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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
California nonprofit corporation,**

15 Petitioner and Plaintiff,

16 v.

17
18 **CALIFORNIA AIR RESOURCES BOARD,
an agency of the State of California, and
19 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
AUTHORITY, an agency of the State of
24 California, and DOES 11-20 inclusive.,**

25 Real Parties in Interest,
26
27
28

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

**MEMORANDUM 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

Trial Date:
Action Filed: June 23, 2014

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

Introduction 1

Background 2

Standard of Review 4

 I. Petitioner’s fourth cause of action fails to state a claim because it seeks relief under a statute that does not apply to the Scoping Plan. 5

 A. The “real, permanent, quantifiable, verifiable, and enforceable” standard does not apply to the Scoping Plan..... 6

 B. TRANSDEF cannot use the Update to the Scoping Plan as the basis for a backdoor attack on the High Speed Rail Project 8

 II. TRANSDEF’s fifth cause of action fails because declaratory relief is not an available remedy in a petition for writ of mandate 9

 III. ARB joins in the demurrer by the California High Speed Rail Authority 12

Conclusion 12

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

CASES

Assn. of Irrigated Residents, et al. v. California Air Resources Bd.
(2012) 206 Cal.App.4th 14873, 4, 6, 7

Aubry v. Tri-City Hospital Dist.
(1992) 2 Cal.4th 9625

Blank v. Kirwan
(1985) 39 Cal.3d 3115

City of Fairfield v. Superior Court
(1975) 14 Cal.3d 76812

City of Pasadena v. Cohen
(2014) 228 Cal.App.4th 14619, 11

City of Santee v. Superior Court
(1991) 228 Cal.App.3d 713.....10

Frantz v. Blackwell
(1987) 189 Cal.App.3d 91.....5

Hayward Area Planning Assn. v. Alameda County Transportation Authority
(1999) 72 Cal.App.4th 95, 1028

Mobil Oil Corp. v. Superior Court
(1976) 59 Cal.App.3d 293.....10

Pacific Legal Foundation v. California Coastal Com.
(1982) 33 Cal.3d 158, 170-1718

Pan Pacific Properties, Inc. v. County of Santa Cruz
(1978) 81 Cal.App.3d 244.....11

Rakestraw v. California Physicians' Service
(2000) 81 Cal.App.4th 395

Schonfeldt v. State of California
(1998) 61 Cal.App.4th 14625

Scott v. City of Indian Wells
(1972) 6 Cal.3d 5419

Selby Realty Co. v. City of San Buenaventura
(1973) 10 Cal.3d 1109

TABLE OF AUTHORITIES

(continued)

Page

1
2
3 *State of California v. Superior Court (Veta)*
4 (1974) 12 Cal.3d 2379, 10, 12
5
6 *Taylor v. Swanson*
7 (1982) 137 Cal.App.3d 416.....10
8
9 *Tejon Real Estate, LLC. v. City of Los Angeles*
10 (2014) 223 Cal.App.4th 14910
11
12 *Walter Leimert Co. v. Calif. Coastal Comn.*
13 (1993) 149 Cal.App.3d 222.....9, 10
14
15 *Western States Petroleum Assn. v. Superior Court*
16 (1995) 9 Cal. 4th 55910, 11, 12

11 **STATUTES**

12 Code of Civil Procedure

13 § 430.10(e)4
14 § 430.10(f).....9
15 § 1085.....10, 11
16 § 1094.5.....10

16 Government Code

17 § 11350.....9

17 Health and Safety Code

18 §§ 38500, et seq.2
19 § 38510.....2
20 § 38550.....2
21 § 38560.....2
22 § 38560.5.....2
23 § 385611, 5, 6, 7
24 § 38561(a)2, 6
25 § 38561(b)2, 6
26 § 38561(h).....3
27 § 38562..... *passim*
28 § 38562(a)3, 6
§ 38562(d).....9
§ 38562(d)(1)1

26 **OTHER AUTHORITIES**

27 Executive Order B-30-154
28

TABLE OF AUTHORITIES

(continued)

Page

Kostka & Zischke, Practice Under the California Environmental Quality Act
(Cont.Ed.Bar 2015) § 23.5911

1
2
3
4
5
6
7
8
9
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11
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14
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INTRODUCTION

Petitioner Transportation Solutions Defense and Education Fund (“TRANSDEF”) challenges the action by the California Air Resources Board (“ARB”) to approve the First Update to the Climate Change Scoping Plan, pursuant to authority provided by AB 32, the Global Warming Solutions Act of 2006. The focus of TRANSDEF’s petition is the High Speed Rail project; a project that was initiated more than a decade ago, is managed by the California High Speed Rail Authority, and was recommended as one of the many measures for reducing California’s greenhouse gas emissions in the original Scoping Plan in 2008. Petitioner claims that by continuing to include the High Speed Rail project in the Board’s Update to the Plan, the Update violates the California Environmental Quality Act, and the statutory mandate of AB 32 itself. TRANSDEF also seeks declaratory and injunctive relief to declare that the Update was not properly-approved and to halt the Legislature’s appropriation of funds for High Speed Rail from the Greenhouse Gas Reduction Fund.

TRANSDEF’s petition suffers from at least two flaws. First, TRANSDEF has failed to state a claim for a violation of AB 32 in the fourth cause of action because the statutory provision upon which TRANSDEF relies is not applicable to the Scoping Plan or its Update. All requirements regarding the Scoping Plan and its Update are contained exclusively in Health and Safety Code section 38561. TRANSDEF improperly asks this court to find a violation of Health and Safety Code section 38562, subdivision (d)(1) which applies only to “[a]ny regulation adopted by the state board.” The Scoping Plan is a plan – a blueprint for how California will attain its greenhouse gas emissions reductions goal – not a regulation. Section 38562 has no application to the Scoping Plan and/or the challenged Update.

Second, to the extent that the petition seeks a declaration against ARB’s approval of the Update, it is well-settled that declaratory relief is unavailable where the exclusive relief to challenge an administrative action is by petition for writ of mandate. Because the Petition overreaches and asserts claims for which there is no basis in law, ARB respectfully requests that the demurrer to the fourth and fifth causes of action be sustained without leave to amend.

1 **BACKGROUND**

2 **AB 32: The Global Warming Solutions Act of 2006**

3 In 2006, the California Legislature enacted AB 32, the California Global Warming
4 Solutions Act of 2006. (See generally, Health & Saf. Code §§ 38500, et seq.)¹ AB 32 charges
5 ARB “with monitoring and regulating sources of greenhouse gases that cause global warming.”
6 (Health & Saf. Code, § 38510.) Further, AB 32 directs ARB to develop regulations to reduce
7 emissions to 1990 levels by 2020. (Id. at §§ 38562, 38560, 38560.5, 38550.)

8 In AB 32, the Legislature established a systematic timeline for ARB to implement the goal
9 of achieving 1990 levels of emissions. First, section 38560.5, subdivision (b) directs ARB to
10 “adopt regulations to implement measures identified” from a list of discrete early action
11 greenhouse gas reduction measures published by ARB in June 2007. (Health & Saf. Code, §
12 38560.5.) Next, ARB was directed to determine the statewide greenhouse gas emissions level in
13 1990 and approve the 2020 limit. (Health & Saf. Code, § 38550.) Accordingly, in December
14 2007, ARB set the limit at 427 million metric tons of carbon dioxide equivalent (MMTCO₂E).

15 The next step was for ARB to prepare and approve a scoping plan. AB 32 provides that:
16
17 on or before January 1, 2009, [ARB] shall prepare and approve a scoping plan, as that
18 term is understood by the state board, for achieving the maximum technologically
19 feasible and cost-effective reductions in greenhouse gas emissions from sources or
20 categories of sources of greenhouse gases by 2020 under this division.
(Health & Saf. Code, § 38561, subd. (a).)

21 In addition, AB 32 states that

22 The plan shall identify and make recommendations on direct emission reduction
23 measures, alternative compliance mechanisms, market-based compliance
24 mechanisms, and potential monetary and nonmonetary incentives... that the state
25 board finds are necessary and desirable to facilitate the achievement of the maximum
26 feasible and cost-effective reductions of greenhouse gas emissions by 2020.
(Health & Saf. Code, § 38561, subd. (b).)

27 The Scoping Plan is the blueprint for ARB to work towards the adoption of regulatory
28 measures but is not a legally binding document. ARB was directed to update its plan at least once

¹ All textual statutory references are to the Health and Safety Code unless otherwise indicated.

1 every five years. (Health & Saf. Code, § 38561, subd. (h); Verified Petition for Writ of Mandate
2 (“Petition”), ¶ 16.) The Update to the Scoping Plan challenged by TRANSDEF was adopted
3 pursuant to this directive.

4 Following development of the Scoping Plan, ARB was required to adopt emission limits
5 and emission reduction measures by regulation to achieve the maximum technologically feasible
6 and cost-effective reductions on or before January 1, 2011; measures which were to be operative
7 no later than January 1, 2012. (See Health & Saf. Code, § 38562, subd. (a).) The adoption of
8 each of these measures involves its own individual rulemaking and environmental review.

9 **Development of the Scoping Plan**

10 The First District Court of Appeal has recognized that the “process for developing and
11 approving the scoping plan in compliance with the statutory mandate was extensive and
12 rigorous.” (*Assn. of Irrigated Residents, et al. v. California Air Resources Bd.* (2012) 206
13 Cal.App.4th 1487, 1491) ARB staff conducted more than 250 public workshops throughout the
14 state, as well as holding more than 350 additional meetings with external stakeholders. (*Ibid.*)
15 Following the Board meeting on December 11 and 12, 2008, ARB adopted Resolution 08-47
16 approving the proposed Scoping Plan, contingent upon the Executive Officer finalizing written
17 responses to environmental comments. (*Id.* at 1491.) The High Speed Rail project was one of the
18 many measures identified and recommended in the first Scoping Plan. The final administrative
19 steps were completed in May 2009, and the Notice of Decision was filed on May 11, 2009. (See
20 Respondents’ Request for Judicial Notice in Support of Demurrer (“RJN”), ¶ 1 at
21 <http://www.arb.ca.gov/cc/scopingplan/scopingplan.htm>.)

22 **Litigation Challenging the Scoping Plan**

23 A group of petitioners challenged ARB’s approval of the Scoping Plan in June 2009
24 alleging violations of AB 32’s requirements and CEQA. (*Assn. of Irrigated Residents, supra*, 206
25 Cal.App.4th at 1493.) The trial court rejected all of the challenges under AB 32² and most of the

26 _____
27 ² Notably, the trial court in the first Scoping Plan case found that ARB did not act
28 arbitrarily and capriciously in identifying the measures in the plan, including the high speed rail
measure. (*Assn. of Irrigated Residents, supra*, 206 Cal.App.4th at 1492-93.)

1 CEQA claims but “did find that the [environmental document] failed to adequately analyze
2 alternatives to the cap-and-trade program.” (*Ibid.*) The parties cross-appealed. After ARB
3 conducted a revised alternatives analysis, the only issues left on appeal were those related to
4 whether the Scoping Plan satisfied AB 32. On those issues, the First District affirmed the trial
5 court’s ruling in favor of ARB, holding that AB 32’s “exceptionally broad and open-ended”
6 directives “leave virtually all decisions to the discretion of the Board, from determining the nature
7 of the scoping plan,...to determining what is most ‘feasible and cost-effective.’” (*Id.* at 1495.)
8 As such, the court held that in weighing the “numerous highly technical and novel scientific,
9 technical and economic issues” involved in identifying cost-effective and feasible measures to
10 maximize greenhouse gas reductions, ARB’s “choices were thoughtfully considered, well within
11 the scope of the Legislature’s directive” and “reflect the exercise of sound judgment based on
12 substantial evidence.” (*Id.* at 1502, 1505.)

13 **2014 Update to the Scoping Plan**

14 ARB began its five year update of the Scoping Plan in 2014. ARB released a draft update
15 in February 2014, followed shortly thereafter by a draft environmental analysis in March 2014.
16 (Petition at ¶ 20.) After receiving public comment on the drafts, ARB released the proposed First
17 Update to the Climate Change Scoping Plan and the supporting Final Environmental Analysis
18 (“EA”) along with written responses to environmental comments on May 15, 2014. (*Id.* at ¶ 22.)
19 Following a public hearing on May 22, 2014, ARB certified the EA and approved the First
20 Update to the Scoping Plan. (*Id.* at ¶ 24.)

21 On April 29, 2015, the Governor issued Executive Order B-30-15 establishing a mid-term
22 GHG reduction target for California and directing ARB to again update the AB 32 Scoping Plan
23 to reflect the 2030 target. (See RJN, ¶ 2 at <https://www.gov.ca.gov/news.php?id=18938>.) In
24 October 2015, ARB kicked off the public process for the 2030 Target Scoping Plan. (See RJN, ¶
25 3 at <http://www.arb.ca.gov/cc/scopingplan/timeline.htm>.)

26 **STANDARD OF REVIEW**

27 A demurrer is used to test whether the complaint alleges facts sufficient to state a cause of
28 action. (Code Civ. Proc., § 430.10, subd. (e).) In deciding a general demurrer, the court should:

1 (1) “treat the demurrer as admitting all material facts properly pleaded, but not contentions,
2 deductions or conclusions of fact or law”; (2) “consider matters which may be judicially noticed”;
3 and (3) “give the complaint a reasonable interpretation, reading it as a whole and its parts in their
4 context.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also *Aubry v. Tri-City Hospital Dist.*
5 (1992) 2 Cal.4th 962, 966-967.) Additionally, the Court may consider matters contained in
6 exhibits to the complaint and those incorporated by reference. (*Frantz v. Blackwell* (1987) 189
7 Cal.App.3d 91, 94.) When a demurrer is sustained, it is the plaintiff’s burden to demonstrate that
8 a reasonable possibility exists that amendment may cure the defects in the complaint. (*Rakestraw*
9 *v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43.) To satisfy this burden, the
10 plaintiff must show in what manner the complaint can be amended and how that amendment will
11 change the legal effect of the pleading. (*Ibid.*) The plaintiff must describe the elements of the
12 cause of action and authority for it plus factual allegations that sufficiently state all required
13 elements of that cause of action. (*Ibid.*) While leave to amend is often liberally allowed, it
14 should be denied where the only issues are legal issues and there is no liability as a matter of law.
15 (See *Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1465.) As explained below,
16 there is no legal basis for the fourth cause of action and the declaratory relief sought against ARB;
17 thus, TRANSDEF will not be able to successfully amend the Petition. Accordingly, ARB asks
18 the Court to grant this demurrer without leave to amend.

19 **I. PETITIONER’S FOURTH CAUSE OF ACTION FAILS TO STATE A CLAIM**
20 **BECAUSE IT SEEKS RELIEF UNDER A STATUTE THAT DOES NOT**
21 **APPLY TO THE SCOPING PLAN.**

22 The fourth cause of action fails because it is reliant on a statutory mandate, Health and
23 Safety Code section 38562, that applies only to ARB’s adoption of greenhouse gas reduction
24 measures by regulation; not to the Update to the Scoping Plan itself, for which specific criteria are
25 mandated only by section 38561. TRANSDEF does not challenge the adoption of any regulation
26 by ARB. In response, TRANSDEF may attempt to argue that it is actually challenging the High
27 Speed Rail project adopted and managed by the California High Speed Rail Authority. Any such
28 argument would be unavailing because the High Speed Rail Project is not an emission reduction

1 measure adopted by regulation by ARB under section 38562. TRANSDEF cannot state a claim
2 under any theory against ARB's Update to the Scoping Plan under section 38562.

3
4 **A. The "Real, Permanent, Quantifiable, Verifiable, and Enforceable"
Standard Does Not Apply to the Scoping Plan**

5 As described above, ARB's duties related to the development of the Scoping Plan stem
6 from section 38561, which requires ARB to prepare and approve a "scoping plan, as that term is
7 understood by [ARB], for achieving the maximum technologically feasible and cost-effective
8 reductions in greenhouse gas emissions" in California. (Health & Saf. Code § 38561, subd. (a).)
9 In that plan, ARB is directed to "identify and make recommendations on direct emission
10 reduction measures, alternative compliance mechanisms, [and] market-based compliance
11 mechanisms...that the state board finds are necessary and desirable." (Health & Saf. Code §
12 38561, subd. (b).) These "exceptionally broad and open-ended" directives "leave virtually all
13 decisions to the discretion of the Board, from determining the nature of the scoping plan,... to
14 determining incentives for emissions reduction that are 'necessary and desirable,' to weighing
15 economic, environmental and public health benefits, to determining what is most 'feasible and
16 cost-effective.'" (*Assn. of Irrigated Residents, supra*, 206 Cal.App.4th at p. 1495.) These
17 provisions reflect the significant flexibility and discretion entrusted to ARB in devising the
18 blueprint for attaining AB 32's goals. The specific design and implementation of the
19 recommended measures are left for future actions by the agency with jurisdiction over the
20 affected resources, including future rulemakings by ARB under section 38562. (Health & Saf.
21 Code § 38562, subd. (a).)

22 The Petition does not challenge ARB's compliance with section 38561 in developing the
23 Update to the Scoping Plan. Rather, the core allegation of the fourth cause of action is that ARB
24 "violated provisions of AB 32 by failing to ensure that the GHG emission reductions claimed to
25 be achieved by the adoption of the PROJECT³ were real, permanent, quantifiable, verifiable, and
26 enforceable." (Petition, ¶ 58.)

27 ³ TRANSDEF defines the "Project" as the actions by ARB "in approving the First Update
28 to the Climate Change Scoping Plan." (Petition, ¶ 1.)

1 What the fourth cause of action fails to reveal, however, is that this statutory language is not
2 found in section 38561, which controls the Scoping Plan process, but is found instead in section
3 38562, which applies only to specific regulations adopted by ARB to achieve emission
4 reductions. This is fatal to TRANSDEF's claim. "The scoping plan is but an initial step in [the]
5 effort [to reduce greenhouse gas emissions], to be followed by the adoption of regulations, the
6 first of which are already in effect, and plan updates no less than every five years." (*Assn. of*
7 *Irrigated Residents, supra*, 206 Cal.App.4th at p. 1505.) "Section 38562...requires the Board to
8 adopt regulations implementing the measures described in the scoping plan." (*Id.* at p. 1497.)
9 TRANSDEF cannot create a cause of action by conflating the requirements of section 38562 with
10 those of section 38561.

11 This conclusion is supported by the First District's decision in the *Association of Irrigated*
12 *Residents* case challenging the original scoping plan. One of the claims brought by petitioners in
13 that case was that in compiling the list of measures in the scoping plan, ARB violated AB 32 by
14 failing to adequately analyze the environmental and public health consequences of each of the
15 measures in the plan. (*Assn. of Irrigated Residents, supra*, 206 Cal.App.4th at p. 1503.) The First
16 District rejected petitioners' cramped interpretation of AB 32. Instead, the court drew a bright
17 line between the requirements of section 38561 and section 38562, reasoning that "[t]he former
18 states that the potential costs and benefits 'of the *plan*' must be evaluated – not that each proposed
19 measure must be so evaluated. Section 38562, on the other hand, relates to the adoption of
20 individual measures by regulation and provides that in adopting regulations, the Board
21 shall...design the regulation 'in a manner that is equitable, seeks to minimize costs and maximize
22 the total benefits to California, and encourages early action to reduce greenhouse gas emissions.'" (*Ibid.* (italics in original, underline added).) The court of appeal agreed with the Board that
23 specific analyses of each individual measure must wait until the administrative process for that
24 measure. (*Id.* at 1504.)

25
26 In the Legislature's structured statutory scheme, section 38562 sets the criteria ARB must
27 follow in adopting regulations in furtherance of achieving the plan but has no bearing on the
28 content of the Scoping Plan. Put another way, ARB is not required to demonstrate that the

1 measures identified in its Scoping Plan and any update thereto meet the “real, permanent,
2 quantifiable, verifiable, and enforceable” standard. Because TRANSDEF is not challenging any
3 regulation adopted by ARB, it cannot state a claim for violation of this standard. The demurrer to
4 the fourth cause of action should be sustained without leave.

5
6 **B. TRANSDEF Cannot Use the Update to the Scoping Plan as the Basis for a
Backdoor Attack on the High Speed Rail Project**

7 The “Project” TRANSDEF purports to challenge is the Update. (Petition at ¶ 1.) As
8 explained above, TRANSDEF cannot properly bring the fourth cause of action against the Update.
9 For the sake of argument, if the Court were to construe the fourth cause of action to be an attack
10 on a specific measure, the only measure that could conceivably be at issue is the High Speed Rail
11 project. (*Id.* at ¶ 59.) This does not save TRANSDEF’s claim, however, because any challenge
12 to the High Speed Rail project must be addressed by petition for writ of mandate against the High
13 Speed Rail Authority for the actions taken in approving the High Speed Rail project.

14 TRANSDEF’s main complaint in the fourth cause of action centers on the inclusion of the
15 High Speed Rail project in the Update to the Scoping Plan. As previously stated, the High Speed
16 Rail project is a project approved by and being implemented by the California High Speed Rail
17 Authority. ARB has no discretionary approval authority over that project. To the extent that the
18 High Speed Rail project has been approved already, any challenges to the project must be brought
19 by petition for writ of mandate directly against the project within the applicable statute of
20 limitations. To the extent that the project has not yet been studied and approved, any challenge is
21 an abstract and speculative dispute, and does not give rise to a justiciable controversy. (*Pacific*
22 *Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170-171; *Hayward Area*
23 *Planning Assn. v. Alameda County Transportation Authority* (1999) 72 Cal.App.4th 95, 102.)
24 Either way, using the Update to the Scoping Plan as a vehicle to challenge High Speed Rail is not
25 permissible.⁴ Accordingly, should TRANSDEF now argue that it is challenging the High Speed

26 ⁴ It is questionable that TRANSDEF could ever state a claim against the High Speed Rail
27 project under the “real, permanent, quantifiable, verifiable, and enforceable” standard in section
28 38562 since, on its face, section 38562 applies only to regulations “adopted by the state board.”
(Health & Saf. Code, § 38562, subd. (d).)

1 Rail project and not the Scoping Plan Update, such argument would not cure the defect in the
2 fourth cause of action and the demurrer should be sustained without leave to amend.

3
4 **II. TRANSDEF'S FIFTH CAUSE OF ACTION FAILS BECAUSE DECLARATORY RELIEF IS
NOT AN AVAILABLE REMEDY IN A PETITION FOR WRIT OF MANDATE**

5 In its fifth cause of action, TRANSDEF seeks a declaration that it is unlawful for the
6 Legislature to appropriate funds for High Speed Rail from the Greenhouse Gas Reduction Fund
7 because the Update to the Scoping Plan was not "properly-approved." (Petition at ¶ 67.)
8 Declaratory relief is improper when challenging administrative agency action. "The law is well
9 established that an action for declaratory relief is not appropriate to review an administrative
10 decision." (*Walter Leimert Co. v. Calif. Coastal Comn.* (1993) 149 Cal.App.3d 222, 230, citing
11 *State of California v. Superior Court (Veta)* (1974) 12 Cal.3d 237, 249; see also *Selby Realty Co.*
12 *v. City of San Buenaventura* (1973) 10 Cal.3d 110, 127; *Scott v. City of Indian Wells* (1972) 6
13 Cal.3d 541, 546.) Declaratory relief is appropriate where the plaintiff seeks to facially challenge
14 a statute or ordinance on constitutional grounds. (*Veta, supra*, 12 Cal.3d at p. 251; *City of*
15 *Pasadena v. Cohen* (2014) 228 Cal.App.4th 1461, 1467; *Walter H. Leimert Co. v. California*
16 *Coastal Com.* (1983) 149 Cal.App.3d 222, 231.) TRANSDEF asserts no constitutional challenge.
17 Declaratory relief is also available for violations of the California APA. (Gov. Code, § 11350.)
18 TRANSDEF asserts no APA claims; nor could it because the Scoping Plan is not a regulation
19 subject to the APA. Rather, TRANSDEF is challenging the administrative act by ARB to adopt
20 the Update to the Scoping Plan on the grounds that it is not a "properly-approved Climate Change
21 Scoping Plan" under CEQA and AB 32. (Petition at ¶ 67.)⁵ Petitioner must proceed exclusively
22 by petition for writ of mandate for those types of claims.

23 In the *Veta* case, the petitioners' application for a development permit from the California
24 Coastal Zone Conservation Commission (the predecessor to the California Coastal Commission)
25 was denied. The petitioners challenged the denial, filing a petition for writ of mandate and

26
27 ⁵ To the extent that the fifth cause of action seeks a judicial declaration against a party or
28 action other than ARB's adoption the Update to the Scoping Plan, the petition is defective as
uncertain. (See Code Civ. Proc., § 430.10, subd. (f).)

1 complaint for other relief, including a cause of action seeking a judicial declaration that
2 petitioners were entitled to construct their development without a permit, or in the alternative that
3 they were entitled to a permit. The Commission filed a demurrer that was overruled.

4 The Commission sought review of the trial court's rulings by prerogative writ in the
5 California Supreme Court which reversed, reasoning that:

6 The third cause of action seeks the same remedies as the second but via a declaratory
7 relief route rather than mandate. . . . It is settled that an action for declaratory relief is
8 not appropriate to review an administrative decision. [Citing *Selby Realty Co. v. City*
9 *of San Buenaventura* (1973) 10 Cal.3d 110, 127, *Hostetter v. Alderson* (1952) 38
10 Cal.2d 499, 500 and other cases]. Veta's attempt in the third cause of action to obtain
11 review of the Commission's denial of the permit by means of declaratory relief is
12 improper, and the demurrer should have been sustained. . .

13 (*Veta*, 12 Cal.3d at p. 249.) More recently, in *Tejon Real Estate, LLC. v. City of Los Angeles*
14 (2014) 223 Cal.App.4th 149, 154-155, a property owner obtained informal opinions from city and
15 fire department staff concerning the cost of a water extension and the need to install a fire hydrant.
16 Believing that these opinions contravened city regulations, the property owner filed a declaratory
17 relief action under section 1060 of the Code of Civil Procedure. Citing *Veta* and *Selby Realty*, the
18 Second Appellate District sustained the city's demurrer on the grounds that declaratory relief was
19 an improper means "to review a purported administrative decision." (*Tejon, supra*, 223
20 Cal.App.3d at p. 155.)

21 In addition, the *Veta* case held that, while declaratory relief is available to challenge the
22 constitutionality of a statute, regulation or ordinance on its face, this procedure cannot be used to
23 challenge the application of such statute, regulation or ordinance to a particular case and thereby
24 "essentially seek[] to review the validity of an administrative action." (*Veta*, 12 Cal.3d at p. 251.)
25 Instead, "such review is properly brought under the provisions of section 1094.5 of the Code of
26 Civil Procedure rather than by means of declaratory relief." (*Id.*; accord *Walter Leimert Co.*,
27 *supra*, 149 Cal.App.3d at pp. 230-231; *City of Santee v. Superior Court* (1991) 228 Cal.App.3d
28 713, 718; *Taylor v. Swanson* (1982) 137 Cal.App.3d 416, 418; *Mobil Oil Corp. v. Superior Court*
(1976) 59 Cal.App.3d 293, 307.)

The same rationale applies to a CEQA claim brought under Code of Civil Procedure section
1085. In *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal. 4th 559, a CEQA case

1 brought both as a petition for writ of mandate and a complaint for declaratory relief, the court first
2 analyzed whether administrative or traditional mandamus was the appropriate method to
3 challenge the ARB regulations at issue. (*Id.* at pp. 566-67.) The court concluded that “[b]ecause
4 WSPA’s petition seeks review of a quasi-legislative action by the ARB – the adoption of air
5 quality regulations – it is properly viewed as a petition for traditional mandamus.” (*Id.* at p. 567
6 (citing Pub. Resources Code, § 21168.5) [“[a] petition for traditional mandamus is appropriate in
7 all other actions brought ‘to attack, review, set aside, void or annul a determination, finding, or
8 decision of a public agency on the grounds of noncompliance with [CEQA]’”].) While the
9 *Western States* court did not specifically address the propriety of declaratory relief, the court’s
10 holdings applying traditional mandamus to ARB regulations and that such challenges should
11 generally be tried on the administrative record strongly indicate that it would have applied the
12 *Veta* rule had the issue been before the court. (*Western States, supra*, 9 Cal. 4th at pp. 467, 472.)
13 Accordingly, the *Veta* rule should apply in a challenge to quasi-legislative administrative
14 decisions by ARB where that challenge does not raise constitutional or APA claims. (See *City of*
15 *Pasadena v. Cohen* (2014) 228 Cal.App.4th 1461, 1467 [“[T]hat declaratory relief is otherwise
16 available generally as a vehicle for interpreting statutes . . . does not have any significance in light
17 of the generally available remedy of traditional mandate and the generally applicable prohibition
18 against declaratory ‘review’ of agency actions.”].); see also, *Pan Pacific Properties, Inc. v.*
19 *County of Santa Cruz* (1978) 81 Cal.App.3d 244, 253 [appropriate vehicle to review the legality
20 of a zoning ordinance was by ordinary mandamus under California Code of Civil Procedure
21 section 1085]; see also, Kostka & Zischke, Practice Under the Cal. Environmental Quality Act
22 (Cont.Ed.Bar 2015) § 23.59 [“the rule prohibiting other forms of review should apply in [CCP §
23 1085] cases as well”].)

24 There are sound policy reasons behind the rule that declaratory relief is not available to
25 review the decisions of administrative agencies. Were the rule otherwise, a petitioner would be
26 able to circumvent the substantial evidence standard of review based upon an administrative
27 record, and improperly obtain broad civil discovery and a trial de novo by filing an action for
28

1 declaratory relief. (See *Veta, supra*, 12 Cal.3d at p. 237; *Western States, supra*, 9 Cal.4th at pp.
2 571-572; and *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 774-775.)

3 In sum, TRANSDEF cannot bring a claim for declaratory relief against the Scoping Plan
4 Update. Accordingly, ARB's demurrer to the fifth cause of action for declaratory relief should be
5 sustained without leave to amend.

6
7 **III. ARB JOINS IN THE DEMURRER BY THE CALIFORNIA HIGH SPEED RAIL AUTHORITY**

8 If the fifth cause of action is determined by this Court to be targeted at an entity or action
9 other than ARB's adoption of the Update, the claim also fails but for the reasons argued by the
10 High Speed Rail Authority in its demurrer. Instead of repeating those arguments here, ARB joins
11 in the arguments made by the High Speed Rail Authority. (See Demurrer to the Verified Petition
12 and Complaint by Real Party in Interest California High Speed Rail Authority.)

13 **CONCLUSION**

14 For all of the above reasons, ARB respectfully requests that the demurrer to the fourth and
15 fifth causes of action be sustained without leave to amend.

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Respectfully Submitted,

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