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Code section 6103*

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SACRAMENTO

11 CIVIL DIVISION  
12

13 **TRANSPORTATION SOLUTIONS**  
14 **DEFENSE AND EDUCATION FUND, a**  
15 **California nonprofit corporation,**

16 Petitioner and Plaintiff,

17 v.

18 **CALIFORNIA AIR RESOURCES BOARD,**  
19 **an agency of the State of California, and**  
**DOES 1-10, inclusive,**

20 Respondents and  
21 Defendants,

22 **BETTY T. YEE, in her official capacity as**  
**the Controller of the State of California; the**  
23 **CALIFORNIA HIGH-SPEED RAIL**  
24 **AUTHORITY, an agency of the State of**  
**California, and DOES 11-20 inclusive.,**

25 Real Parties in Interest,  
26  
27  
28

Case No. 34-2014-80001974-CU-WM-GDS

**REPLY IN SUPPORT OF DEMURRER  
BY RESPONDENT CALIFORNIA AIR  
RESOURCES BOARD TO THE  
VERIFIED PETITION FOR  
PEREMPTORY WRIT OF MANDATE  
AND COMPLAINT FOR  
DECLARATORY RELIEF**

Date: August 19, 2016  
Time: 10:00 a.m.  
Dept: 24  
Judge: The Honorable Shelleyanne  
W.L. Chang

Action Filed: June 23, 2014

## INTRODUCTION

Petitioner's Fourth Cause of Action alleges that the First Update to the Climate Change Scoping Plan (Update) developed by Respondent California Air Resources Board (ARB) violates AB 32 because the greenhouse gas (GHG) reductions associated with the high-speed rail project – one of the many measures identified in the Update – are not “real, permanent, quantifiable, verifiable, and enforceable by the ARB.” (Petition, ¶¶ 58-59 [emphasis in original].) Petitioner's Opposition sets forth two theories to attempt to save the legal defects of its Fourth Cause of Action. Neither can be sustained.

First, Petitioner contends that the “real, permanent, quantifiable, verifiable, and enforceable” criteria mandated by Health and Safety Code section 38562, subdivision (d) (Section 38562(d)) applies to every measure identified in the Scoping Plan, including measures not yet adopted or implemented by ARB or other state agencies. This argument should be rejected because it ignores the plain meaning of the statute. The Legislature used clear and unambiguous language in Section 38562(d), which (like the rest of Section 38562) applies exclusively to “regulation[s] adopted by [ARB].” (Health & Saf. Code, § 38562, subd. (d).) Petitioner's argument that the Section 38562(d) criteria apply to measures identified in the Scoping Plan, including the high-speed rail project, thus fails because neither the Update nor the high-speed rail project are a “regulation adopted by” ARB.

Second, Petitioner argues in the alternative that if the Fourth Cause of Action fails to state a claim for violation of Section 38562(d), then the Court should construe the claim as one for a violation of Health and Safety Code section 38561 (Section 38561), the statutory provision that does govern the development of the Scoping Plan and the Update. However, the Fourth Cause of Action fails to include any allegation that ARB violated Section 38561 in developing the Update. (Petition at ¶¶ 56-59.) Not only does the Petition fail to identify Section 38561 explicitly, it does not include any language from Section 38561 and instead refers exclusively to language contained in Section 38562(d). (*Id.*) Petitioner cannot transform its own words nor can it state a wholly new claim for the first time in its Opposition Brief. Nor would leave to amend to assert a claim under Section 38561 allow Petitioner to cure the legal defects in its Fourth Cause of

1 Action because Petitioner's new argument conflicts with fundamental canons of statutory  
2 construction and case law analyzing ARB's statutory requirements in developing the Scoping  
3 Plan.

4 Finally, Petitioner concedes that its Fifth Cause of Action for declaratory relief is not  
5 appropriate to challenge ARB's inclusion of the high-speed rail in the Update and that  
6 Petitioner's remedy is limited to mandamus. (See Opp. at 10.) Therefore, the Court should  
7 sustain ARB's demurrer to Petitioner's Fourth and Fifth Causes of Action, without leave to  
8 amend.

## 9 ARGUMENT

### 10 I. THE COURT SHOULD GRANT ARB'S DEMURRER TO PETITIONER'S FOURTH CAUSE 11 OF ACTION WITHOUT LEAVE TO AMEND

12 In its Opposition, Petitioner seeks to cure the legal defects in its Fourth Cause of Action by  
13 arguing: (1) that the "real, permanent, quantifiable, verifiable, and enforceable" criteria mandated  
14 by Section 38562(d) applies to every measure identified in the Scoping Plan; and (2) if the Court  
15 finds that Section 38562(d) does not apply, then the claim should be construed as a violation of  
16 Section 38561, the statutory provision that actually applies to the Scoping Plan and the Update.  
17 Because Petitioner ignores the plain meaning of Sections 38561 and 38562(d), as well as case law  
18 regarding these statutory provisions, the Court should reject both arguments.

#### 19 A. Petitioner's Argument That Section 38562(d) Applies to The Scoping Plan 20 Update Ignores the Plain Meaning of the Statute

21 Petitioner's Fourth Claim rests entirely on the allegation that the Update developed by ARB  
22 pursuant to Section 38561 is subject to the criteria that apply exclusively to "regulation[s]  
23 adopted by [ARB]" under Section 38562(d). Specifically, Petitioner alleges that the "GHG  
24 reductions claimed through the inclusion of the HSR project in [the Update] were neither real,  
25 permanent, quantifiable, or verifiable but were instead illusory because in reality the construction  
26 of the HSR project would result in a significant increase in GHG emissions ...." (Petition, ¶ 59  
27 [emphasis in original].) In support of its claim, Petitioner argues, "because the measures  
28 proposed in the Scoping Plan would serve as the basis for ARB's regulations – to which the

1 standard in § 38562 would apply, the same standard must necessarily apply to the measures in the  
2 Scoping Plan.” (Opp. at 8.) Petitioner further characterizes ARB’s position as being “that there  
3 is no standard that applies to measures proposed in the Scoping Plan,” and describes this  
4 purported position as “nonsensical.” (*Id.*)

5 Petitioner’s strained attempt at statutory construction while mischaracterizing ARB’s  
6 position fails on every level. “The fundamental rule of statutory construction is that a court  
7 should ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citation  
8 omitted.]” (*O’Kane v. Irvine* (1996) 47 Cal.App.4th 207, 211.) In order to determine the intent of  
9 legislation, courts “first consult the words themselves, giving them their usual and ordinary  
10 meaning. [Citations omitted.]” (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) Section  
11 38562, entitled, “Adoption of greenhouse gas emission limits and emission reduction measures by  
12 regulation; ... requirements of adopted regulations,” provides:

13 Any **regulation adopted by the state board** pursuant to this part or Part 5  
14 (commencing with Section 38570) shall ensure all of the following: (1) The  
15 greenhouse gas emission reductions achieved are real, permanent, quantifiable,  
verifiable, and enforceable by the state board.

16 (Health & Saf. Code § 38562, subd. (d.) [emphasis added].) Section 38562(d), by its own express  
17 words, applies only to “any regulation adopted by the state board.” (*Id.*; see also *Our Children’s*  
18 *Earth Foundation v. California Air Resources Board* (2015) 234 Cal.App.4th 870, 874 (2015)  
19 [“Board regulations adopting GHG emissions limits and emission measures ‘shall ensure’ that the  
20 GHG ‘emission reductions achieved are real, permanent, quantifiable, verifiable, and enforceable  
21 by the state board.’”].)

22 The Scoping Plan, however, is not an ARB “regulation,” as defined by Government Code  
23 section 11342.600, and neither the Scoping Plan nor the Update were subject to the rulemaking  
24 procedures of the Administrative Procedure Act. Rather, “[t]he scoping plan is but an initial step  
25 in [the] effort [to reduce greenhouse gas emissions], to be followed by the adoption of  
26 regulations....” (*Assn. of Irrigated Residents* (2012) 206 Cal.App.4th 1487, 1505.) As set forth in  
27 ARB’s opening brief, the Scoping Plan is exactly what its name suggests – a non-binding set of  
28 recommendations (not a regulation) “for achieving the maximum technologically feasible and

1 cost-effective reductions in greenhouse gas emissions.” (Health & Saf. Code, § 38561, subd. (a).)  
2 So contrary to Petitioner’s assertions, it is not ARB’s position that “no standard” applies to the  
3 development of the Scoping Plan. Rather, the requirements for the Scoping Plan are found  
4 exclusively in Section 38561 and Petitioner cannot rewrite Section 38562(d) to apply to both  
5 ARB regulations and the Scoping Plan. (See *Napa Valley Wine Train, Inc. v. Public Utilities*  
6 *Com.* (1990) 50 Cal.3d 370, 381 [“In construing the statutory provisions, a court is not authorized  
7 to insert qualifying provisions not included and may not rewrite the statute to conform to an  
8 assumed intention which does not appear from its language.”])

9 Moreover, the high-speed rail project is not an ARB regulation adopted pursuant to AB 32.  
10 Rather, its statutory authority is found in the Public Utilities Code, including section 185030,  
11 which charges the California High-Speed Rail Authority with directing the development and  
12 implementation of an intercity high-speed rail system. Indeed, Petitioner’s argument entirely  
13 misconstrues the nature of the Scoping Plan. Although Section 38562(d) applies to regulations  
14 adopted by ARB, it does not follow that every measure identified in the Scoping Plan will  
15 become an ARB regulation. In fact, the specific design and implementation of many of the  
16 recommended measures – like the high-speed rail – are left for future regulatory actions by other  
17 state agencies with jurisdiction over the affected resource. (See Health & Saf. Code, § 38561,  
18 subd. (a).) In essence, Petitioner contends that Section 38562(d), which expressly applies to ARB  
19 regulations, in fact governs every measure identified in the Scoping Plan, including measures not  
20 yet adopted or implemented by other state agencies. Petitioner cannot bootstrap a standard  
21 expressly applicable to regulations adopted by ARB to a high-speed rail program being developed  
22 and implemented by an entirely different state agency.

23 The Legislature could not have used clearer language to denote its intent and therefore,  
24 Petitioner’s argument that the “real, permanent, quantifiable, verifiable, and enforceable”  
25 standard of Section 38562(d) applies to measures identified in the Scoping Plan must fail.

26 ///

27 ///

28 ///

1           **B.     Petitioner Cannot Salvage its Fourth Cause of Action by Relying On**  
2           **Provisions in Section 38561**

3           In its Opposition, Petitioner now argues that because the high-speed rail project will  
4           purportedly result in an increase in GHG emissions,<sup>1</sup> its inclusion in the Update was “directly  
5           contrary” to the Scoping Plan’s requirement to identify the “maximum technologically feasible  
6           and cost-effective reductions in greenhouse gas emissions” and “opportunities for emission  
7           reductions measures.” (Opp. at 8-9, citing Health & Saf. Code, § 38561, subdivisions (a) & (f).)  
8           But, Petitioner’s Fourth Cause of Action does not allege that ARB violated Section 38561 and  
9           cites to no language or any criteria that would even arguably come from Section 38561. (Petition  
10          at ¶¶ 56-59.) Rather, Petitioner’s Fourth Cause of Action rests entirely on its allegation that  
11          ARB’s approval of the Update violated the “real, permanent, quantifiable, verifiable, and  
12          enforceable” criteria in Section 38562(d). (*Id.*) Petitioner cannot now, for the first time in its  
13          Opposition Brief, challenge ARB’s compliance with Section 38561 in developing the Update  
14          without having included such allegations in its pleading.

15          Further, Petitioner cannot cure the legal defects in its Fourth Cause of Action by amending  
16          its Petition to allege violation of Section 38561. Petitioner’s new argument is premised on the  
17          erroneous contention that ARB should have incorporated the Section 38562(d) criteria into  
18          Section 38561 in conducting its analysis of each individual measure recommended in the Scoping  
19          Plan. But, the First Appellate District’s decision in the *Association of Irrigated Residents* case  
20          squarely addressed that issue and rejected the position that Petitioner now advances. (*Assn. of*  
21          *Irrigated Residents v. California Air Resources Board* (2012) 206 Cal.App.4<sup>th</sup> 1487.) In that case,  
22          the appellate court drew a bright line between the requirements of Section 38561 and Section  
23          38562(d), finding that Section 38561 requires ARB to evaluate the costs and benefits of the  
24          Scoping Plan itself, “not that each proposed measure must be so evaluated.” (*Id.* at 1503.  
25          [emphasis added]) The court also noted “further analysis of the environmental and public health

26  
27          <sup>1</sup> While Petitioner’s factual assertions are irrelevant to the legal issues presented by this  
28          motion, ARB disagrees that the high-speed rail project will result in an increase in GHG  
        emissions.

1 consequences of each proposed measure will be considered as part of the process of adopting  
2 implementing regulations.” (*Id.* at 1504)

3 With respect to Petitioner’s argument that certain activities associated with the high-speed  
4 rail project “would not be subject to direct ARB regulation,” and therefore Section 38561,  
5 subdivision (f) somehow applies, Petitioner again ignores the plain meaning of the statute.  
6 Section 38561, subdivision (f) states: “In developing its plan, the state board shall identify  
7 opportunities for emission reductions measures from all verifiable and enforceable voluntary  
8 actions ....” This statutory provision has no application here. The high-speed rail project is not a  
9 “voluntary action.” The high-speed rail is codified by statute, and the Legislature specifically  
10 created the California High-Speed Rail Authority to direct its development and implementation.  
11 (See Pub. Util. Code, §§ 185000, *et seq.*)

12 In sum, Petitioner’s last-ditch effort to save its fourth cause of action conflicts with Section  
13 38561 and case law interpreting that statutory provision. Petitioner’s Opposition reaffirms what  
14 is evident from the Petition: Petitioner’s challenge is really an attack on the high-speed rail  
15 project in the guise of a challenge to the Update. However, any challenge to the GHG emissions  
16 associated with the high-speed rail project should have been addressed by a petition for writ of  
17 mandate against the project within the applicable statute of limitations, which has now long  
18 passed. Petitioner’s new allegation that ARB violated Section 38561 in developing the Update  
19 cannot cure the defect in the Fourth Cause of Action and ARB’s demurrer should be sustained  
20 without leave to amend.

21  
22 **II. PETITIONER CONCEDES THAT ITS FIFTH CAUSE OF ACTION FAILS TO STATE A**  
23 **CLAIM BECAUSE DECLARATORY RELIEF IS NOT AN AVAILABLE REMEDY IN A**  
**PETITION FOR WRIT OF MANDATE**

24 Petitioner concedes that declaratory relief is not appropriate to challenge ARB’s inclusion  
25 of the high-speed rail project in the Scoping Plan and that Petitioner’s remedy is limited to  
26 mandamus. (See Opp. at 10.) Therefore, the Court should sustain ARB’s general demurrer to  
27 Petitioner’s Fifth Cause of Action without leave to amend.  
28

1 **III. ARB JOINS IN CALIFORNIA HIGH SPEED RAIL AUTHORITY'S REPLY IN SUPPORT OF**  
2 **ITS DEMURRER TO PETITIONER'S FIFTH CAUSE OF ACTION**

3 Petitioner does not, however, concede that its Fifth Cause of Action fails to state a claim  
4 because the requested declaration raises a non-justiciable political question and would violate the  
5 separation of powers doctrine. (Opp. at 10.) As such, ARB joins in the arguments made by  
6 California High Speed Rail Authority in its reply brief in support of its demurrer.

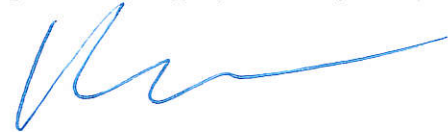
7 **CONCLUSION**

8 For all of the above reasons, ARB respectfully requests that the Court sustain its demurrer  
9 to Petitioner's Fourth and Fifth Causes of Action without leave to amend.

10  
11 Dated: August 12, 2016

Respectfully Submitted,

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**DECLARATION OF SERVICE BY OVERNIGHT COURIER**

Case Name: **Transporatation Solutions Defense and Education Fund v. CARB (AB 32 Scoping Plan)**

No.: **34-2014-80001974-CU-WM-GDS**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On August 12, 2016, I served the attached:

**REPLY IN SUPPORT OF DEMURRER BY RESPONDENT CALIFORNIA AIR RESOURCES BOARD TO THE VERIFIED PETITION FOR PEREMPTORY WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF**

by placing a true copy thereof enclosed in a sealed envelope with the **[FEDEX overnight courier service]**, addressed as follows:

Stuart M. Flashman, Esq.  
5626 Ocean View Drive  
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 12, 2016, at Los Angeles, California.

Blanca Cabrera  
\_\_\_\_\_  
Declarant

  
\_\_\_\_\_  
Signature