectly; CEQA Guidelines § 15042 [authority to disapprove project includes refusal to approve project in order to avoid direct or indirect environmental effects; § 15064 [determination of significant impacts includes both direct and reasonably foreseeable indirect effects]; *See also, POET, LLC v. California Air Resources Bd.* (2013) 218 Cal.App.4th 681, 741 [ARB used a mathematical model to estimate indirect land use impacts from its proposed Low Carbon Fuel Standard].)

2. ARB mischaracterizes the effect of the 2009 CEQA Guidelines amendment regarding evaluating GHG emissions impacts.

ARB points to a 2009 amendment to the CEQA Guidelines removing the term "lifecycle" from Appendix F to the Guidelines. (ARB Opposition at pp. 30-31.) ARB characterizes the amendment as eliminating lifecycle analysis as a method for identifying indirect impacts. (*Id*.) ARB mischaracterizes the amendment.

The portion of the Resources Agency's explanation of the amendment quoted by ARB notes that, "the term [lifecycle] *could* refer to emissions beyond those that could be considered 'indirect effects' of a project." [emphasis added] The explanation goes on to note that, "CEQA only requires analysis of impacts that are directly or indirectly attributable to the project under consideration." [emphasis added] It then notes that, "In some instances, materials may be manufactured for many different projects… Thus such emission *may* not be 'caused by' the project under consideration." [emphasis added] In other words, a lifecycle analysis, if broadly

construed, might include effects that would occur regardless of the project, and hence would not qualify as indirect impacts. That is very different from saying that lifecycle analysis may not be used to evaluate indirect GHG emissions impacts. Indeed, the paragraph cited (in part) by ARB goes on to state the following:

> Conversely, other projects may spur the manufacture of certain materials, and in such cases, consideration of the indirect effects of a project resulting from the manufacture of its components may be appropriate. A lead agency must determine whether certain effects are indirect effects of a project, and where substantial evidence supports a fair argument that such effects are attributable to a project, that evidence must be considered. However, to avoid potential confusion regarding the scope of indirect effects that must be analyzed, the term "lifecycle" been removed from Appendix F. (ARB's RJN, Ex. 6, p. 72, emphasis added.)

Here, as TRANSDEF's analysis and the Chester-Horvath article note, high-speed rail construction would result in approximately eight teragrams (8×10^{12} grams = eight billion kilograms or eight million metric tons) of CO_2 (Figure 4 at 57 AR 32347), of which 67% would be due to cement production. (57 AR 32343.) By comparison, the total annual CO_2 production associated with all California cement production in 2020 is estimated at nine million metric tons. (2 AR 651, 652.) Thus CO_2 production from constructing the high-speed rail project would cause a significant increase in statewide cement production-associated GHG emissions, and would result in a significant indirect impact caused by the high-speed rail construction.[7]

C. ARB's refusal to analyze the indirect GHG emission impact from inclusion of the high-speed rail project as a "recommended measure" in the Updated Scoping Plan violated its duty under CEQA.

CHSRA's report on its project's GHG impacts dismissed the CO_2 generation impact from cement manufacture for construction as too speculative for analysis:

> While it is understood that the rail infrastructure will consist, largely of aggregate, concrete, steel, rails, and ballast; the precise source and supplier of those materials is not yet known. Additionally, the precise quantities are not available, given the nature of the design-build procurement process which involves development of concept-level designs which are then taken to final design and construction by a design-build contractor. (21 AR 11669)

[7] This presumes that cement for the high-speed rail project would be manufactured within California. While likely, that would not necessarily be the case, especially if California cement prices increased due to cap and trade fees. The indirect GHG emissions impact of cement manufacture, however, would remain unchanged.

However, TRANSDEF's comment letter and attachments (57 AR 32320-32362) provided sufficient substantial and credible evidence to rebut CHSRA's claim that analysis was infeasible. (See, 57 AR 32335-32336 [TRANSDEF detailed critique of CHSRA analysis]; 57 AR 32342-32348 [Chester-Horvath analysis of HSR GHG emission effects, showing that indirect construction-related emissions, and specifically cement manufacture, overshadow operational reductions in GHG emissions, with "payback periods" – i.e., point at which operational reductions in GHG emissions "repay" GHG emissions increases due to cement and steel manufacture for construction – of more than twenty years]; see also, 57 AR 32358 [Legislative Analyst's Office report].)

Not only did the TRANSDEF letter and attachments show that estimating the GHG emission impacts from construction-associated cement production was feasible. They also showed that those impacts are highly significant, and indeed overbalance any operational reduction in GHG emissions for over twenty years. (See 57 AR 32347 [Figure 4 – left-hand graphs showing "payback" period for indirect HSR construction GHG emission increases, depending on the estimated HSR ridership levels].)

This information was before ARB as it revised its Environmental Assessment to respond to comments. Whether TRANSDEF's comments were "aimed" at the Environmental Assessment or at the Scoping Plan itself, ARB had a duty to respond to the new information provided, which showed that its assessment was defective in failing to disclose and discuss the significant indirect GHG emissions impact from including high-speed rail as a recommended measure in the Updated Scoping Plan.

D. Changed circumstances and new information precluded continuing to rely on the 2008 Scoping Plan's analysis of the high-speed rail project to justify its inclusion as a recommended measure.

At the final hearing on the Updated Scoping Plan, counsel for ARB asserted that ARB could continue to rely on the 2008 Scoping Plan and its 2010 supplement to include high-speed rail as a recommended measure. (56 AR 31216-17.) ARB's reliance was, and is, misplaced. The circumstances of the high-speed rail project had changed significantly since 2008, and even since 2010, in ways that made it ineligible to be a recommended measure under AB 32. In addition, new information, both about the project and about its indirect GHG emissions impacts, indicated that the project's indirect construction-related GHG emissions impacts, while perhaps speculative in 2008, were now both reasonably foreseeable and significant.

1. The circumstances for implementing the high-speed rail project had changed significantly in ways that would increase that project's indirect GHG emissions impact, especially prior to 2020.

As noted in Petitioner's Opening Brief (at p. 7), at the time the initial Scoping Plan was approved, December 2008, Proposition 1A, a $9.95 billion bond measure to support construction of the high-speed rail system, had just been passed. In an uncodified portion of AB 3034, the legislation placing the bond measure on the ballot, the Legislature had stated its intent that the entire system be operational by 2020. Thus, in 2008 ARB could presume that by 2020, the system would be carrying passengers who would otherwise have traveled by automobile or air, resulting in reduced GHG emissions. Further, the 2008 program EIR for the Bay Area to Central Valley portion of the system assumed that high-speed rail would have its own tracks throughout, allowing maximum speeds and train frequencies, with a correspondingly large ridership. All these factors supported ARB's conclusion that by 2020, the system would be reducing GHG emissions compared to the base case scenario.

By 2014, the situation had changed dramatically. As noted earlier, construction of the high-speed rail system had not yet even begun, and even the 300 mile long Initial Operating Segment, the first usable high-speed rail segment, was not expected to start passenger service until 2022 at the earliest.[8,9] Consequently, by 2020 there would be no cars taken off the road or passenger airliners removed from service, and hence no GHG emission reduction.

In addition, as an economy measure, in 2012 CHSRA approved revising the system to provide only "blended" service in its Phase 1 operation. In blended service, high-speed rail trains would share the right of way, and in some cases the tracks themselves, with existing conventional rail commuter trains. As a result, true high-speed train speeds would not be possible on the blended segments, and high-speed train frequencies would need to be reduced to accommodate commuter trains sharing the track. Even when high-speed train service did begin, this was acknowledged to result in reduced ridership, a reduced ability to take passengers away from auto and air travel, and less reduction in GHG emissions than had been expected in 2008.

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[8] In fact, even as of 2013, delays in obtaining environmental clearances had already made the 2022 start-date for HSR service unrealistically optimistic.

[9] The IOS, being shorter and not including San Francisco, San Jose, or Los Angeles, was projected to have much lower ridership than the full phase I system, and therefore to have proportionately less effect in reducing GHG emissions.

All of these factors meant that high-speed rail would be far less effective as a GHG reduction measure than had been determined in the 2008 Scoping Plan.

2. New information about high-speed train routes and the evaluation of secondary GHG emissions impacts now indicated that those secondary impacts would be significant.

As noted above, in 2008, only a general program-level analysis of the high-speed rail system had been completed.[10] However, as the Updated Scoping Plan noted, the first project-level EIR for the high-speed rail system, for the Merced to Fresno segment, was certified, and that segment approved for construction, in 2012. (1 AR 398.) With that approval, it became possible to obtain much more accurate information on the amounts of cement and steel the high-speed rail project would need. In addition, in 2010, Chester and Horvath published their first paper conducting a life cycle analysis of GHG impacts of the high-speed rail system. That analysis was further refined in their 2012 paper. (See, 57 AR 32340.) With the additional information from project-level environmental review and the new analytical methods developed by Chester and Horvath, the indirect GHG emissions impact of constructing the high-speed rail system was no longer too speculative to evaluate. Indeed, in their 2012 paper, Chester and Horvath concluded that the secondary construction GHG emission impacts would be large-scale, releasing roughly eight million metric tons of CO_2 and requiring at least 20 years of high-speed rail operation to offset them.

Both because of the changes in the circumstances of implementing the high-speed rail system and because of the new, previously unavailable information showing that high-speed rail construction would have significant secondary GHG emissions impacts during its construction, the 2008 analysis in the Environmental Assessment for that document could no longer be relied upon in 2014. (Public Resources Code § 21166(a)-(c); *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 949.)

III. ARB'S CEQA FINDINGS IN SUPPORT OF THE UPDATED SCOPING PLAN WERE INADEQUATE FOR FAILING TO CALL OUT AND EXPLAIN ITS SIGNIFICANT INDIRECT GHG EMISSIONS IMPACT.

[10] In fact, while the Bay Area to Central Valley High-Speed Train EIR was initially completed in August 2008, successful challenges to its adequacy delayed its final approval to 2012, when it was modified to also consider a blended system alternative, which was then adopted. (See, *Town of Atherton*, *supra*.) Only with the appellate ruling in that case in the summer of 2014 was program-level analysis fully complete.

ARB calls Petitioner's argument about the inadequacy of ARB's CEQA findings "threadbare," but if anything was threadbare it was those findings, which failed to even mention the Scoping Plan's significant indirect impact on GHG emissions. It was that defect, not the failure to specifically call out the high-speed rail project (although it was the high-speed rail project that was the source of the GHG emissions impact) that made the findings inadequate.

Finding are intended to "connect the dots;" that is, to bridge the analytical gap between the raw evidence and the agency's ultimate conclusions. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.) Here, there is a basic problem – ARB ignored the evidence presented to it by TRANSDEF showing that the high-speed rail project would result in a significant indirect GHG emissions impact. Not surprisingly, since ARB saw no impact, it made no finding about that impact. The argument in Petitioner's opening brief was short because the findings' deficiency was simple and obvious.

IV. THE UPDATED SCOPING PLAN VIOLATES THE REQUIREMENTS OF AB 32 AND THEREFORE MUST BE INVALIDATED

A. The Second Amended Petition adequately pled the violation of AB 32.

ARB complains that the Second Amended Petition ("SAP") failed to adequately inform it that TRANSDEF was challenging the Updated Scoping Plan's compliance with AB 32's mandatory requirements. It claims that, because the SAP did not specifically mention Health & Safety Code § 38561 or "otherwise put ARB on notice that ARB allegedly exceeded its authority under AB 32," the cause of action must be denied. ARB conveniently forgets that it is black-letter law that the allegations of a complaint [or petition] are to be liberally construed. (Code of Civil Procedure § 452; *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1118.)

In its Fourth Cause of Action, the SAP alleges that the PROJECT [i.e., Updated Scoping Plan] violated provisions of AB 32:

> …by failing to ensure that the GHG emission reductions claimed to be achieved by the adoption of the PROJECT would achieve the maximum technologically feasible and cost-effective reductions in Greenhouse gas emissions from sources or categories of sources of greenhouse gases by 2020, as required by AB 32. (SAC at p. 12: 10-13, ¶ 56.)

The Fourth Cause of Action then continues by stating:

> More specifically, the GHG reductions claimed through the inclusion of the HSR project in the PROJECT would not, in reality and as demonstrated by the evidence in the record before ARB, result in reducing greenhouse gas emissions by 2020, but were instead illusory because in reality the construction of the HSR project would result in a significant increase in GHG emissions by 2020 and that increase in emissions would not be fully offset by any concomitant reductions in GHG emissions, making the HSR project a contributor to a net increase in GHG emissions before 2020, directly contrary to the intent and requirements of AB 32. (SAC at p. 12:14-20, ¶ 57.)

California is not a form-pleading state, where specific technical allegations are required to plead a cause of action. TRANSDEF was not required to identify specific statutes, but only to allege facts sufficient to state a cause of action.

> Our system of code pleading requires only fact pleading. (See, e.g., 4 Witkin, Cal. Procedure, supra, Pleading, § 332, pp. 381-383.) Loring was notified of the prospect of statutory damages *and this suffices to put him on notice to inquire which statutes might apply*. (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1750 [emphasis added].)

Here, the SAP put ARB on notice that TRANSDEF alleged it had violated AB 32 in approving the Updated Scoping Plan because the high-speed rail project did not satisfy AB 32's requirements that the Scoping Plan "achieve the maximum technologically feasible and cost effective reductions in GHG emissions by 2020, because the high-speed rail project would, by 2020, only increase GHG emissions. That is what the SAC alleges, and that is what TRANSDEF's brief argues. The fact that the brief cites the specific statutory section where the complaint did not is immaterial. The alleged facts were sufficient to put ARB on notice that it was being sued because the Updated Scoping Plan, and specifically its inclusion of the high-speed rail project as a recommended measure, violated the requirements of AB 32. It certainly knew enough about AB 32's provisions to inquire which specific code sections were involved. No more was required.

B. While AB 32 allows ARB to look at GHG emission effects beyond 2020, it specifically requires the Scoping Plan to focus on emission reductions to be achieved "by 2020."

ARB claims that the statutory language of Health & Safety Code § 38561 allows the Updated Scoping Plan to include as recommended measures GHG reduction measures that would only reduce GHG emissions well beyond 2020. Contrary to ARB's Opposition Brief, it is this interpretation, rather than that of TRANSDEF, that stretches the meaning of the statute's language beyond reason. The very first provision of § 38561 begins by stating:

> On or before January 1, 2009, the state board shall prepare and approve a scoping plan, as that term is understood by the state board, 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. (Health & Safety Code § 38561(a) [emphasis added].)

The importance of the 2020 deadline is further emphasized by its repetition in subdivision (b).[11] ARB argues that the section's requirement that the Scoping Plan be periodically updated requires ARB to provide measures that extend beyond 2020. It does not, and even if it did, that would not negate the requirement that the GHG reduction measures start by reducing GHG emissions by 2020.

To go back to the captain and navigator analogy used in Petitioner's Opening Brief, with Health & Safety Code § 38561, it is as if the captain directed the navigator to plot a course for a ship to successively visit six Caribbean islands. Obviously, the captain would start by ordering the navigator to plot a course to the first island, especially if the captain considered that first island particularly important. The captain might further direct that the navigator also look at the courses to visit the next three islands, but that would not negate the directive to plot the course to the first island first. A navigator who plotted a course to the second or third island while failing to visit the first island would obviously not be following the captain's orders.

Similarly here, in § 38561, the Legislature directed ARB to focus first on GHG reductions to be achieved by 2020. The Legislature also allowed ARB to consider other later GHG reduction goals, but nowhere in AB 32, nor even in the later-enacted SB 32, did the Legislature rescind or countermand its direction that the Scoping Plans focus on addressing GHG emission reductions to be achieved by 2020.[12] A measure that failed to produce at least some GHG emission reduction by 2020 would be in direct violation of the Legislature's clear mandate in § 38561. Yet that is exactly what ARB did in the Updated Scoping Plan by continuing to include the high-speed rail project as a recommended measure, despite the uncontradicted evidence that it could only increase GHG emissions by 2020.

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[11] ARB conveniently neglects to include in its selective quotation of subsections (a) and (b) those subsections' prominent 2020 deadline. Such selective quoting borders on misrepresenting the statute to the Court.

[12] Obviously, no Governor's executive order had the power to rescind, or even modify a direct Legislative mandate from the Legislature; at least not without that power first having been delegated to the Governor, and AB 32 includes no such delegation of power.

C. Neither the Governor's 2015 Executive Order nor the passage of SB 32 in 2016 moots Petitioner's Fourth Cause of Action.

As a last gap attempt to avoid the invalidation of the Updated Scoping Plan, ARB argues that Governor Brown's 2015 Executive Order B-30-15 (Exhibit 2 to Respondent's Request for Judicial Notice) and the Legislature's passage of SB 32 in its 2016 legislative session (Exhibit 3 to Respondent's Request for Judicial Notice) moot Petitioner's claim that the 2014 Updated Scoping Plan violates AB 32. Respondent's argument is to no avail.

Executive Order B-30-15, among other things, set an interim standard for GHG emissions reductions for 2030, calling for state agencies to take action so that emissions as of that date would be reduced to 40% below 1990 levels. (Paragraph 1 of executive order.) SB 32, in Section 2, states (Health & Safety Code § 38566):

> In adopting rules and regulations to achieve the maximum technologically feasible and cost-effective greenhouse gas emissions reductions authorized by this division, the state board shall ensure that statewide greenhouse gas emissions are reduced to at least 40 percent below the statewide greenhouse gas emissions limit no later than December 31, 2030.

Thus SB 32 places in the statutes the 2030 GHG emissions reduction goal established by executive order through B-30-15. However, neither the executive order nor SB 32 attempt to amend Health & Safety Code § 38561. Thus that section's provisions remain in effect as established by AB 32, including the requirement that ARB's Scoping Plans, including its Updated Scoping Plan, aim at "achieving the maximum technologically feasible and cost-effective reductions in greenhouse gas emissions from sources or categories of sources of greenhouse gases by 2020." Going back to the captain-navigator analogy, SB 32 may have ordered ARB to reach the second "island" – the 2030 emissions reduction goal. But it did not rescind the prior order to first plot a course to the 2020 "island."

Further, while SB 32 set a new 2030 standard for emissions reductions to be achieved by ARB's rules and regulations, a Scoping Plan is neither a rule nor a regulation. Instead, as ARB acknowledges, it provides guidance to the Legislature on what steps the Legislature should take to achieve AB 32's stated goal of achieving the maximum technologically feasible and cost-effective reductions in greenhouse gas emissions from sources or categories of sources of greenhouse gases by 2020. In other words, the Scoping Plans mandated by § 38561 are unaffected by either the Governor's Executive Order B-30-15 or the Legislature's enactment of SB 32.

It may well be that as the year 2020 approaches, the Legislature will determine that Health & Safety Code § 38561 should be modified to reflect that and other changes in circumstance. However, that is for the Legislature to determine, not ARB or the courts. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 334.)

> Under these circumstances, we are bound by the words of the statute and must conclude the Legislature meant what it said. Whatever may be thought of the wisdom, expediency, or policy of the act, we have no power to rewrite the statute to make it conform to a presumed intention that is not expressed. (*County of Santa Clara v. Perry* (1998) 18 Cal.4th 435, 446 [internal citations omitted].)

As of now, § 38561 remains as it was enacted by AB 32, and ARB's responsibility under that statute to ensure that its Scoping Plans are designed to achieve their goal of reducing GHG emissions by 2020 is unchanged and has not been mooted.

CONCLUSION

ARB may feel that it would be a good idea, in order to achieve long-term GHG reductions, for the Legislature to provide funding and other mechanisms to advance the implementation of CHSRA's high-speed rail system. Clearly, the current Governor shares that feeling. However, the Legislature has, through AB 32, defined the role of ARB's Climate Change Scoping Plans, and that role is to advise the Legislature on how to achieve the maximum technological and cost-effective GHG emission reductions by 2020.

In conjunction with that determination, ARB was also required, under its certified regulatory program, to evaluate the potential environmental impacts of the Updated Scoping Plan, and to identify mitigation measures and alternatives to address impacts found to be significant. Despite the information it had available to it, including TRANSDEF's comment letter and attached analyses, ARB failed to identify the significant secondary GHG emissions impact that would be associated with including the high-speed rail project as a recommended measure in the Updated Scoping Plan. Consequently, it failed to identify mitigation measures and alternatives that might reduce or avoid that impact, and its findings were defective in failing to call out that significant secondary impact.

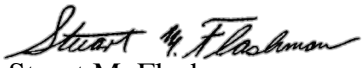
If it had properly identified the impacts of including the high-speed rail project as a recommended measure, perhaps ARB would have thought better of making that recommendation. As it stands, however, that recommendation flies in the face of the

Legislature's specific mandate that the Updated Scoping Plan identify measures that will provide the maximum feasible and cost-effective means for reducing GHG emissions by 2020.

For all the above reasons, the Petition for Writ of Mandate should be granted and ARB should be ordered to rescind its approval of the high-speed rail project as a recommended measure in its 2014 Updated Scoping Plan, and to revise the Environmental Assessment for that plan accordingly.

Dated: February 22, 2017

Respectfully submitted,



Stuart M. Flashman
Attorney for Petitioner
Transportation Solutions Defense
and Education Fund

PROOF OF SERVICE BY MAIL AND ELECTRONIC MAIL

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the action involved herein. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On February 22, 2017, I served the within PETITIONER'S REPLY BRIEF; PETITIONER'S SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING DECLARATION OF AUTHENTICITY; PETITIONER'S MOTION TO STRIKE A PORTION OF RESPONDENT'S OPPOSITION BRIEF; SUPPORTING DECLARATION OF AUTHENTICITY; PETITIONER'S OBJECTIONS TO RESPONDENT'S REQUEST FOR JUDICIAL NOTICE on the parties listed below by placing true copies thereof enclosed in sealed envelopes with first class mail postage thereon fully prepaid, in a United States Postal Service mailbox at Oakland, California, addressed as follows:

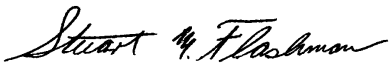
Mark Poole, Deputy Attorney General
Office of the California Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Mark.Poole@doj.ca.gov

Kavita Lesser, Deputy Attorney General
Office of the California Attorney General
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013
Kavita.Lesser@doj.ca.gov

In addition, on the above-same day, I also served the above-same documents, converted into pdf files, on the above-same parties via electronic service as e-mail attachments sent to the e-mail addresses shown above. I received no e-mail responses indicating that the e-mail had not been properly received.

I, Stuart M. Flashman, hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on February 22, 2017.



Stuart M. Flashman