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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

CIVIL DIVISION

TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, a California nonprofit corporation, Petitioner, **v.** **CALIFORNIA AIR RESOURCES BOARD, an agency of the State of California, and DOES 1-10, inclusive,** Respondent.	Case No. 34-2014-80001974-CU-WM-GDS **RESPONDENT CALIFORNIA AIR RESOURCES BOARD'S OPPOSITION BRIEF** Date: March 17, 2017 Time: 10:00 a.m. Dept: 24 Judge: The Honorable Shelleyanne W.L. Chang Action Filed: June 23, 2014

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INTRODUCTION

Global warming is the most pressing environmental problem in existence today. The climate has experienced an unprecedented increase in the concentration of greenhouse gases ("GHGs") in the atmosphere, and an accompanying rapid increase in the atmosphere's average temperature. In enacting the Global Warming Solutions Act of 2006 (Heath & Safety Code, §§ 38500, *et seq.*) (AB 32), the California Legislature found that:

> Global warming poses a serious threat to the economic well-being, public health, natural resources and environment of California. The potential adverse impacts of global warming include the exacerbation of air quality problems, a reduction in the quality and supply of water to the state from the Sierra snowpack, a rise in sea levels resulting in the displacement of thousands of coastal businesses and residences...and an increase in the incidences of infectious diseases, asthma and other human health-related problems." (Health & Saf. Code, § 38501, subd. (a).)

Here, Petitioner Transportation Solutions Defense and Education Fund (TRANSDEF or Petitioner) challenges the California Air Resources Board's (ARB) approval of the First Update to the Climate Change Scoping Plan (2014 Update) under AB 32. Specifically, TRANSDEF's Second Amended Petition (Amended Petition) contends that ARB's inclusion of the California high-speed rail project as a "recommended measure" within the 2014 Update violates the California Environmental Quality Act (Public Resources Code, §§ 21000, *et seq.*) (CEQA) and the statutory requirements of AB 32. The Court should deny TRANSDEF's Amended Petition in its entirety.

With respect to TRANSDEF's CEQA causes of action, it was incumbent on TRANSDEF to raise the precise issues in front of ARB for which it now seeks judicial review. (See Pub. Resources Code, § 21177.) By not complying with this jurisdictional prerequisite, TRANSDEF failed to exhaust its administrative remedies and is barred from pursuing its CEQA claims regarding supplemental environmental review, feasible mitigation measures, alternatives analysis, recirculation, project description, and cumulative impacts. TRANSDEF's remaining CEQA claims are equally flawed. ARB conducted a supplemental programmatic analysis for all the recommended measures in the 2014 Update. But TRANSDEF improperly invites this Court to engage in a project-level review (including project-specific impact analysis, mitigation measures, and alternatives) of one of those measures – the high-speed rail project. Finally, CEQA does not

require a "lifecycle analysis" for GHG emissions. Because each of TRANSDEF's CEQA causes of action is premised on this faulty assumption, its challenge is baseless.

TRANSDEF's statutory claim fails because AB 32 provides broad authority for ARB to adopt a 2014 Update that evaluates a range of measures including measures that may be implemented beyond 2020. Further, TRANSDEF's claim has been rendered moot by recent legislation removing any doubt about ARB's authority to continue GHG emission reductions after 2020.

For these reasons, ARB respectfully requests that the Court deny TRANSDEF's Amended Petition in its entirety, and enter judgment in favor of ARB.

BACKGROUND

I. CALIFORNIA'S CLIMATE GOALS: EXECUTIVE ORDER S-3-05 AND AB 32

In 2005, Governor Arnold Schwarzenegger issued Executive Order S-3-05 (EO S-3-05), which established GHG emissions reduction targets for California. (ARB's Req. for Judicial Notice [RJN], Ex. 1.) Specifically, EO S-3-05 directed the State to reduce GHG emissions to 1990 levels by 2020 and to reduce GHG emissions to 80 percent below 1990 levels by 2050. (*Id.*) "The 2020 goal was established to be an aggressive, but achievable, mid-term target, and the 2050 . . . goal represents the level scientists believe is necessary to reach levels that will stabilize the climate." (1 AR 450.)

One year later, the California Legislature enacted AB 32, which codified the 2020 emissions limit and charged ARB "with monitoring and regulating sources of [GHGs] that cause global warming." (Health & Saf. Code, § 38510.) The Legislature established a systematic timeline for ARB to implement the 2020 goal. First, ARB was directed to quantify the statewide GHG emissions target. (Health & Saf. Code, § 38550.) Next, ARB had to prepare and approve a "scoping plan" for "achieving the maximum technologically feasible and cost-effective reductions in [GHG] emissions from sources or categories of sources of [GHGs] by 2020." (Health & Saf. Code, § 38561, subd. (a).) AB 32 also expressly directed ARB to update its Scoping Plan "at least once every five years." (Health & Saf. Code, § 38561, subd. (h).) The Scoping Plan is not a regulation and its recommendations are not binding on ARB in its

consideration of what emissions reduction measures to adopt. Following development of a Scoping Plan, ARB had to adopt regulations to achieve maximum technologically feasible and cost-effective reductions. (See Health & Saf. Code, § 38562, subd. (a).) Each of these measures involves its own individual rulemaking and environmental review. The Legislature intended for the emissions limit mandated by AB 32 to "continue in existence and be used to maintain and continue reductions in emissions of [GHGs] beyond 2020." (Health & Saf. Code, § 38551, subd. (b).)

II. ARB'S 2008 CLIMATE CHANGE SCOPING PLAN

A. Developing the 2008 Climate Change Scoping Plan

The "process for developing and approving the scoping plan in compliance with the statutory mandate was extensive and rigorous." (*Assn. of Irritated Residents, et al. v. California Air Resources Bd.* ("*AIR*") (2012) 206 Cal.App.4th 1487, 1491) Indeed, more than 42,000 people commented on the draft Scoping Plan. (1 AR 435.) In October 2008, after taking into consideration the public input received, ARB released the Proposed Scoping Plan and appendices, including a CEQA "functional equivalent document" (2008 FED). (1 AR 447.) On December 11, 2008, the Board adopted the approved "Climate Change Scoping Plan" (2008 Scoping Plan). (1 AR 433.)

B. The 2008 Scoping Plan Recommends a Comprehensive Suite of Measures, Including the High-Speed Rail Project

The 2008 Scoping Plan recommends a mix of measures to provide "a comprehensive approach to reduce emissions to achieve the 2020 target, and to initiate the transformations required to achieve the 2050 target." (1 AR 468.) It identifies emissions reductions measures in 18 categories including, the cap-and-trade program, light-duty vehicle GHG standards, energy efficiency, renewables portfolio standard, low carbon fuel standards, and high speed rail. (See 1 AR 476-513.)

"High-speed rail" is defined as "intercity passenger rail service . . . capable of sustained speeds of 200 miles per hour or greater." (Pub. Util Code, §185012, subd. (c).) In 1996, the Legislature created the California High-Speed Rail Authority (HSRA) to prepare a plan for

construction, operation, and financing of statewide high-speed rail service. (*Id.* at §§ 185000, *et seq.*) In 2008, voters approved Proposition 1A, authorizing nearly $10 billion in state bonds for high-speed rail. (27 AR 14782.)

The 2008 Scoping Plan recommends implementation of a high-speed rail system as part of the "statewide strategy to provide more mobility choices and reduce [GHG] emissions." (1 AR 502.) It recognized the benefits of high speed rail would "increase over time as additional portions of the planned system are completed" and "[o]ver the long term, the system has the potential to support the reduction of [GHG] emissions . . . by providing opportunity for and encouraging low-impact transit oriented development." (*Id.*)

C. Litigation Over the 2008 Scoping Plan

The 2008 Scoping Plan was challenged on the grounds that it violated AB 32 and CEQA. (*AIR, supra,* 206 Cal.App.4th at p. 1493.) The trial court rejected all of the AB 32 claims and most of the CEQA claims but "did find that the [environmental document] failed to adequately analyze alternatives to the cap-and-trade program." (*Ibid.*) After ARB conducted a revised alternatives analysis[1], only the statutory issues remained on appeal. The appellate court found that ARB's "choices were thoughtfully considered, well within the scope of the Legislature's directive" and "reflect the exercise of sound judgment based on substantial evidence." (*Id.* at 1502, 1505.)

III. ARB'S 2014 SCOPING PLAN UPDATE

A. Developing the 2014 Scoping Plan Update

In 2013, ARB began updating the 2008 Scoping Plan as required by AB 32. Unlike the 2008 Scoping Plan, the focus of the Update was on new and longer-term measures to meet post-2020 goals to put California on the path to the 2050 goal. (See 13 AR 6988 ["The first update presents the priorities and recommendations for achieving the State's longer-term emissions reduction objectives."]; 1 AR 00035.) ARB identified six focus areas to evaluate: energy,

[1] In response to the trial court decision, ARB supplemented the alternatives analysis (2011 Supplement). (See 1 AR 30.) In August 2011, ARB certified the 2011 Supplement in combination with the prior environmental documents, after which it reconfirmed the approval of the 2008 Scoping Plan. (*Id.*)

transportation, agriculture, water, waste management, and natural and working lands. (13 AR 6992.) Several state agencies developed working papers for each sector upon which the 2014 Update's recommended actions were based. (*Id.*)

On February 10, 2014, ARB released a draft Proposed Scoping Plan Update (2014 Draft Update), and on March 14, 2014, ARB released its draft environmental analysis in accordance with is certified regulatory program (2014 Draft EA). (*Id.*) During the public comment period, ARB received comment letters through two comment dockets opened for the 2014 Draft Update and 2014 Draft EA. (12 AR 6218.) On April 7, 2014, TRANSDEF submitted a comment through the docket for the 2014 Draft Update, "vigorously applaud[ing] ARB for ... 'progressing toward California's long-term climate goals'" (57 AR 32319-20) and supporting "passenger rail as a key low-carbon transportation mode of the future" (57 AR 32321).

Under ARB's certified regulatory program, ARB evaluated all the comment letters received on the two dockets and determined which raised "significant environmental issues" relating to the 2014 Draft EA requiring a written response. (12 AR 6218-6220.) Although ARB only responded to those comments relating to the 2014 Draft EA, "all of the public comments were considered by staff and provided to the Board members for their consideration." (12 AR 6220.) On May 15, 2014, ARB released the First Update to the Climate Change Scoping Plan (2014 Update) and the Final Environmental Analysis (2014 EA), with written responses to comments. (13 AR 6992.) On May 22, 2014, ARB certified the 2014 EA and approved the 2014 Update. (1 AR 1-8.)

B. California's Long-Term 2050 Goal and the Role of the High-Speed Rail Project in Meeting That Goal

The stated purpose of the 2014 Update is to identify "the next steps for California's leadership on climate change" by laying the foundation for "continued emission reductions beyond 2020, on the path to 80 percent below 1990 levels by 2050." (13 AR 6990.) Similar to the 2008 Scoping Plan, the 2014 Update identifies a comprehensive suite of emissions reduction strategies for each of California's six major economic sectors to meet California's long-term climate goal. (13 AR 7080-7085.)

The 2014 Update includes the high-speed rail project among several "key recommended actions" in the transportation sector. (13 AR 7036, 7040-41.) The 2014 Update states that "[r]ail modernization in California will increase benefits for passengers . . . with a reduced carbon footprint" and that "[p]rior to 2030, high-speed rail will reduce GHG emissions by providing a cleaner alternative to air and private car travel." (13 AR 7040.) Citing the HSRA's June 2013 report prepared for the Legislature, it further states that the high-speed rail is "projected to realize GHG emission reductions its first year in operation, with annual increases in GHG reductions as the system expands."[2] (*Id.*) The "high-speed rail project will be an important part of meeting California's overall climate goals." (21 AR 11655.) Construction began on the first high speed rail segment in the Central Valley in August 2013. (27 AR 14782-83.)

C. ARB's 2017 Climate Change Scoping Plan Update

In 2015, Governor Brown issued Executive Order B-30-15 establishing a mid-term GHG reduction goal of 40 percent below 1990 levels by 2030 and directing ARB to update the scoping plan to achieve the 2030 target. (RJN, Ex. 2.) In summer 2016, the Legislature passed Senate Bill 32 (SB 32), codifying the 2030 target. (RJN, Ex. 3.) Pursuant to these directives, ARB recently released its 2017 Update and draft environmental analysis which it expects to act on in April 2017. (RJN, Ex. 4.)

IV. ARB'S ENVIRONMENTAL REVIEW PROCESS FOR THE 2008 SCOPING PLAN AND 2014 UPDATE

A. ARB's Certified Regulatory Program

ARB conducts its environmental review under a certified regulatory program. (See Cal. Code Regs., tit.17, §§ 60000-60008.) Certification of a regulatory program by the Resources Agency is in effect a finding that the statutes and regulations comprising the program provide for environmental review equivalent to an environmental impact report (EIR). (*Californians for Alternatives to Toxics v. Cal. Dept. of Pesticide Regulation* (2006) 136 Cal.App.4th 1049, 1067-

[2] The HSRA's June 2013 report prepared for the Legislature states that by 2030, operation of the high-speed rail "will have reduced GHG emissions between 4.5 and 8.4 million metric tons of [GHGs], based on low and high scenarios." (21 AR 11652.) ARB reviewed the HSRA's analysis of the GHG emissions and found it "reasonable, and the methodologies used for the analysis are consistent with the latest ARB emissions models." (21 AR 11654.)

1068; Pub. Resources Code, § 21080.5(a); Cal. Code Regs., tit. 14, §§ 15250, 15251.) Although the Scoping Plan is not a regulation, ARB still followed this process.

Under ARB's certified regulatory program, ARB must identify any significant adverse environmental impacts and consider feasible mitigation measures or feasible alternatives and respond to comments "which raise significant environmental issues associated with the proposed action" before the final rule is adopted. (Cal. Code Regs., tit. 17, §§ 60005-60007.)

B. The 2008 Scoping Plan FED: A Programmatic Environmental Analysis That Included the High-Speed Rail Project

The 2008 FED contained a programmatic level of environmental review, providing a basis for "future project-specific environmental analysis." (71 ARB 27493.)[3] Thus, it did not contain "a detailed quantitative impact analysis for each of the measures in the Scoping Plan." (*Id.*).

Regarding the high-speed rail project, the 2008 FED "incorporated by reference" the 2005 Programmatic EIR prepared by HSRA. (71 ARB 27509.) In 2001, HSRA had undertaken a programmatic environmental review to study a proposed high-speed rail system. (71 ARB 27588; see also *Town of Atherton v. Cal. High Speed Rail Authority* (2014) 228 Cal.App.4th 314.) In November 2005, HSRA certified its Final Program EIR for the statewide high-speed rail system. (1 AR 398.) HSRA's 2005 Programmatic EIR was never challenged, and thus ARB appropriately presumed that it fully complied with CEQA. (See Pub. Resources Code, § 21167.)

Although the 2008 FED summarized the potential and cumulative impacts of the high-speed rail project, it did not include a project-level environmental analysis. (71 ARB 27509.) The 2008 FED further incorporated by reference mitigation measures identified in the HSRA's 2005 Programmatic EIR (71 ARB 27588) and noted that the high-speed rail project "may proceed with or without adoption of the Scoping Plan." (71 ARB 27509.) No challenge was brought to ARB's non-binding recommendation of high speed rail as a measure in the 2008 Scoping Plan.

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[3] References to the administrative record lodged with the Court (both in electronic and hard format) will be either to "AR" or "ARB."

C. The 2014 EA: A Supplemental Programmatic Analysis That Included The "Continued Implementation" of the High-Speed Rail Project

The 2014 EA is a "supplemental analysis" to the 2008 FED and 2011 Supplement, and thus contains the information necessary to make those documents adequate for the project as revised. (1 AR 29; see also Cal. Code Reg., tit. 14, § 15163, subd. (a).) Thus, the 2014 EA defines the "project" for CEQA purposes as the "recommended actions in the [2014 Update]." (1 AR 34.) Like the 2008 FED, the 2014 EA analyzes the project at a programmatic level. (1 AR 30; see also Cal. Code Regs., tit. 14, § 15168.)

Contrary to TRANSDEF's assertions, the 2014 EA included high-speed rail in its supplemental programmatic analysis. Continued construction of high-speed rail is identified as a "recommended action" in the transportation sector of the 2014 Update and is therefore part of the "project" analyzed by the EA. (1 AR 46.) The EA concluded that the short-term construction-related GHG emissions impacts associated with the Transportation Sector would be less than significant and the long-term impacts on GHG emissions would be beneficial. (1 AR 154-55.) The EA also references the impacts disclosed in HSRA's 2005 Programmatic EIR, and in the "Merced-to-Fresno section of the program [that] was approved in May 2012." (1 AR 398.)

Finally, the EA states that "[t]he HSR Project has been the subject of lawsuits that have challenged the Program EIR/EIS and subsequent CEQA documents." (1 AR 398.) Specifically, the project-level EIR prepared for the Fresno-to-Bakersfield segment of high-speed rail is subject to ongoing litigation.[4] TRANSDEF submitted a comment letter to HSRA regarding the Fresno-to-Bakersfield EIR, raising the exact same issue regarding the "lifecycle" GHG impacts of constructing the high-speed rail as it does here. (RJN, Ex. 5.). TRANSDEF also participated in prior litigation challenging HSRA's 2008 program-level EIR for the Bay Area to Central Valley segment. (*Town of Atherton, supra*, 228 Cal.App.4th at p. 324.). TRANSDEF did not claim in

[4] See *County of Kings et al. v. Cal. High-Speed Rail Authority*, Sacramento Superior Court No. 34-2014-80001861; *Dignity Health v. Cal. High-Speed Rail Authority*, Sacramento Superior Court No. 34-2014-80001865; *First Freewill Baptist Church of Bakersfield v. Cal. High-Speed Rail Authority*, Sacramento Superior Court No. 34-2014-80001864; *City of Shafter v. Cal. High-Speed Rail Authority*, Sacramento Superior Court No. 34-2014-80001908.

that case that HSRA failed to adequately analyze GHG emissions related to construction. (*Ibid.*) The court of appeal rejected TRANSDEF's petition, holding that the impacts analysis of the "general alignment and choice of routes" in the 2008 programmatic EIR was sufficient, and more specific analysis was properly deferred to the project stage. (*Id.* at p. 346.)

STANDARD OF REVIEW

Petitioners assert that ARB's 2014 Update violates both CEQA and AB 32, which involve two similar standards of review, both of which require substantial deference to ARB's judgment.

I. THE STANDARD OF REVIEW FOR CEQA ACTIONS IS ABUSE OF DISCRETION AND DEFERENCE MUST BE GIVEN TO ARB'S SUBSTANTIVE DETERMINATIONS

In reviewing the EA, the standard of review is abuse of discretion. "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Pub. Resources Code, § 21168.5.) Because documents prepared pursuant to a certified regulatory program are the functional equivalent of an EIR, they are judged under the deferential "substantial evidence" standard. (*EPIC v. Johnson* (1985) 170 Cal.App.3d 604, 614.) The substantial evidence standard also applies to an agency's decision to prepare a supplemental environmental document. (*Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist. ("San Mateo Gardens")* (2016) 1 Cal.5th 937 (2016).) Substantial evidence means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Cal. Code Regs., tit. 14, § 15384(a).)

Here, TRANSDEF must prove an abuse of discretion. (*Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 740.) However, "the mere presence of conflicting evidence in the administrative record does not invalidate" an agency's CEQA determinations. (*Barthelemy v. Chino Basin Municipal Water Dist.* (1995) 38 Cal.App.4th 1609, 1620.) All reasonable doubts must be decided in favor of the agency's determination, and the decision may not be set aside even if the opposite decision would have been more reasonable. (See *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 393.) Absent contrary evidence, the presumption is that the agency complied with its

official duties under the certified program. (*City of Sacramento v. State Water Resources Control. Bd.* (1992) 2 Cal.App.4th 960, 976.)

Deference should also be given to ARB's substantive determinations. Courts "have neither the resources nor scientific expertise to engage in such analysis." (*Laurel Heights, supra*, 47 Cal.3d at p. 393.) As a result, "'[t]he court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document.'" (*Id.* at p. 392, quoting *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 189.)

Finally, "informed decision making" is the touchstone of CEQA. (See e.g., *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162.) Indeed, "the absence of information in an EIR...does not per se constitute a prejudicial abuse of discretion," but instead, a "prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision making and informed public participation." (*Id.*) ARB more than satisfied these standards here.

II. JUDICIAL REVIEW OF A QUASI-LEGISLATIVE ACT EXAMINES WHETHER ARB'S ACTION WAS "ARBITRARY, CAPRICIOUS OR ENTIRELY LACKING IN EVIDENTIARY SUPPORT"

The parties agree that the adoption of the 2014 Update is a quasi-legislative administrative action. (See Pet. Brf., at p. 12:2-3; see *AIR, supra,* 206 Cal.App.4th at p. 1494.) When reviewing quasi-legislative action, courts exercise a limited scope of review "out of deference to the separation of powers between the Legislature and the judiciary, and to the presumed expertise of the agency within the scope of its authority." (*Western Oil & Gas Assn. v. Air Resources Board* (1984) 37 Cal.3d 502, 509.) Because "agencies granted such substantive rulemaking power are truly 'making law,' their quasi-legislative rules have the dignity of statutes." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10-11.) If a court is "satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end." (*Yamaha, supra*, 19 Cal.4th at pp. 10-11.)

Accordingly, the Court must first determine – in its independent judgment – whether ARB's adoption of the 2014 Update is "within the bounds of the statutory mandate." (*Id.* at 16;

see also *AIR*, *supra*, 206 Cal.App.4th at p. 1494.) Second, the Court must determine whether the 2014 Update is "reasonably necessary to effectuate the purpose of the statute." (*Yamaha*, *supra*, 19 Cal.4th at pp. 16-17.) This deferential standard only requires the Court to determine "whether [ARB] exercised its discretion arbitrarily and capriciously, without substantial evidentiary support." (*AIR*, *supra*, 206 Cal.App.4th at p. 1494.)

ARGUMENT

I. ARB FULLY COMPLIED WITH ITS CERTIFIED REGULATORY PROGRAM IN PREPARING AND CERTIFYING THE EA FOR THE 2014 SCOPING PLAN UPDATE

As set forth below, ARB fully complied with its certified regulatory program in preparing and certifying the 2014 EA. As an initial matter, TRANSDEF failed to exhaust its administrative remedies and is barred from pursuing its claims regarding supplemental environmental review, feasible mitigation measures, alternatives analysis, recirculation, project description, and cumulative impacts. With respect to the remaining claims, TRANSDEF improperly invites this Court to engage in a project-level review (including project-specific impact analysis, mitigation measures, and alternatives) of the high speed rail project. ARB properly conducted a supplemental programmatic analysis for the 2014 Update. Further, CEQA does not require a "lifecycle analysis" (or the evaluation of emissions attributable to the manufacture of materials used by a project) for GHG emissions. Because each of TRANSDEF's CEQA claims is premised on this faulty assumption, the claims fail. Finally, ARB complied with its certified regulatory program in responding to comments. Accordingly, the Court should deny TRANSDEF's First, Second, and Third Causes of Action.

A. TRANSDEF Failed to Exhaust its Administrative Remedies on Most of Its Claims in the Amended Petition

A CEQA challenge is not preserved "unless the alleged grounds for noncompliance with [CEQA] were presented to the public agency orally or in writing by any person during the public comment period ... or prior to the close of the public hearing ...." (Pub. Res. Code, § 21117, subd. (a).) "Exhaustion of administrative remedies is a jurisdictional prerequisite to maintenance

of a CEQA action." (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199.)

The exhaustion doctrine ensures that public agencies have "an opportunity to act and render the litigation unnecessary." (*Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 894). This is possible only if public agencies are given an opportunity to respond to specific factual and legal objections. (See *Corona-Norco Unified Sch. Dist. v. City of Corona* (1993) 17 Cal.App.4th 985.) Thus, "the exact issue raised in the lawsuit must have been presented to the...agency." (*Resource Defense Fund, supra*, 191 Cal.App.3d at p. 894.) Likewise, "generalized environmental comments at public hearings, ... or isolated and unelaborated comment[s] will not suffice." (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535-536; see also *Citizens for Responsible Equitable Environmental Development (CREED) v. City of San Diego* (2011) 196 Cal.App.4th 515.)

The *CREED* decision is instructive. There, petitioner submitted a letter urging a city not to approve a project, contending it would "cause direct and indirect [GHG] emissions that, when considered cumulatively, are significant." (*Id.* at p. 521.) Petitioner filed a CEQA petition, alleging new information required the city to prepare a supplemental EIR. The court held that petitioner's comment letter contained only "general, unelaborated objections insufficient to satisfy the exhaustion doctrine." (*Id.* at pp. 527-528.) Petitioner's comment did not give the city "the opportunity to consider whether a [supplemental EIR] was required." (*Id.* at p. 528.)

It was therefore incumbent on TRANSDEF to raise the precise issues in front of ARB for which it now seeks judicial review. But TRANSDEF failed to do so. In fact, TRANSDEF submitted its comments in support of the Update, stating that the Update "contains an amazingly comprehensive collection of well thought-through measures and programs" reflecting a "thorough and thoughtful approach to the challenges of climate change." (57 AR 32319.) Although TRANSDEF stated that "the [high-speed rail project]'s construction emissions will make the [high-speed rail project] a net GHG emitter for two or more decades," (57 AR 32321), nowhere in its written comments does TRANSDEF even mention the 2014 EA, direct a critique at the 2014

EA or ARB's compliance with its certified regulatory program or CEQA generally. (See 52 AR 32319-32362.)

It was not until TRANSDEF's oral comments at the hearing on the 2014 Update that TRANSDEF finally raised a criticism of the 2014 EA. (55 AR 31150-51 ["including the cement and other construction materials would actually increase GHGs for the first 20 to 30 years of operations. That makes the environmental assessment's GHG impacts assessment incorrect."].) Liberally construing TRANSDEF's oral comments, at most, TRANSDEF raised a single issue regarding whether the emissions associated with cement production to construct the high-speed rail was a significant environmental impact. The issues TRANSDEF failed to raise include:

- *Supplemental environmental review*: that changes in the high-speed rail project and/or new information regarding the project's impacts require preparation of a supplemental environmental document; (Pet. Brf., at pp. 12-14.)
- *Mitigation measures:* that the EA's failure to consider feasible mitigation measures for the construction impacts of the high-speed rail project violated CEQA; (Pet. Brf., at pp. 16-17; Amended Petition, First Cause of Action (Count No. 4).)
- *Alternatives analysis:* that the EA's alternatives analysis was flawed because it failed to consider an alternative that did not include high-speed rail; (Pet. Brf., at p. 17; Amended Petition, First Cause of Action (Count No. 5).)
- *Recirculation:* that "new information" regarding the high-speed rail project required recirculation of the EA; (Pet. Brf., at p. 18; Amended Petition, Third Cause of Action.)
- *Project description:* that the EA's project description was inadequate because it failed to include an "accurate and adequate description of the high-speed rail project" (Amended Petition, First Cause of Action (Count No. 1.); and
- *Cumulative impacts:* that the EA failed to "properly consider cumulative impacts of the project" by omitting construction impacts of the high-speed rail project. (Amended Petition, First Cause of Action (Count No. 3.)[5]

While courts have sometimes given commenters leeway in construing whether an issue has been adequately raised or not, the complete failure to identify specific CEQA issues that TRANSDEF now seeks to litigate is a blatant failure to exhaust. (See *California Native Plant*

[5] TRANSDEF fails to brief Count One (inadequate project description) and Count Three (cumulative impacts) of its First Cause of Action and thereby waives these issues. (See e.g., *Holmes v. Petrovich Development Co.* (2011) 191 Cal.App.4th 1047, 1064, n. 2 [argument not raised in opening brief is waived].)

Society v. City of Rancho Cordova (2009) 172 Cal.App.4th 603, 617 [petitioner failed to exhaust its administrative remedies on issues of project description, piecemealing, and recirculation because its comments solely related to mitigation measures.].) Moreover, because no other person raised any issues related to the EA's inclusion of the high-speed rail project (See 56 AR 3137 – 58 AR 32954), ARB was not given "an opportunity to act and render the litigation unnecessary." (*Resource Defense Fund, supra*, 191 Cal.App.3d at p. 894.)

Due to TRANSDEF's failure to specifically raise these factual and legal issues in front of ARB, its CEQA claims regarding supplemental environmental review, feasible mitigation measures, alternatives analysis, recirculation, project description, and cumulative impacts are barred under Public Resources Code section 21177.

B. A Programmatic Level Review of the 2014 Update Under ARB's Certified Regulatory Program Was Appropriate

TRANSDEF's remaining CEQA claims also fail because TRANSDEF ignores that ARB conducted a programmatic review of the 2014 Update – just as it did for the 2008 Scoping Plan – anticipating future project-level review of individual measures. When viewed under the proper legal standards for programmatic review, the 2014 EA for the 2014 Update clearly satisfies CEQA.

1. The "project" is the 2014 Update to the 2008 Scoping Plan, not the high-speed rail project

TRANSDEF's primary CEQA argument is that the 2014 EA for the 2014 Update violates CEQA because it did not analyze the high-speed rail project in enough detail. (Pet. Brf., at p. 13:1-6.) Incredibly, nowhere in the opening brief does TRANSDEF discuss the programmatic nature of ARB's review.[6] Like the 2008 Scoping Plan, the 2014 Update is a non-binding blueprint for identifying future regulatory and non-regulatory measures. Consistent with this scope, "[t]he level of detail in [the] EA reflects that the project is a broad plan" and "does not

[6] TRANSDEF and its counsel are well aware of the distinction between programmatic and project level EIRs. (See Pet. Brf., at pp. 7:15-16, 9:17-21, 13, fn 11; *Town of Atherton, supra*, 228 Cal.App.4th at p. 324.) The omission of any discussion of ARB's programmatic review of the Update, and the corresponding standards governing judicial review of the EA is glaring. This results in a waiver that cannot be resuscitated by raising arguments for the first time in the reply.

provide the level of detail that will be provided in subsequent environmental documents prepared for specific regulatory actions that ARB or other agencies decide to pursue to reduce GHG emissions. (Cal. Code Regs., tit. 14, § 15152.)" (1 AR 00030.) As a result, TRANSDEF bases its entire CEQA argument on the wrong foundation. The "project" is the 2014 Update – specifically, the numerous recommended measures for the reduction of GHGs to attain the long-term goals of AB 32 beyond 2020. TRANSDEF ignores this project description, and instead attempts to characterize the project as one of the recommended actions – the high-speed rail project – and hold ARB to standards applicable to project EIRs. TRANSDEF's claims are thus misplaced.

2. The 2014 Update necessitated a programmatic environmental review

A program EIR "may be prepared on a series of actions that can be characterized as one large project and are related either: (1) Geographically, (2) As logical parts in the chain of contemplated actions, (3) In connection with issuance of ... plans, or other general criteria to govern the conduct of a continuing program, or (4) As individual activities carried out under the same authorizing statutory or regulatory authority and having generally similar environmental effects which can be mitigated in similar ways." (Cal. Code Regs., tit. 14, § 15168, subd. (a); *Laurel Heights*, *supra*, 47 Cal.3d at p. 399, n.8.)[7] Program EIRs for planning documents analyze environmental effects at the "first-tier" of review and need not provide detailed, project-specific analyses. (*Town of Atherton*, *supra*, 228 Cal.App.4th at p. 344, 347; *Rio Vista Farm Bur. Center v. County of Solano* (1992) 5 Cal.App.4th 351, 375 [programmatic review of waste disposal plan upheld]; *see also*, *In re Bay-Delta*, *supra*, 43 Cal.4th at p. 1169 [programmatic review of CalFed plan to restore Bay-Delta].) Where program EIRs are focused on this "first-tier" review – and the agency explicitly indicates that future, project-specific environmental review will be conducted – the court's review is limited to a more general assessment of the program's secondary effects, mitigation measures, and alternatives. (*Rio Vista*, *supra*, 5 Cal.App.4th at pp. 373-375, 377-379;

[7] In contrast, a project EIR "examines the environmental impacts of a specific development project" and "all phases of the project including planning, construction, and operation." (Cal. Code Regs., tit. 14, § 15161.)

In re Bay-Delta, supra, 43 Cal.4th at p. 1169.) As a result, a "first-tier EIR may defer for future study specific impacts of individual projects that will be evaluated in subsequent second-tier EIRs...and may contain generalized mitigation criteria and policy-level alternatives." (*Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29, 37; *Rio Vista, supra*, 5 Cal.App.4th at pp. 373-374, 377, 379.)

Several cases strongly support ARB's use of a programmatic document here. First, in *Town of Atherton*, petitioners, including TRANSDEF, challenged the programmatic EIR for the high-speed rail segment from the Central Valley to the Bay Area, alleging that the impacts from the precise elevated alignment of the tracks were not analyzed in sufficient detail. The Third Appellate District rejected this challenge holding that the "precise vertical alignment...at specific locations is the type of site-specific consideration that must be examined in detail in a project EIR." (*Town of Atherton, supra*, 228 Cal.App.4th at p. 346.) The court reasoned that "[r]equiring a first-tier program EIR to provide greater detail as revealed by project-level analyses 'undermines the purpose of tiering and burdens the program EIR with detail that would be more feasibly given and more useful at the second tier stage.'" (*Ibid.* quoting *In re Bay-Delta, supra*, 43 Cal.4th at p. 1173.) The court concluded that the HSRA had "properly deferred analysis of environmental impacts and mitigation measures for the vertical alignments at certain portions of the...system's route to later project EIRs." (*Id.* at p. 347.)

Similarly, in *In re Bay-Delta*, the California Supreme Court upheld the programmatic review of the CALFED program to improve the Bay-Delta, holding that project-level "impacts and mitigation measures are not determined by the first-tier approval decision but are specific to the later phases." (*In re Bay-Delta, supra*, 43 Cal.4th at p. 1170.) Thus, CALFED properly deferred the consideration of specific impacts, mitigation measures, and alternatives to later, "second-tier" project-level review. (*Id.* at 1169, 1172.) The Supreme Court confirmed that the scope of environmental review for a program is to be guided by the "rule of reason" and may be structured around a "reasonable definition of underlying purpose and need not study alternatives that cannot achieve that basic goal." (*In re Bay-Delta, supra*, 43 Cal.4th at 1163, 1166.)

Finally, in the *Rio Vista* case, Solano County prepared a hazardous waste management plan that included site selection criteria for future facilities. (*Rio Vista*, *supra*, 5 Cal.App.4th at 363.) The plan was an initial working document to be periodically updated. (*Ibid.*) Solano County certified a programmatic EIR, which concluded that the plan would have no direct adverse environmental impacts and should cause beneficial impacts. (*Id.* at 365-66.) However, because future hazardous waste facility projects were envisioned in the plan, the county also analyzed the impacts, cumulative impacts, and suggested alternatives and mitigation measures in general terms. (*Id.* at 366-67.) The EIR specifically noted that "siting and approval of specific hazardous waste facilities will require separate environmental reviews." (*Id.*, at 367.) The First District Court of Appeal, recognizing that the plan made no specific siting decisions regarding new facilities and explicitly anticipated future project-specific review, rejected the challenges to the program EIR, explaining:

> Where, as here, an EIR cannot provide meaningful information about a speculative future project, deferral of an environmental assessment does not violate CEQA. The County has not impermissibly approved a project which envisions future action without future environmental review. Instead, the FEIR properly commits the County to future EIR's in the event a specific facility is proposed.

(*Id.* at 373 (internal citations deleted).) The First District concluded that the general analyses of the impacts, mitigation measures and alternatives were sufficient. (*Id.* at 375-379.)

The 2014 EA for the 2014 Update has similarities to each of the above situations. The EA identifies overall impacts, mitigation, and alternatives regarding the full suite of recommended measures in the 2014 Update – but defers specific analysis of project-level impacts, mitigation measures, and alternatives to subsequent project EIRs. (1 AR 00010-11, 00030-31, 00064-287.) As in each of the three cases, ARB explicitly relies upon the need for future project-specific environmental analyses. (See *In re Bay-Delta*, *supra*, 43 Cal.4th at p. 1170; *Town of Atherton*, *supra*, 228 Cal.App.4th at p. 346; *Rio Vista*, *supra*, 5 Cal.App.4th at 375-379.) Requiring ARB to examine the level of detail that TRANSDEF demands on each measure in the Update would "undermine the purpose of tiering and burden the program EIR with detail that would be more feasibly given and more useful at the second tier stage.'" (*In re Bay-Delta*, *supra*, 43 Cal.4th at p.

1173.) As in all three cases, the Court should conclude that ARB complied with its obligations in conducting a programmatic review.

Finally, high-speed rail is a project approved by and being implemented by the HSRA. ARB has no discretionary approval authority over that project and any CEQA challenge to the project must have been brought by petition for writ of mandate directly against HSRA within the applicable statute of limitations. To the extent that high-speed rail has not yet been studied and approved, any challenge is an abstract dispute, and does not give rise to a justiciable controversy. (*Pacific Legal Foundation v. Cal. Coastal Com.* (1982) 33 Cal.3d 158, 170-171.) Either way, using the 2014 Update as a vehicle to challenge high-speed rail is not permissible.

3. ARB's analysis of programmatic mitigation measures and alternatives fully complies with the requirements of ARB's certified regulatory program

TRANSDEF essentially punts on its claims regarding the mitigation measures and the alternatives analysis in the 2014 EA, including a total of nine lines of argument with no citations to authority. (Pet. Brf., at pp. 16:21-17:12.) To the extent this necessitates a response, for many of the same reasons stated above, ARB's mitigation measures and alternatives analysis is also sufficient at this stage.

Under its certified regulatory program, ARB must "address feasible mitigation measures and feasible alternatives to the proposed action which would substantially reduce any significant adverse impact identified." (Cal. Code Regs., tit. 17, § 60005(b).) The term "feasible" is defined as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors ...." (Cal. Code Regs., tit. 17, § 60006.)

The requirement to identify alternatives and mitigation measures "must be judged against a rule of reason." (*Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1083-1084.) Where, as here, the program is a planning document, a general discussion of the alternatives "tailored to the nature of the Plan" will suffice. (*Rio Vista, supra*, 5 Cal.App.4th at pp. 378-79; *see also, Al Larson Boat Shop, supra*, 18 Cal.App.4th at pp. 744-46.) Likewise, a "general statement of mitigation measures" follows "the general nature of the Plan" and any "detailed statement of

mitigation measures . . . would [be] neither reasonably feasible nor particularly illuminating." (*Rio Vista, supra*, 5 Cal.App.4th at p. 377.) Further, deference is accorded ARB in conducting its analysis. (*Laurel Heights, supra*, 47 Cal.3d at p. 393; *City of Sacramento, supra*, 2 Cal.App.4th at p. 976.) ARB's discussion of alternatives and mitigation measures more than satisfied these requirements. (1 AR 00064-287.); see *Town of Atherton, supra*, 228 Cal.App.4th at p. 359.)

In sum, TRANSDEF's argument improperly invites this Court to engage in its own evaluation of the 2014 EA using TRANSDEF's preferred approach: project-level review of the high speed rail project, additional project-specific mitigation measures, and the inclusion of an alternative comprised of the 2014 Update minus the high-speed rail project. (See Pet. Brf., 17:9-11.) None of TRANSDEF's assertions have merit. ARB fully satisfied the requirements of its certified regulatory program in analyzing the 2014 Update at a programmatic level. Again, TRANSDEF may not use the 2014 Update as a proxy for its challenge to the high-speed rail project.

4. The findings adopted by ARB do not violate CEQA

TRANSDEF also provides a threadbare argument with no citation to legal authority on its claim that ARB failed to adequately support its CEQA findings and statement of overriding considerations. The thrust of this argument is that the findings are deficient because they fail to specifically mention the high-speed rail project. This is not a basis to upend ARB's findings.

After considering all of the material in the 2014 Update, the EA, public comments, and responses to comments, the Board issued 12 pages of findings and a statement of overriding considerations for the 2014 Update, findings that are supported by substantial evidence. (1 AR 00010-21.) This satisfies ARB's obligation under CEQA. (Pub. Resources Code, § 21081; Cal. Code Regs., tit. 14, § 15091 [where a project has potentially significant effects, the agency must make "written findings for each of those significant effects, accompanied by a brief rationale for each finding"]; *Rio Vista, supra*, 5 Cal. App. 4th at pp. 373-379; *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal.App.3d 433, 441 ["the purposes of section 21081 are that there be some evidence that the alternatives or mitigation measures in the EIR actually were considered by the decision making agency and...that there be a disclosure of 'the analytic route the ... agency

traveled from evidence to action.'"].) Similarly, ARB's statement of overriding considerations was properly adopted. (See Cal. Code Regs., tit. 14, § 15093, subd. (b) ["agency shall state in writing the specific reasons to support its action based on the final EIR and/or other information in the record"]; see also Pub. Resources Code, § 21081, subd. (b).)

ARB notified the public of the scope of its review, the evidence it considered, its findings regarding potentially significant impacts enumerated in eleven separate categories, its findings regarding consideration of the three alternatives and bases for rejecting each, and the rationale for its statement of overriding considerations, all supported by substantial evidence. (1 AR 00010-21.) TRANSDEF identifies no basis for the Court to hold ARB's findings are deficient.

C. The Update's EA Adequately Supplements The Prior Environmental Analyses for the 2008 Scoping Plan

CEQA limits the circumstances under which a subsequent or supplemental EIR is required. (See *San Mateo Gardens, supra*, 1 Cal.5th at p. 949.) "These limitations are designed to balance CEQA's central purpose of promoting consideration of environmental consequences of public decisions with interests in finality and efficiency." (*Id.*) Thus, "no subsequent or supplemental environmental impact report shall be required" unless: (i) substantial changes to the project are proposed requiring major revisions of the EIR; (ii) substantial changes occur with respect to the circumstances under which the project is being undertaken will require major revisions in the EIR; or (iii) new information becomes available. (Pub. Resources Code, § 21166.)

"The purpose behind the requirement of a subsequent or supplemental EIR . . . is to explore environmental impacts not considered in the original environmental document." (*San Mateo Gardens, supra*, 1 Cal.5th at p. 948.) A supplemental EIR "need contain only the information necessary to make the previous EIR adequate for the project as revised." (Cal. Code Reg., tit. 14, § 15163, subd. (b).) As the Supreme Court has cautioned, "the event of a change in a project is not an occasion to revisit environmental concerns laid to rest in the original analysis" and courts "should tread with extraordinary care before reversing an agency's determination . . . that its initial environmental document retains some relevance to the decisionmaking process." (*San*

Mateo Gardens, supra, 1 Cal.5th at p. 949, citing *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1052, fn. 6.)

Here, TRANSDEF contends, for the first time in this litigation, that ARB's 2014 EA erred by relying on its analysis of the high-speed rail project in the 2008 FED. Specifically, TRANSDEF now argues that the changes in the high-speed rail project's route, changes in the timing of construction of the project, and new information regarding the "lifecycle" impacts of project construction require supplemental environmental review. TRANSDEF's argument reflects a fundamental misunderstanding of the 2014 EA.

Contrary to TRANSDEF's assertions, the 2014 EA included the high-speed rail in its supplemental programmatic analysis. The 2014 EA defines the "project" as the "recommended actions" in the 2014 Update. (1 AR 34.) Continued construction of the high-speed rail project is discussed as a "recommended action" in the EA and analyzed at a programmatic level. (1 AR 46.) This analysis builds off of the 2005 Programmatic EIR prepared for the high-speed rail system that was never challenged and that ARB appropriately relied upon in the 2008 FED. (1 AR 398.) Because the programmatic analysis of the high-speed rail project remained legally sufficient, the 2014 EA did not need to revisit that analysis and ARB was justified in continuing to rely on it to conclude in the EA that the impacts of the transportation sector measures would be less than significant, and ultimately beneficial. (See Pub. Res. Code, § 21167; 1 AR 154-55.) ARB's "determination . . . that its initial environmental document retains some relevance to the decisionmaking process" is therefore justified. (*San Mateo Gardens, supra*, 1 Cal.5th at p. 951.)

Furthermore, while TRANSDEF contends that the high-speed rail project has "changed," the changes it asserts have occurred (delay in the construction of the project, changes to phasing of segments, routing of Peninsula segment) have no apparent bearing on TRANSDEF's fundamental complaint: the emissions from concrete production. TRANSDEF in fact concedes that the high-speed rail project will achieve reductions after 2020. (Pet. Brf., at p. 15:8-9, 11:10-12.) In any event, they are the type of specific issues more appropriate to the project-level analysis done by HSRA. Given that the project at issue is a programmatic analysis of all of the measures in the Update, the "changes" TRANSDEF asserts do not give rise to the need to

"revisit" issues laid to rest in 2005 or 2008. For these reasons, the 2014 EA appropriately supplemented the prior environmental analyses conducted for the 2008 Scoping Plan.

D. TRANSDEF's CEQA Causes of Action Also Fail Because CEQA Does Not Require A Lifecycle Analysis For GHG Emissions

Even assuming the 2014 EA should have conducted a project-level analysis of the high-speed rail project, the Court should deny all of TRANSDEF's CEQA causes of action because CEQA does not require a lifecycle analysis for GHG emissions. TRANSDEF's core contention is that constructing the high-speed rail project will require "tons of cement," and the "associated massive GHG emissions, is an indirect impact of the high-speed rail project," which should have been analyzed in the EA. (Pet. Brf., at p. 16; Amended Petition, First, Second and Third Causes of Action.) TRANSDEF further contends that under CEQA, the "standard for evaluating GHG emissions is a lifecycle assessment analysis." (*Id.*)

Notably, TRANSDEF cites no legal authority for its proposition that CEQA requires a lifecycle analysis for GHG emissions. In fact, the CEQA Guidelines – the guidelines "central to the statutory scheme" that "serve to make the CEQA process tractable for those who must administer it [and] those who must comply with it" – state the opposite. (See *San Mateo Gardens, supra*, 1 Cal.5th at p. 954.) In December 2009, the California Natural Resources Agency adopted amendments to the CEQA Guidelines addressing the analysis and mitigation of GHG emissions as required by Public Resources Code section 21083.05. (RJN, Ex. 6, pp. 71-72.) In these amendments, the Natural Resources Agency specifically removed the term "lifecycle" from the CEQA Guidelines because "requiring such an analysis may not be consistent with CEQA." (*Id.* at p. 71.) As the Natural Resources Agency explained:

> [T]he term [lifecyle] could refer to emissions beyond those that could be considered 'indirect effects' of a project ... An example of such emissions could be those resulting from the manufacture of building materials. [Citation.] CEQA only requires analysis of impacts that are directly or indirectly attributable to the project under consideration. [Citation.] In some instances, materials may be manufactured for many different projects as a result of general market demand . . . Thus, such emissions may not be 'caused by' the project under consideration. (*Id.* at pp. 71-72 [emphasis added].)

Therefore, "to avoid potential confusion regarding the scope of indirect effects that must be analyzed," the Natural Resources Agency removed the term "lifecycle" from the CEQA Guidelines. (*Id.* at p. 72.)

The CEQA Guidelines are owed "deference insofar as they reflect the agency's specialized knowledge and expertise" and are afforded "great weight" unless a provision is "clearly unauthorized or erroneous under the statute." (*San Mateo Gardens, supra*, 1 Cal.5th at p. 954.) Thus, contrary to TRANSDEF's assertions, CEQA does not require a "lifecycle analysis" (evaluating emissions attributable to the manufacture of materials used by a project) for GHG emissions. Because each of TRANSDEF's CEQA causes of action is premised on this faulty assumption, its CEQA challenge is baseless and should be denied in its entirety.

E. ARB Complied With Its Certified Regulatory Program in Responding to Comments.

TRANSDEF further contends that ARB violated CEQA because the 2014 EA failed to include a written response to its April 7, 2014 comment letter. ARB fully complied with its certified regulatory program in responding to comments.

Under ARB's program, "if comments are received during the evaluation process which raise significant environmental issues associated with the proposed action, the staff shall summarize and respond to the comments either orally or in a supplemental written report." (Cal. Code Regs., tit. 17, § 60007(a).) During the public comment period, ARB received 118 comment letters through the two comment dockets opened for the 2014 Draft Update and 2014 Draft EA. (12 AR 6218.) ARB determined that "seven (7) mentioned or raised an issue related to the EA or an environmental issue related to the Update addressed in the EA." (12 AR 6220.) TRANSDEF concedes that its April 7, 2014 written comment "was not explicitly identified as a comment letter on the EA." (Pet. Brf. at p. 17.) Indeed, TRANSDEF's written comment was largely supportive of the 2014 Update and failed to mention the 2014 EA or ARB's compliance with its certified regulatory program or CEQA generally. (See 52 AR 32319-32362.) As such, ARB properly determined that TRANSDEF's letter was unrelated to the 2014 EA and required no written

response under its certified regulatory program. But, "all of the public comments were considered by staff and provided to the Board members for their consideration." (12 AR 6220.)

It was not until TRANSDEF's oral comments at the public hearing on the 2014 Update, that TRANSDEF finally criticized the 2014 EA's failure to analyze the "lifecycle" GHG emissions associated with construction of the high-speed rail project. (55 AR 31150-51.) ARB orally responded to TRANSDEF's comment during the public hearing, explaining that the high-speed rail project was analyzed in the 2008 FED and it "wasn't reconsidered at this time." (56 AR 31216-17.) ARB's oral response is entirely consistent with the supplemental programmatic analysis of the 2014 EA, as detailed above. Accordingly, ARB fully complied with its certified regulatory program by responding orally. (See Cal. Code Regs., tit. 17, section 60007, subd. (a)). Moreover, ARB was under no obligation to provide a written response to TRANSDEF's late comment. (See *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1010-1111).

Finally, ARB's failure to respond in writing to TRANSDEF's written comment is not prejudicial. Only "[i]f it is established that a state agency's failure to consider some public comments has frustrated the purpose of the public comment requirements of the environmental review process" is the error deemed prejudicial. (*Environmental Protection Information Center v. California Dep't of Forestry and Fire Protection* ("*EPIC*") (2008) 44 Cal.4th 459.) *EPIC* is instructive. There, the comments in question were not even placed in the administrative record certified by the respondent agency and were thus completely missing from the decision-making process. (*EPIC*, *supra*, 44 Cal.4th at p. 483.). Despite this omission – and directly contrary to TRANSDEF's characterization of the case – the Supreme Court determined that the agency's failure to consider the comments was not prejudicial. (*Id.* at 488.) It was clear from the record that the agency had considered information from "a variety of experts and sources," and "analyzed and considered the implications of its actions." (*Id.* citing *Schoen v. Dept. of Forestry & Fire Protection* (1997) 58 Cal.App.4th 556, 573-574.)

EPIC illustrates the high burden TRANSDEF must meet to show that ARB's alleged error was prejudicial. TRANSDEF cannot meet that burden. CEQA's purpose of requiring public review has not been subverted here. TRANSDEF's written comment was reviewed and

considered by ARB before making its decision and the agency complied with its certified regulatory program by responding orally. Further, ARB conducted multiple public hearings and received "information from a variety of experts and sources" and "analyzed and considered the implications of its action." For these reasons, even if the Court determines that ARB erred in failing to provide a written response to TRANSDEF's comment, that error is not prejudicial.

F. ARB Did not Violate CEQA by Failing to Recirculate the EA after Receiving TRANSDEF's Comment Letter

Finally, TRANSDEF contends that ARB erred by "failing to recirculate the EA after TRANSDEF's comments identified the significant GHG emissions impact associated with the high-speed rail project." (Pet. Br. at p. 18.) CEQA requires recirculation "when significant new information is added to an environmental impact report after notice has been given . . . but prior to certification." (Pub. Resources Code, § 21092.1.) "New information added to an EIR is not 'significant' unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project ...." (Cal. Code Regs. tit. 14, § 15088.5.)

CEQA's provisions requiring recirculation of an EIR have no application here. Recirculation of an EIR is required "when significant new information *is added*" to an EIR. (Pub. Resources Code, § 21092.1) [emphasis added].) Under the plain meaning of the statute, recirculation is only triggered if significant new information is actually added to the EA. (See *Laurel Heights Improvement Assn' v. Regents of the Univ. of Cal.* (1993) 6 Cal. 4th 1112, 1126-1132.) Here, no new information relating to the high-speed rail project – significant or otherwise – was added to the EA after the public comment period closed. Nor was it required. (See *supra*, Sections I, B. – E.) For these reasons, ARB did not violate CEQA by failing to recirculate the EA and the Court should deny TRANSDEF's last-ditch CEQA claim.

II. ARB COMPLIED WITH ALL OF ITS STATUTORY DUTIES IN PREPARING THE UPDATE TO THE SCOPING PLAN

The crux of TRANSDEF's Fourth Cause of Action is that ARB violated AB 32 by including measures in the Update that extend beyond 2020. Petitioner's argument fails because AB 32 provides ample authority for ARB to adopt an Update to the Scoping Plan which includes

a range of measures, and specifically measures that are implemented beyond 2020. (Health & Saf. Code, §§ 38551, subds. (b), (c), 38561.)

A. TRANSDEF Fails to Properly Plead its Fourth Cause of Action

As an initial matter, TRANSDEF fails to properly plead its statutory claim. A petition, like a civil complaint, frames and limits the issues and apprises the defendant of the basis on which the plaintiff seeks recovery. (See *Hughes v. Western MacArthur Co.* (1987) 192 Cal.App.3d 951, 956.) "The complaint also limits the proof that may be submitted, because it advises the court and the adverse party of what plaintiff relies on as a cause of action." (*Id.*) The authority issue presented in Part III. of TRANSDEF'S Brief does not appear in the Second Amended Petition. (See Pet. Brf., at p. 20.) Nowhere does the Amended Petition cite to Health and Safety Code section 38561 or otherwise put ARB on notice that ARB allegedly exceeded its authority under AB 32. (SAC, ¶¶ 56, 57.) Thus, the issue is not properly before this Court.

B. Section 38561 Authorizes ARB to Update the Scoping Plan with GHG Emission Reductions Beyond 2020

TRANSDEF contends that the 2014 Update violates AB 32 because including high-speed rail as a measure does not "achieve maximum technologically feasible and cost-effective reductions in greenhouse gas emissions from sources or categories of sources by 2020." In its Opening Brief, TRANSDEF further stretches its claim, stating that "[c]ertainly, the Act allowed ARB to make recommendations for future long-term measures intended to extend GHG emissions beyond the 2020 deadline" but then suggesting that the 2014 Update must be "tailored to meet the Act's specific requirement that [the identified measures] achieve...GHG reductions by 2020" only. This contradictory limitation imposed by TRANSDEF to salvage its claim makes no sense in the statutory scheme

When construing a statute, the California Supreme Court has stated, "[o]ur primary task . . . is to determine the intent of the Legislature, and we begin by looking to the statutory language." (*Olson v. Automobile Club of Southern Cal.* (2008) 42 Cal.4th 1142, 1147.) Courts give "the language its usual, ordinary import and accord[ ] significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose." (*Dyna–Med, Inc. v. Fair Employment &*

Housing Com. (1987) 43 Cal.3d 1379, 1386–1387.) "The words of the statute must be construed in context, keeping in mind the statutory purpose, and ... statutory sections relating to the same subject must be harmonized ... to the extent possible." (*Id.*) Applying these principles, there is no question that AB 32 requires ARB to look beyond 2020, and that the 2014 Update is an appropriate vehicle to convey its post-2020 recommendations.

AB 32 does not command ARB to halt its planning and regulatory efforts when the clock strikes midnight on December 31, 2020. To the contrary, Section 38510 provides, *without any time limitation*, that ARB "is the state agency charged with monitoring and regulating sources of emissions of greenhouse gases that cause global warming in order to reduce emissions of greenhouse gases." (Health & Saf. Code, § 38510.) Section 38551 makes clear that the "statewide greenhouse gas emissions limit shall remain in effect unless otherwise amended or repealed," and establishes the Legislature's intent "that the statewide greenhouse gas emissions limit continue in existence and be used to maintain and continue reductions in emissions of greenhouse gases *beyond 2020*." (emphasis added) (Health and Saf. Code, § 38551, subds. (a), (b).)[8] Section 38551 further provides that ARB "shall make *recommendations*...on how to continue reductions of greenhouse gas emissions beyond 2020." (Health & Saf. Code, § 38551 [emphasis added].)

Under Section 38561, ARB must prepare and approve a "scoping plan, as that term is understood by [ARB], for achieving the maximum technologically feasible and cost-effective reductions in greenhouse gas emissions" in California. (Health & Saf. Code § 38561, subd. (a).) ARB is charged with updating the Scoping Plan "at least once every five years," again without a time limitation. (*Id.* subd. (e).) In that plan, ARB is directed to "identify and *make recommendations* on direct emission reduction measures...that the state board finds are necessary and desirable." (Health & Saf. Code § 38561, subd. (b) [emphasis added].) These "exceptionally broad and open-ended" directives "leave virtually all decisions to the discretion of the Board.'" (*AIR, supra*, 206 Cal.App.4th at p. 1495.)

[8] Remarkably, TRANSDEF does not cite section 38551 in its statutory argument.

The only logical harmonization of AB 32 is that ARB will make recommendations in the Updates to the Scoping Plan for how to continue to reduce GHG emissions beyond 2020. Indeed, AB 32's mandates that ARB make recommendations beyond 2020, and that ARB update the Scoping Plan at least every five years, *require* ARB to make post-2020 recommendations. Even if AB 32's scheme somehow lacked clarity, ARB's decision to focus the 2014 Update on post-2020 measures is well within its discretion. Either way, there is no basis for TRANSDEF's contorted reading that "recommendations" in the Scoping Plan and the updates are limited only to those completed by 2020.[9]

What TRANSDEF's challenge really amounts to is an attack on the choices made by ARB within the Update (i.e., the Update's content), not whether ARB had the authority to adopt the Update in the first place. As discussed, ARB's adoption of the Update was "clearly within the lawmaking authority delegated to it", and ARB's "choices were thoughtfully considered, well within the scope of the Legislature's directive," and "reflect the exercise of sound judgment based on substantial evidence." (*Id.* at 1502, 1505; see also, *Yamaha, supra*, 19 Cal.4th at 10-11.)

C. ARB's Adoption of the 2014 Update Including High-Speed Rail was Not Arbitrary and Capricious

Having demonstrated that ARB was clearly authorized to include the high-speed rail as a measure in the 2008 scoping plan and again in the 2014 Update, ARB need only show that it was not arbitrary and capricious to do so in order to defeat TRANSDEF's Fourth Cause of Action. (*AIR, supra,* 206 Cal.App.4th at p. 1495; *Carrancho v. Air Resources Bd.* (2003) 111 Cal.App.4th 1255, 1268-69; see also *Yamaha, supra*, 19 Cal.4th at 10-11, 17.)

From the beginning of the Scoping Plan process, ARB has repeatedly stressed the importance of putting California on a path to even greater reductions beyond 2020. (See e.g., 1 AR 434 ["Getting to the 2020 goal is not the end of the State's effort."].) ARB explicitly

[9] Even if there were a basis for TRANSDEF's statutory argument that only measures that reduce emissions by 2020 were authorized to be included in the initial Scoping Plan under Health and Safety Code section 38561, subdivision (a), there is no similar time constraint in subdivision (h) which governs ARB's updates. (*cf.* Health & Saf. Code § 38561, subds. (a), (h).) Moreover, subdivision (a) requires reductions from "sources or *categories of sources*" and ARB has twice determined – in both the Scoping Plan and the Update – that emissions will be reduced from the transportation *category*. (*Id.* § 38561, subd. (a), emphasis added.)

indicated throughout the 2008 Scoping Plan that it expected that the measures included in the Plan would put California on a path towards the 80% reduction by 2050 goal. (See e.g., 1 AR 434. 450, 468, 563-566.) The 2008 Scoping Plan was the first step and the 2014 Update continues this effort. (1 AR 10-11, 29-31, 34-60.) Like in *AIR*, the "record provides ample support for the recommendations on which the Board settled, and that its choices were thoughtfully considered, well within the scope of the Legislature's directive, and not arbitrary and capricious." (*AIR*, *supra*, 206 Cal.App.4th at p. 1502.)

AB 32 provides the statutory foundation for the continuation and expansion of California's global warming reduction program beyond the year 2020. ARB has consistently interpreted and applied its authority under AB 32 to this end. And if there was any remaining doubt, SB 32 quashed it. As such, ARB's inclusion of measures such as the high-speed rail that may require longer-term investments and implementation was not arbitrary and capricious.

D. TRANSDEF's Fourth Cause of Action is Now Moot

In 2015, Governor Brown issued Executive Order B-30-15, establishing a GHG reduction target for California of 40 percent below 1990 levels by 2030 and directing ARB to update the scoping plan to reflect the path to achieving the 2030 target. (RJN, Ex. 1.) In summer 2016, the Legislature passed SB 32, codifying the 2030 target by amending the Health and Safety Code as follows:

> In adopting rules and regulations to achieve the maximum technologically feasible and cost-effective [GHG] emissions reductions . . . [ARB] shall ensure that statewide [GHG] emissions are reduced to at least 40 percent below the statewide [GHG] emissions limit no later than December 31, 2030. (Health & Saf. Code, § 38566.)

TRANSDEF's Fourth Claim for Relief has now been rendered moot by Executive Order B-30-15, SB 32, and the amendments to Health & Safety Code. "A case is considered moot when 'the question addressed was at one time a live issue in the case,' but has been deprived of life 'because of events occurring after the judicial process was initiated." (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 120.) Because " 'the duty of . . . every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions . . . [i]t necessarily follows that when … an event occurs which renders it impossible for

[the] court . . . to grant [plaintiff] any effectual relief whatever, the court will not proceed to formal judgment ...." (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1574 citing *Consol. etc. Corp. v. United A. etc., Workers* (1946) 27 Cal.2d 859, 863).) Additionally, a court in mandamus proceedings must "apprise itself of facts that arise after the pleading which render the dispute moot or make the remedy useless." (*Bruce v. Gregory* (1967) 65 Cal.2d 666, 671 [internal quotations and citations omitted].)

Here, TRANSDEF's entire Fourth Claim for Relief rests on its argument that ARB did not have the authority under AB 32 to include measures in the 2014 Update that would achieve GHG emission reductions after 2020. Even if this were a proper construction of AB 32, ARB is now clearly and expressly authorized to continue GHG emission reductions after 2020 towards the 2030 target. Further, ARB is now directed by the Governor to update the scoping plan to achieve that 2030 target and has already done so. Thus, the Court cannot "grant any effectual relief" to TRANSDEF and should deny the Fourth Cause of Action on mootness grounds.

CONCLUSION

For the foregoing reasons, ARB respectfully requests that the Court deny TRANSDEF's Amended Petition in its entirety and grant judgment in favor of ARB.

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