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10
 11 SUPERIOR COURT OF CALIFORNIA
 12 COUNTY OF ALAMEDA
 13

14 BAY AREA CITIZENS, a non-profit corporation,)

15 Petitioner,)

16 v.)

17 ASSOCIATION OF BAY AREA GOVERNMENTS,)
 a joint powers agency; METROPOLITAN)
 18 TRANSPORTATION COMMISSION, a local area)
 planning agency, and DOES 1 through 50,)

19 Respondents.)
 20 _____)
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ENDORSED
 FILED
 ALAMEDA COUNTY

MAR 10 2014

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No. RG13690631

**MEMORANDUM
 OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 PETITIONER'S MOTION FOR
 JUDGMENT ON PETITION
 FOR WRIT OF MANDATE**

DATE: June 12, 2014

TIME: 1:30 p.m.

ASSIGNED FOR ALL PURPOSES
 TO:

JUDGE EVELIO GRILLO
 DEPARTMENT 31

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INTRODUCTION AND ARGUMENT SUMMARY

Petitioner Bay Area Citizens (Citizens) is a non-profit California corporation that supports and protects the interests of California citizens concerning land-use regulation, property rights, local community control, and the environment. The Citizens have brought this action under the California Environmental Quality Act (CEQA), Pub. Res. Code §§ 21100-21177, to challenge the adoption of Plan Bay Area by Respondents Association of Bay Area Governments (Association) and Metropolitan Transportation Commission (Commission) (collectively “the Agencies”).

State law and administrative regulation require that these Agencies produce a sustainable communities strategy (the Plan) for the Bay Area that, if implemented, will result in the per capita reduction (from 2005 levels) of passenger vehicle greenhouse gas emissions: (i) 7% by year 2020; and (ii) 15% by year 2035. To achieve the targeted reduction, the Agencies propose a draconian, high-density land-use regime that will require nearly 80% of new housing and over 60% of new jobs in the Bay Area to be located within just 5% of the region’s surface area. The Agencies admit that their Plan will cause dozens of significant yet unavoidable environmental effects, but the CEQA analysis accompanying the Plan remains gravely flawed. Based on projected improvements in vehicle efficiency and related factors, the Bay Area can handily exceed the required greenhouse-gas-reductions without reliance on the Agencies’ high-density land-use vision. Remarkably, though, the Plan’s environmental impact report does not convey this basic information. Rather, the report assumes contrary-to-fact numbers, thereby giving the public the false impression that the Agencies’ high-density approach (or something very close to it) is necessary to achieve the required greenhouse gas reductions. Thus, the Plan’s CEQA analysis undercuts that law’s purpose of informing the public and decision-makers of the real-world environmental consequences of, and alternatives to, discretionary government action.

For the reasons explained herein, the Court should issue a peremptory writ of mandate directing the agencies to rescind their approval of the Plan and their certification of the Plan’s Final Environmental Impact Report.

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STATEMENT OF THE CASE

I

LEGAL BACKGROUND

A. Transportation Planning for the Bay Area

Federal and state law require that the Commission prepare and regularly update a regional “transportation plan,” a planning and fiscal blueprint for transportation and road-related projects. *See* 23 U.S.C. § 134(c), (i); 49 U.S.C. § 5303(i); Gov’t Code § 65080(a). Producing a legally adequate transportation plan is important for a community, because the plan makes the area eligible for considerable federal highway and transportation funding. *See* 23 C.F.R. § 450.308. Federal law places various constraints on how metropolitan planning organizations such as the Commission produce their transportation plans. *See, e.g.*, 23 C.F.R. § 450.322(e) (requiring the use of the “latest planning assumptions”).

B. Greenhouse-Gas-Reduction Constraints on Transportation Planning

State law also provides important constraints on the transportation planning process. In 2006, the Legislature passed the California Global Warming Solutions Act of 2006 (popularly known as A.B. 32), which requires that California reduce its statewide greenhouse gas emissions to 1990 levels by 2020. Health & Safety Code §§ 38550, 38551. To help implement A.B. 32’s goal, the Legislature in 2008 passed S.B. 375, which coordinates existing transportation and housing planning processes with A.B. 32’s greenhouse-gas-reduction mandate. *See* S.B. 375, ch. 728, § 1(e), (i). S.B. 375 requires transportation agencies like the Commission to produce a “sustainable communities strategy,” which must be integrated with a region’s transportation plan. Gov’t Code § 65080(b)(2). For the Bay Area, the Commission and the Association have joint responsibility for the strategy’s production. *Id.* § 65080(b)(2)(B).

1. Target-Setting

An important goal for the strategy is to set forth a course whereby the region will achieve, through integrated development and transportation planning, the S.B. 375 greenhouse-gas-reduction targets that the California Air Resources Board (Board) has established for the region. *See id.* § 65080(b)(2)(A). These S.B. 375 regional targets must “take into account greenhouse gas

1 emission reductions that will be achieved by improved vehicle emission standards, changes in fuel
2 composition, and other measures [the Board] has approved that will reduce greenhouse gas
3 emissions in the affected regions.” *Id.* § 65080(b)(2)(A)(iii).

4 **2. Relevant Statewide Emission Reduction Programs**

5 The most prominent of these statewide greenhouse-gas-reduction measures are: (i) the Low
6 Carbon Fuel Standard, Cal. Code Regs. tit. 17, §§ 95480-95490, which reduces the “carbon
7 intensity” of vehicle fuel sold within California; (ii) the California Clean Cars Standards
8 (commonly known as “Pavley I,” after the sponsor of the authorizing legislation), which require
9 substantial miles-per-gallon improvements for California vehicles through model year 2016, *see*
10 Verified Petition for Writ of Mandate (Pet.) ¶ 19(b); and (ii) the California Advanced Clean Cars
11 Standards (commonly known as “Pavley II,” after the sponsor of the authorizing legislation), which
12 require further miles-per-gallon improvements for California vehicles after 2016, *see* Pet. ¶ 19(c)
13 (collectively the “Statewide Vehicle Emission Standards”).

14 **3. Using the Targets in a Sustainable Communities Strategy**

15 A strategy must, among other things, “set forth a forecasted development pattern for the
16 region, which, when integrated with the transportation network, and other transportation measures
17 and policies, will reduce the greenhouse gas emissions from automobiles and light trucks to achieve
18 . . . the greenhouse gas emission reduction targets approved by the state board.” Gov’t Code
19 § 65080(b)(2)(B)(ii), (iii), (vii); *id.* § 65080(b)(2)(M). The strategy, as well as the S.B. 375 targets,
20 are to be updated on a regular basis. Gov’t Code § 65080(b)(2)(A)(iv).

21 **C. Environmental Impact Assessment Under** 22 **the California Environmental Quality Act**

23 Although it does not itself regulate the use of land, Gov’t Code § 65080(b)(2)(K), a
24 sustainable communities strategy provides powerful tools to coerce a local government to comply
25 with the strategy’s land-use prescriptions, even over the wishes of local residents, taxpayers, and
26 their elected representatives. Therefore, the strategy has a significant impact on the region’s
27 environment, for at least two reasons. First, the strategy is incorporated into the region’s
28 transportation plan, which largely dictates which transportation projects will be funded and built.

1 *Cf.* 23 C.F.R. § 450.308. Second, the region's housing need allocation, to which local governments
2 must conform their general plans, must be consistent with the strategy. *See* Gov't Code
3 § 65584.04(i). Because of these impacts, the promulgation of a strategy triggers CEQA.

4 Under CEQA, an agency must analyze the environmental impact of any discretionary
5 project that will cause a direct physical change to the environment, or a reasonably foreseeable
6 indirect physical change to the environment. *See* Pub. Res. Code §§ 21065(a), 21080(a); Cal. Code
7 Regs. tit. 14, §§ 15378(a)(1), 15357, 15358. Where the project may have a significant impact on
8 the environment, the lead agency must prepare an environmental impact report. Pub. Res. Code
9 § 21080(d).

10 An environmental impact report must "identify the significant effects on the environment
11 of a project, . . . identify alternatives to the project, and . . . indicate the manner in which those
12 significant effects can be mitigated or avoided." Pub. Res. Code § 21002.1(a). *See id.* § 21061.
13 The report must also include a "detailed statement" discussing the project's significant effects, any
14 unavoidable significant effect, any irreversible significant effect, mitigation measures, alternatives
15 to the project, and the reasons various effects on the environment have been determined to be
16 insignificant. *See* Pub. Res. Code § 21100. The report's analysis must be based on the
17 environmental setting, which "constitute[s] the baseline physical conditions by which a lead agency
18 determines whether an impact is significant." Cal. Code Regs. tit. 14, § 15125(a).

19 In addition to identifying and discussing all of the project's significant environmental
20 effects, an environmental impact report must "describe a range of reasonable alternatives to the
21 project . . . which would feasibly attain most of the basic objectives of the project but would avoid
22 or substantially lessen any of the significant effects of the project, and evaluate the comparative
23 merits of the alternatives." Cal. Code Regs. tit. 14, § 15126.6(a). The report must also consider
24 a "no project" alternative. *Id.* § 15126.6(e). Once the "no project" alternative is identified, the lead
25 agency must analyze its impacts by projecting what would reasonably be expected to occur in the
26 foreseeable future if the project were not approved. *Id.* § 15126.6(e)(3)(C). The purpose of the "no
27 project" alternative is to allow decision-makers to compare the impacts of approving the proposed
28 project with the impacts of not approving the proposed project. *Id.* § 15126.6(e)(1).

Following the preparation of the draft environmental impact report, the lead agency must make the report available for public comment. Pub. Res. Code §§ 21091, 21092; Cal. Code Regs. tit. 14, §§ 15087, 15105(a). A lead agency must “consider” and “evaluate” every comment submitted on a draft environmental impact report and prepare a written response describing the disposition of each significant environmental issue raised therein. Pub. Res. Code § 21091(d)(1)-(2); Cal. Code Regs. tit. 14, § 15088(c).

Finally, a public agency may not approve or carry out a project that will have a significant effect on the environment unless (1) the effect is mitigated to insignificance, (2) the effect is avoided through adoption of an alternative, or (3) the agency determines that mitigation is infeasible and the project’s overriding benefits outweigh the significant effect. *See* Pub. Res. Code § 21081; Cal. Code Regs. tit. 14, §§ 15002(h), 15091(a), 15092(b), 15093(c).

II

FACTUAL BACKGROUND

A. Plan Bay Area

Plan Bay Area is the first sustainable communities strategy for the Bay Area. *See* AR004023. The Plan has two legislatively mandated goals. First, the Plan must set forth a system of development, based on the latest demographic predictions, that will ensure that the area’s transportation-related development will achieve the S.B. 375 targets that the Board has assigned. *See* AR034739. Second, the Plan must also identify areas within the Bay Area sufficient to house the region’s projected population, based on figures that the Department of Housing and Community Development has produced. *Id.* The Plan also has several “voluntary” goals, adopted by the Agencies, pertaining to community health and safety, open space, transportation, and similar concerns. AR034753.

The Plan attempts to achieve the S.B. 375 targets primarily through reduction in the vehicle miles traveled of passenger motorcars and light trucks. *See* AR001690 (“Reducing per-capita [vehicle miles traveled] is the primary strategy for regional agencies to achieve the [greenhouse gas] reduction . . .”). The Plan aims to reduce vehicle miles traveled principally through high-density land-use patterns. *See* AR034830. Specifically, the Plan requires that 78% of the new

1 housing and 62% of the new jobs to be expected to be created in the Bay Area by 2040 must be
2 located within priority development areas. *See* AR000282. Priority development areas are
3 “[l]ocations within existing communities that present infill development opportunities, and are
4 easily accessible to transit, jobs, shopping and services.” AR004039. To date, Bay Area local
5 governments have established approximately 200 such areas, AR034777, comprising only about
6 5% of the region’s surface area.¹

7 **B. The Draft Environmental Impact Report**

8 On April 2, 2013, the Agencies released the Plan’s draft environmental impact report
9 (“Draft Report”). The Draft Report anticipates that the Plan will have 39 significant environmental
10 impacts. *See* AR003528, AR000352-AR000414. The Draft Report also discusses five alternatives.
11 Alternative 1 is “no project.” Alternative 2 is the proposed Plan. Alternative 3, “Transit Priority
12 Focus,” calls for higher densities than those found in the Plan. Alternative 4, “Enhanced Network
13 of Communities,” calls for development somewhat less dense than that proscribed in the Plan.
14 Finally, Alternative 5, “Environment, Equity and Jobs,” seeks to maximize affordable housing
15 while also achieving the greenhouse-gas-reduction targets. AR000346-AR000347. According to
16 the Agencies, Alternatives 3 through 5 would meet both mandatory goals, whereas the “no project”
17 alternative would not meet the greenhouse-gas-reduction targets under S.B. 375. *See* AR034850.

18 **C. The Citizens’ Comments on the Draft Environmental Impact Report**

19 Throughout the process leading up to the Plan’s adoption, many citizen groups, including
20 the Bay Area Citizens and their experts, expressed strong opposition to the Plan. Their comments
21 highlight serious legal and policy shortcomings to the Plan as well as to the Agencies’
22 environmental impact analysis. *See* Pet. ¶ 54 (summarizing the Citizens’ comments). Chief among
23 these is that, by ignoring the Statewide Vehicle Emission Standards when measuring the
24 greenhouse-gas-emission impacts of the Plan and its alternatives, the Plan creates a false need for
25 its draconian high-density development prescriptions. If instead the Plan were to take the
26

27 ¹ The Plan also seeks to reduce vehicle miles traveled by increasing mass transit ridership,
28 principally through the construction and extension of light and heavy rail. *See* AR000292,
AR034821-AR034825.

1 Statewide Vehicle Emission Standards into account, the public would understand that the S.B. 375
2 targets can be reached without the Plan's drastic land-use changes. *See* AR003146-AR003153,
3 AR003170-AR003171.

4 In their comments, the Citizens also underscored that environmentally sensitive alternatives
5 to the Plan exist that would achieve the Plan's basic objectives of greenhouse gas reduction and
6 housing development, without the Plan's acknowledged significant and unavoidable impacts. "The
7 Bay Area Citizens Transportation and Housing Alternative," AR003156-AR003159, AR003381-
8 AR003382, recommends, among several points, that the region's sustainable community strategy:
9 (i) expand and improve the existing transit system; (ii) significantly reduce fares to encourage
10 individuals to abandon their high-emission vehicles and thereby support the mobility needs of
11 lower-income residents; and (iii) de-emphasize the expansion of high-carbon-footprint and
12 low-cost-effective rail transit and ferry service. The Citizens' alternative reasonably relies on the
13 anticipated substantial greenhouse gas reductions that will occur over the planning horizon owing
14 to the Statewide Vehicle Emission Standards. *See* AR003153 (noting that the greenhouse gas
15 reductions attributable to these measures are more than 16 times the reductions that allegedly will
16 occur as a result of the Plan's housing mandates and transit subsidies). *See also* AR003381-
17 AR003382. The Citizens' alternative has the happy consequence of achieving the Plan's housing
18 mandates while respecting the housing preferences of Bay Area residents. *See* AR003157. Finally,
19 by de-emphasizing rail expansion and toll roads, the Citizens' alternative will generate more money
20 for on road maintenance. *Id.*

21 **D. The Final Plan and Final Report**

22 On July 19, 2013, the Agencies certified the Plan's Final Report and adopted the Plan. The
23 Final Report purports to assess the environmental impact of the Plan, as well as the impact of an
24 array of supposed reasonable alternatives to the Plan. The Final Report comprises the Draft Report,
25 along with amendments made after the comment period, comments submitted, and responses
26 thereto. As discussed below, none of the Final Report's changes to the Draft Report remedies the
27 Citizens' criticisms. *Cf.* AR003902.

28 ///

1 **1. The Final Report's Discussion of the "No Project" Alternative**

2 The Final Report concludes that the "no project" alternative would result in the region
3 missing its greenhouse-gas-reduction targets. AR004008, AR001317. In reaching that conclusion,
4 the Final Report (like the Draft Report) mistakenly assumes that the Statewide Vehicle Emission
5 Standards do not exist. *See* AR001688-AR001690. *See also* AR003644 (the Final Report
6 "estimate[s] carbon dioxide emissions assuming a hypothetical future in which new vehicle
7 technologies and the increased use of low carbon fuel are not present"). And compounding this
8 error is the Final Report's conclusion that emissions must be reduced by 25% to 35% from today's
9 levels to meet the A.B. 32 goal of 1990 levels by 2020, *see* AR000763, notwithstanding that
10 emission levels today are already at or about 1990 levels, *see* AR030557.

11 In its response to the Citizens' criticisms, the Final Report states that S.B. 375 requires a
12 bifurcated approach to assessing the Plan's environmental impacts. AR003644-AR003645. The
13 Final Report agrees with the Citizens that the Statewide Vehicle Emission Standards should be
14 taken into account when predicting the environmental effects of the Plan *other than* those relating
15 to greenhouse gases. But, for these latter effects, the Final Report asserts that S.B. 375 forbids
16 taking into account the Statewide Vehicle Emission Standards. The Final Report explains that to
17 rely on the undeniable benefits of these programs would be impermissible "double counting." The
18 Final Report asserts that the Board's A.B. 32 Scoping Plan, as well as the Board staff's initial
19 review of the Plan, support the Final Report's position that the Board's greenhouse-gas-reduction
20 targets are meant to exclude any reductions attributable to these statewide programs. AR001688-
21 AR001690. The Final Report also asserts that it cannot take into account the California Advanced
22 Clean Car Standards for any purpose, notwithstanding that these standards were formally adopted
23 in January, 2012, seven months before the environmental impact report process began, and went
24 into effect in their current form in December, 2012, months before the Draft Report was released.
25 The Final Report reasons that the Plan's computer modeling software—EMFAC 2011—was
26 developed before the adoption of these standards, and that there was insufficient time to produce
27 a software update that would predict their impact. AR003648, AR003650.

28 ///

2. The Final Report's Rejection of the Citizens' Proposed Alternative

The Citizens' proposal would achieve the Plan's main objectives, would be legally and financially feasible, and could be implemented without the Plan's significant environmental impacts. Nevertheless, the Final Report fails to give the Citizens' proposal meaningful consideration in its response. AR003651. Instead, the Final Report states that it is not required to consider every possible alternative, and that existing alternatives adequately incorporate the main parts of the Citizens' proposal. Yet the Final Report does not explain how the existing alternatives are adequate, given that they—unlike the Citizens' proposal—ignore the greenhouse-gas-reduction benefits of the Statewide Vehicle Emission Standards. In other words, the Final Report's rejection of the Citizens' proposal is based entirely on a faulty interpretation of S.B. 375, one that requires the Agencies to ignore greenhouse-gas-reduction reality when determining whether the Plan will meet the regional targets.

3. Statement of Overriding Considerations

In adopting the Plan and the Final Report, the Agencies also approved a Statement of Overriding Considerations, given the Final Report's conclusion that the Plan will have dozens of significant and unavoidable environmental impacts. *See* AR000167-AR000170. The Statement asserts that overriding considerations—among them meeting the S.B. 375 targets and housing all the projected population—merit adoption of the Plan, notwithstanding its significant environmental impacts. *See* AR000185-AR000189.

The Statement acknowledges that the “no project” alternative “will lessen some of the proposed Plan's potentially significant and unavoidable impacts.” AR000174. But the Statement goes on to reject the “no project” alternative on three grounds: (a) it is not the “environmentally superior” alternative (neither, of course, is the Plan, *see* AR000181); (b) it will not meet the S.B. 375 targets; and (c) it is otherwise legally infeasible. AR000175. The Statement does not discuss the Citizens' proposal.

STANDARD OF REVIEW

CEQA challenges to quasi-legislative decision-making, such as the Plan, are reviewed for “prejudicial abuse of discretion.” Pub. Res. Code § 21168.5. *Cf. Cal. Native Plant Soc'y v. City*

1 of Santa Cruz, 177 Cal. App. 4th 957, 984 (2009). “An agency may abuse its discretion under
2 CEQA either by failing to proceed in the manner CEQA provides or by reaching factual
3 conclusions unsupported by substantial evidence.” *Vineyard Area Citizens for Responsible*
4 *Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 435 (2007).

5 A court reviews *de novo* whether an agency has proceeded in the manner required by law,
6 “scrupulously enforc[ing] all legislatively mandated CEQA requirements.” *Citizens of Goleta*
7 *Valley v. Board of Supervisors*, 52 Cal. 3d 553, 564 (1990). “[A]n agency’s failure to comply with
8 the procedural requirements of CEQA is prejudicial when the violation thwarts the [a]ct’s goals
9 by precluding informed decision-making and public participation.” *San Lorenzo Valley*
10 *Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District*,
11 139 Cal. App. 4th 1356, 1375 (2006). Thus, an environmental impact report “will be found legally
12 inadequate—and subject to independent review for procedural error—where it omits information
13 that is both required by CEQA and necessary to informed discussion.” *California Native Plant*
14 *Soc’y*, 177 Cal. App. 4th at 986.

15 In contrast, when reviewing a challenge to agency factual findings and determinations, a
16 court applies the substantial evidence standard. *San Joaquin Raptor Rescue Center v. County of*
17 *Merced*, 149 Cal. App. 4th 645, 654 (2007). Substantial evidence means “enough relevant
18 information and reasonable inferences from this information that a fair argument can be made to
19 support a conclusion, even though other conclusions might also be reached.” Cal. Code Regs.
20 tit. 14, § 15384(a). Thus, a court must confirm that “the record contains relevant information that
21 a reasonable mind might accept as sufficient to support the conclusion reached.” *Great Oaks Water*
22 *Co. v. Santa Clara Valley Water Dist.*, 170 Cal. App. 4th 956, 968 (2009). The reviewing court
23 must consider all relevant evidence, “including evidence that fairly detracts from the evidence
24 supporting the agency’s decision.” *California Youth Authority v. State Personnel Bd.*, 104 Cal.
25 App. 4th 575, 579 (2002).

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ARGUMENT

I

THE AGENCIES FAILED TO PROCEED IN THE MANNER REQUIRED BY LAW BECAUSE THE FINAL REPORT FAILS ACCURATELY TO DESCRIBE A BASIC PLAN OBJECTIVE

As a corollary of its mandate to consider a reasonable range of feasible alternatives to the project, CEQA requires that the lead agency accurately identify the project's "basic objectives." *See* Cal. Code Regs. tit. 14, §§ 15126.6(a), 15126.6(c). A proper understanding of a project's basic objectives is also key to determining the accuracy of a statement of overriding considerations, because such a determination is based on the project's supposed benefits. *See* Pub. Res. Code § 21081(b); Cal. Code Regs. tit. 14, § 15093(a).

A. The Final Report Improperly Defines the Plan's Basic Objective as Meeting the Regional Targets *Without* Taking Into Account Emissions Reductions from the Statewide Vehicle Emission Standards

The Agencies identified one of the Plan's basic objectives as achieving the regional greenhouse-gas-reduction targets *without* taking into account the Statewide Vehicle Emission Standards. *See* AR001688-AR001690. For the several reasons set forth below, the Agencies failed to proceed in the manner required by law in the Final Report's assessment of the Plan's greenhouse-gas-reduction objective, and in so doing frustrated CEQA's purpose of informed decision-making.

First, S.B. 375 does not impose any limitation on how to achieve the targets that the Board has established. To the contrary, the statute requires only that a sustainable communities strategy set forth a development forecast that, when combined with the region's transportation network, (i) will reduce greenhouse gas emissions such that (ii) the region will meet the targets. *See* Gov't Code § 65080(b)(2)(B)(vii). The statute does not mandate that these requirements be met in a particular manner.

Second, the Agencies' interpretation of their S.B. 375 obligations is inconsistent with the statute's mandate that the regional targets take account of the greenhouse-gas-reduction impacts of the Statewide Vehicle Emission Standards, among other factors, and be updated in light of changes to those same factors. *Cf.* Gov't Code § 65080(b)(2)(A)(iii)-(iv). The Agencies cannot

1 explain how ignoring the Statewide Vehicle Emission Standards when determining whether the
2 targets will be met is consistent with the statute's requirement that the Board take these very same
3 factors into account when setting the targets.²

4 Third, the Agencies' interpretation is inconsistent with the targets themselves. The adopted
5 and published version of the targets contains no instruction to ignore the Statewide Vehicle
6 Emission Standards. Rather, the targets are simply stated as a per capita percentage reduction of
7 greenhouse gas emissions from 2005 levels. See RJN Exh. B. Moreover, the Board resolutions
8 adopting the targets do not support the Agencies' interpretation. RJN Exh. A at 1-4; Exh. C. To
9 the contrary, these resolutions support the Citizens' interpretation. See RJN Exh. C at 3 (noting
10 that S.B. 375 requires the Board, "in establishing the Regional Targets, to take into account
11 greenhouse gas emission reductions that will be achieved by improved vehicle emission standards,
12 changes in fuel composition," among others); *id.* at 3 (noting that A.B. 32 does *not* require a
13 greenhouse gas reduction "from any particular source category (including transportation) and no
14 absolute reduction from any particular source category").

15 Fourth, the Agencies' interpretation of their target-meeting obligations is inconsistent with
16 the administrative history leading up to the targets' adoption.³ S.B. 375 requires the Board to
17 establish a Regional Targets Advisory Committee, which in turn must prepare a report to assist the
18 Board in target-setting. See Gov't Code § 65080(b)(2)(A)(i). Although the Committee Report
19

20 ² The Board's 2008 Scoping Plan estimates that achievement of the "Regional Transportation-
21 Related GHG Targets" will result in a reduction of five million metric tons of carbon dioxide
22 equivalent (MMTCO₂E). AR008787. The Board did *not* take into account the Statewide Vehicle
23 Emission Standards in setting that figure. AR008819 ("The [Board] estimate of the statewide
24 benefit of regional transportation-related greenhouse gas emissions reduction targets is based on
analysis of research results quantifying the effects of land use and transportation strategies.").
Thus, the *only* place that the Board could have taken these factors into account and thereby satisfy
its statutory obligation is, as the Citizens argue in the text, in the setting of targets themselves.

25 ³ The Citizens' principal contention is that the S.B. 375 targets are clear on their face and that
26 recourse to the administrative history leading to their adoption is unnecessary and therefore
27 improper. *Cf. Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, 133 Cal. App.
28 4th 26, 29 (2005) (noting that judicial notice of legislative history is improper when the relevant
statutory language is unambiguous). Nevertheless, should the Court determine that the targets are
ambiguous, then their administrative history would be relevant. Accordingly, the Citizens argue
in the alternative that, based on the targets' administrative history, the Citizens' interpretation of
the targets is reasonable and the Agencies' interpretation is unreasonable.

1 does suggest certain limitations in establishing the targets, they are not the limitations that the
2 Agencies advance here. The Committee Report states that “[g]reenhouse gas reductions not related
3 to the land use and transportation sectors should not be credited towards meeting of SB 375
4 targets.” AR009397. But clearly the Statewide Vehicle Emission Standards *are* related to the
5 transportation sector, as they concern vehicle efficiency and fuel composition. Indeed, the
6 Committee Report goes on to “recommend[] that [the Board] provide [the regional agencies] with
7 information on the anticipated greenhouse gas emission reduction impacts of the adopted Pavley
8 regulation and . . . [low carbon fuel standard]” as part of the Board’s requirement “to take into
9 account improved vehicle emission standards, [and] changes in the carbon-intensity of fuels,”
10 among other things. AR009399. There would be no point to the Board providing this information
11 to the regional agencies if, as the Agencies contend, this information should be ignored in
12 determining whether the targets will be met. Although the Board staff report accompanying the
13 *draft* regional targets states that the targets exclude emission savings from the Statewide Vehicle
14 Emission Standards, RJN Exh. D at 4, the staff report accompanying the *final* regional targets is
15 silent on that point, RJN Exh. E at 25-26, thus implying that the Board ultimately rejected the
16 interpretation that the Agencies advance. *Cf. Los Angeles Police Officers Ass’n v. City of Long*
17 *Beach*, 46 Cal. 3d 736, 744-45 (1988) (declining to interpret a statute in a way more consistent with
18 a *prior* version of the statute than with its subsequently amended version).

19 Fifth, the Agencies’ interpretation improperly ascribes to the Board an underground
20 regulation. The California Administrative Procedure Act forbids agencies to enforce rules that
21 have not gone through a public notice and comment process. *See* Gov’t Code § 11340.5(a).
22 “Regulation” is defined broadly to include “every rule, regulation, order, or standard of general
23 application . . . adopted by any state agency to implement, interpret, or make specific the law
24 enforced or administered by it.” *Id.* § 11342.600. Here, the Agencies are ascribing to the Board
25 a rule either for how to interpret the regional targets or how sustainable community strategies are
26 to meet the targets. Such a rule would be exempt from the Administrative Procedure Act if
27 S.B. 375 mandated that interpretation. *Cf. id.* § 11340.9(f). But the interpretation certainly is *not*
28 mandated by the text of S.B. 375, which is silent as to *how* the targets are to be met, nor is it

1 mandated by the targets themselves, which are also silent on that subject. Thus, accepting the
2 Agencies' target interpretation would improperly ascribe to the Board an underground regulation.

3 Sixth, the Agencies' interpretation would undermine CEQA's core purpose of supporting
4 informed public decision-making. *Cf. Citizens of Goleta Valley*, 52 Cal. 3d at 564 (an
5 environmental impact report "'protects not only the environment but also informed self-
6 government'" (quoting *Laurel Heights Improvement Ass'n of San Francisco v. Regents of the*
7 *Univ. of Cal.*, 47 Cal. 3d 376, 392 (1988))). The Agencies' interpretation of how to meet the
8 targets is found neither in the text of S.B. 375, nor the published targets, nor the Board resolutions
9 approving those targets, nor in the staff report accompanying the final resolutions, nor in the Draft
10 Report, but rather in the Final Report's response to the Citizens' and others' comments.⁴
11 Repeatedly during the Plan's preparation, the Agencies provided materials to the public that simply
12 referred to the targets as requiring a per capita reduction, *without* any limitations on how to achieve
13 the reduction. *See, e.g.*, AR011343 (July, 2010, memorandum from Commission's executive
14 director stating that the Board "should not establish a GHG target for the Bay Area that exceeds
15 a 7% per capita reduction for 2020 or a 10% per capita reduction for 2035"); AR011854
16 (September, 2010, Agencies' committee meeting minutes noting that a "GHG target for the Bay
17 Area [must] exceed[] a 7% per capita reduction for 2020 or a 15% per capita reduction for 2035,
18 compared to a 2005 base case"); AR012880 (November, 2010, Agencies' staff memorandum
19 noting that the targets require reduction for "per capita CO2 emissions from cars and light duty
20 trucks by 7% by 2020 and 15% by 2035); AR013097 (November, 2010, Association staff
21 memorandum noting that the targets require reduction for "per-capita CO2 emissions from cars and
22 light-duty trucks by 15%"); AR006404 (December, 2010, Agencies' staff memo describing the
23 targets as "[r]educe per capita CO2 emissions rom cars and light duty trucks by 7% by 2020 and
24 15% by 2035); AR013131 (December, 2010, Agencies' OneBayArea power point presentation
25 noting that the targets require "-7% *per capita* by 2020" and "-15% *per capita* by 2035");
26

27 ⁴ A slide from a December, 2011, Regional Modeling Working Group presentation observes that
28 the targets require "ignoring improvements resulting from vehicle or fuel regulations." AR023111.
See also 023329 (slide from a December, 2011, Regional Advisory Working Group presentation).

1 AR023403, AR023418 (December, 2010, Agencies' staff presentation to Bay Area regional elected
2 representatives noting that the targets require reduction for "greenhouse gas emissions from cars
3 and light duty trucks in the Bay Area by 15% by 2035"); AR014146 (January, 2011, Commission
4 resolution noting that the targets require reduction for "per-capita CO2 emissions from cars and
5 light-duty trucks by 15%"); AR021411 (October, 2011, presentation to the Bay Area Air Quality
6 Management District noting that the targets are "-7%" and "-15%" based on "per capita reduction
7 compared to 2005); AR026422 (April, 2012, Agencies' staff presentation noting that the "reduction
8 targets are 7% and 15%"); AR001379 (June, 2012, final report notice of preparation stating that
9 the "Bay Area's per-capita GHG emission reduction targets are -7% in 2020 and -15% in 2035
10 from 2005 levels); AR036432 (April, 2013, presentation to Santa Clara County Association of
11 Planning Officials noting that the targets require reduction for "greenhouse gas emissions . . . by
12 15% per capita by 2035"); AR036909 (April, 2013, presentation to Agencies noting that the targets
13 require reduction for "greenhouse gas emissions . . . by 15% per capita by 2035"). In fact, the
14 clearest statement of the position that the Agencies advance now is found in the Board's draft
15 technical evaluation of the Plan, released in June, 2013, AR043029, *well after* the Draft Report had
16 been circulated and the Citizens and others had submitted their comments. *See also* AR055565
17 (Agencies' "Frequently Asked Questions" document dated June, 2013.).

18 Essentially, the Agencies want it both ways. They want very ambitious targets that require
19 greenhouse gas reduction over and above the emission savings from the Statewide Vehicle
20 Emission Standards; but they also want to give the public the impression that they are only
21 satisfying their obligation to meet the target and not imposing a more ambitious standard. They
22 accomplish this legerdemain by publishing one number, but interpreting it obscurely to make it,
23 *de facto*, another far more ambitious number. Hence, to credit the Agencies' interpretation of the
24 Plan's basic greenhouse reduction objective would undermine CEQA's informational purpose. *Cf.*
25 *Planning & Conservation League v. Dep't of Water Resources*, 83 Cal. App. 4th 892, 920 (2000)
26 ("[T]he most important purpose of CEQA [is] to fully inform the decision makers and the public
27 of the environmental impacts of the choices before them."). The Agencies' subterfuge should be
28 rejected.

B. The Agencies' Purported Defense

In the Final Report, the Agencies defend their interpretation on three grounds. First, to take the Statewide Vehicle Emission Standards into account would be inconsistent with S.B. 375's finding and declaration that, although new vehicle technology and changes in fuel composition will help reduce greenhouse gas emissions from the transportation sector, the A.B. 32 goal cannot be reached without "improved land use and transportation policy." AR003648. Second, taking the Statewide Vehicle Emission Standards into account would result in impermissible double counting, because the Board's Scoping Plan assigns reductions to S.B. 375 that are distinct from reductions assigned to the Statewide Vehicle Emission Standards. AR001688-AR001690. Third, the Agencies did not have a computer program able to take the California Advanced Clear Car Standards into account. AR003648, AR03650. None of these defenses has merit.

1. The Legislative Finding Defense

The Agencies argue based on the "spirit" of S.B. 375: because the Legislature assumed that land-use changes would be necessary to meet the A.B. 32 target of reducing statewide emissions to 1990 levels by 2020, *cf.* S.B. 375, ch. 728, § (1)(c), the Agencies must continue to assume that to be true. And, because it is no longer the case—*i.e.*, the A.B. 32 target can be met without any greenhouse gas reduction from land-use changes—the Agencies must entertain a fictional future in order to make the targets meaningful.⁵

The difficulties with this position are manifold. First, it cannot be reconciled with the statute's text, which specifically requires the Board to take into account advances in vehicle technology and related factors when setting and updating the targets. Second, it improperly allows a legislative finding to trump a clear legislative command. *See Torres v. Parkhouse Tire Service, Inc.*, 26 Cal. 4th 995, 1003 (2001) (if a statute is clear, reliance on legislative purpose or history is improper). Third, it presupposes that S.B. 375's interpretation depends solely on A.B. 32, whereas even the Board itself has avowed that "SB 375 exists independently of AB 32 as a means for the State to reduce greenhouse gas emissions from the transportation sector in combination with

⁵ In fact, the A.B. 32 statewide goal may well have been met already. *See* AR030557 (national emission levels are currently at or about 1990 levels).

1 other related measures and regulations the Board has approved and will consider for fuels and
2 vehicles.” RJN Exh. C at 3. Fourth, it presupposes that S.B. 375 requires a certain quantum
3 reduction in greenhouse gas emissions regardless of anything else happening in the state, whereas
4 the Board itself acknowledges that A.B. 32 does *not* require a greenhouse gas reduction “from any
5 particular source category (including transportation) and no absolute reduction from any particular
6 source category.” *Id.* Hence, the Agencies’ reliance on the “spirit” of S.B. 375 is unavailing.

7 **2. The Double Counting Defense**

8 The Agencies’ double counting defense is based on the Board’s 2008 Scoping Plan,
9 produced as a result of A.B. 32. The Scoping Plan describes how the state will meet the A.B. 32
10 goal of reducing greenhouse gas emissions to 1990 levels by 2020. The Scoping Plan assigns a
11 figure (based in million metric tons of carbon dioxide equivalent, abbreviated “MMTCO₂E”) to
12 a variety of reduction measures, including the Statewide Vehicle Emission Standards.
13 *See* AR008787. The Scoping Plan also assigns a separate reduction (5 MMTCO₂E) for S.B. 375
14 measures. *Id.* The Agencies reason that they cannot take “credit” for reductions attributable to the
15 Statewide Vehicle Emission Standards because the Scoping Plan presupposes that S.B. 375 will
16 provide five units of greenhouse gas reduction over and above reductions provided by the
17 Statewide Vehicle Emission Standards. This argument is without merit.

18 First, because of the nature of the objective and how the Board has drafted the Scoping
19 Plan, there will always be some double counting. That is to say, the Bay Area’s transportation
20 sector emissions are necessarily a subset of the total statewide transportation sector emissions. And
21 factors such as fuel composition and vehicle efficiency will necessarily have an impact on regional
22 transportation sector emissions. Double counting is a bad thing, to be sure, yet the way to avoid
23 it is *not* to ignore the Statewide Vehicle Emission Standards as the Agencies suggest, but rather to
24 take these Standards into account by setting the targets high enough such that a region cannot meet
25 the targets simply by relying on emission savings from the Standards.⁶ This course is exactly what
26

27 ⁶ In other words, if a 15% reduction by 2035 can easily be achieved by relying on the Statewide
28 Vehicle Emission Standards, the remedy is not to produce a contrary-to-fact environmental impact

(continued...)

1 S.B. 375 prescribes, by directing the Board to take factors like the Standards into account when
2 setting the targets. *Cf.* Gov't Code § 65080(b)(2)(A)(iii). Perversely, the Agencies' interpretation
3 would reverse this command, requiring that the Agencies and the Board *not* take the Standards into
4 account.

5 Second, the Agencies' interpretation is inconsistent with how the Board produced the
6 targets. The statute requires the Board to "take into account" factors such as the Statewide Vehicle
7 Emission Standards when setting the targets. *See id.* This "take into account" obligation can occur
8 in only two places: either during the Scoping Plan process, or during the target-setting process
9 itself. But the Scoping Plan's discussion of how the Board produced a 5-unit reduction allotment
10 for S.B. 375 measures is *silent* as to the Statewide Vehicle Emission Standards; the 5-unit figure
11 is based entirely on ways to reduce vehicle miles traveled. *See* AR008819. Hence, the only way
12 that the Board could have taken the Statewide Vehicle Emission Standards factors into account and
13 thereby comply with its obligations under S.B. 375 is during the target-setting process itself.

14 3. The Inadequate Computer Modeling Defense

15 Finally, the Agencies contend that under no circumstances were they required to take
16 account of the California Advanced Clean Car Standards because they did not have the computer
17 software to do so. But the Agencies cannot shirk their CEQA obligations so easily. The Board
18 adopted the California Advanced Clean Car Standards over a year before the certification of the
19 Final Report, giving adequate time for the Agencies to develop at least a rough estimate of the
20 Advanced Standards' greenhouse-gas-reduction potential. *See Citizens for East Shore Parks v.*
21 *California State Lands Comm'n*, 202 Cal. App. 4th 549, 563 (2011) ("Administrative agencies not
22 only can, but should, make appropriate adjustments . . . as the environmental review process
23 unfolds."). *See also Mira Monte Homeowners Ass'n v. County of Ventura*, 165 Cal. App. 3d 357,

24
25 ⁶ (...continued)

26 report but to set the target higher. Accuracy and transparency are critical given that the Agencies'
27 own polling numbers show that the vast majority of Bay Area residents consider the Plan's non-
28 greenhouse-gas components to be more important. *See* AR055513, AR055540 (only 18% of
respondents considered "[r]educing driving and greenhouse gas emissions" to be the Plan's most
important component).

1 364-66 (1985) (overturning a Report for a new subdivision that failed to take into account impacts
2 discovered at the last minute to a wetland area).

3 The Final Report also asserts that by law the Agencies must use EMFAC2011 to model
4 emissions, and the Board has not yet integrated the California Advanced Clean Car Standards into
5 that processor. *See* AR003648. But the Final Report is wrong to assert that the Agencies must use
6 EMFAC2011 for *all* purposes. Although federal and state law may require that EMFAC2011 be
7 used for the regional transportation plan and for estimating emissions *other than* greenhouse gases,
8 there is no requirement that EMFAC2011 be used to determine compliance with the S.B. 375
9 targets. Indeed, using different emission modeling processes is certainly not new to the Agencies,
10 given that the Final Report does precisely this in modeling greenhouse gas versus other emissions.
11 *See* AR003645.

12 Hence, for all these reasons, the Agencies failed to proceed in the manner required by law
13 in defining the Plan's basic objective of meeting the S.B. 375 targets. That failure vitiates the Final
14 Report's informational purpose, and therefore constitutes a prejudicial abuse of discretion.

15 II

16 THE AGENCIES FAILED TO PROCEED IN 17 THE MANNER REQUIRED BY LAW, AND LACKED 18 SUBSTANTIAL EVIDENCE, IN ASSESSING THE 19 FINAL REPORT'S "NO PROJECT" ALTERNATIVE

20 CEQA requires that every environmental impact report contain an alternatives analysis that
21 includes a "no project" alternative. Cal. Code Regs. tit. 14, § 15126.6(e). The purpose of the "no
22 project" alternative is to give the lead agency and the public an accurate understanding of the
23 impacts of the proposed project. *See id.* § 15126.6(e)(1). Knowing what the world would look like
24 without the project going forward makes possible an understanding of what the impacts of the
25 proposed project would be. *See Planning & Conservation League v. Dep't of Water Resources*,
26 83 Cal. App. 4th at 917-18 (analysis of the "no project" alternative "is a factually based
27 forecast of the environmental impacts of preserving the status quo" that "provides the decision
28 makers with a base line against which they can measure the environmental advantages and
disadvantages of the project and alternatives to the project"). Thus, faithfully assessing the "no

project” alternative is critical to serving the environmental impact report’s role as an informational document. *Cf.* Pub. Res. Code § 21061.

A. The Agencies’ Misinterpretation of S.B. 375 and Failure To Take Account of Emission Savings from the Statewide Vehicle Emissions Standards Vitiates the Final Report’s “No Project” Analysis

The Final Report fails meaningfully to assess the “no project” alternative because it ignores the greenhouse-gas-reduction effects of the Statewide Vehicle Emission Standards. Taking these measures into account is critical to understanding the Plan’s impacts, as well as the Plan’s utility. As noted in the preceding section, one of the Plan’s “basic objectives” is to meet the region’s S.B. 375 goals. *Cf.* AR034830-034831, AR001336. The Final Report acknowledges that the “no project” alternative can meet this objective if the Statewide Vehicle Emission Standards are taken into account. *See* AR001689 (observing that, had statewide greenhouse-gas-reduction policies been taken into account, the Plan “could have simply stated that the Bay Area meets its emissions reduction targets solely through statewide clean technology initiatives”). The Final Report also acknowledges that the Plan’s greenhouse-gas-reduction regime will have significant yet unavoidable impacts. *See* AR000352-AR000414. *Cf.* AR000167-000170. Thus, had the Final Report correctly assessed the “no project” alternative, the Agencies as well as the public would have known that the Plan’s significant and unavoidable impacts are unnecessary to achieving the Plan’s basic objective of meeting the S.B. 375 targets. *Cf. County of Inyo v. City of Los Angeles*, 124 Cal. App. 3d 1, 9 (1981) (analysis of “no project” alternative helps the decision-maker to determine whether the project should be terminated). And, as demonstrated in the preceding section, S.B. 375 does not impose these blinders on the Agencies. Hence, the Agencies failed to proceed in the manner required by law in defining and assessing the Final Report’s “no project” alternative.

B. The Final Report’s No Project Analysis Is Legally Inadequate, Regardless of S.B. 375

Even if the Agencies’ interpretation of S.B. 375 were correct, the Final Report’s “no project” analysis would still be contrary to law, for two reasons.

///

1 First, CEQA's informational purpose requires that the Final Report assess the real-world
2 consequences of the "no project" alternative rather than, as here, a legal fiction. *Cf. Planning &*
3 *Conservation League*, 83 Cal. App. 4th at 917 ("no project" alternative is a "*factually* based
4 forecast") (emphasis added).

5 Second, the Final Report arbitrarily selects a baseline of greenhouse gas emissions that is
6 far greater than reality. In other words, the Final Report's estimation of the current rate of
7 greenhouse gas emissions, extrapolated to the end of the Plan's horizon, is vastly overstated, *even*
8 *ignoring* the Statewide Vehicle Emission Standards. The Final Report assumes that emissions
9 must be reduced by 25% to 35% from today's levels to meet the A.B. 32 goal of 1990 levels by
10 2020. AR000763. But the Final Report takes no account that current greenhouse-gas-emission
11 levels nationwide are already at or about 1990 levels. *See* AR030557. Thus, the Final Report's
12 approach is irreconcilable with CEQA's requirement that the environmental baseline normally
13 constitute existing physical conditions, not a hypothetical condition or legal fiction. *See* Cal. Code
14 Regs. tit. 14, § 15125(a). *See also Communities for a Better Env't v. S. Coast Air Quality Mgmt.*
15 *Dist.*, 48 Cal. 4th 310, 321 (2010) ("[T]he impacts of a proposed project are ordinarily to be
16 compared to the actual environmental conditions existing at the time of CEQA analysis, rather than
17 to allowable conditions defined by a plan or regulatory framework."). Similarly, the Final Report's
18 expectation that, in the "no project" scenario, greenhouse gas emissions will continue to trend
19 upwards indefinitely, *cf.* AR000745, is unsupported by substantial evidence, *see* AR030557
20 (national emission levels are currently at or about 1990 levels); AR038199-AR038201 (emission
21 rates from transportation sector have been leveling off for some time). Both of these errors are
22 prejudicial, because they contribute to the false impression that the Plan's high-density vision is
23 needed.

24 Accordingly, the Agencies failed to proceed in the manner required by law in assessing, and
25 lacked substantial evidence to support, the Final Report's "no project" alternative. That failure
26 vitiates the Final Report's informational purpose, and therefore constitutes a prejudicial abuse of
27 discretion.

28 ///

III

**THE AGENCIES FAILED TO PROCEED IN THE MANNER
REQUIRED BY LAW, AND LACKED SUBSTANTIAL
EVIDENCE, IN FAILING TO INCLUDE THE CITIZENS'
REASONABLE AND FEASIBLE ALTERNATIVE**

CEQA requires that the lead agency consider a reasonable range of feasible alternatives to the proposed project. Cal. Code Regs. tit. 14, § 15126.6(a). During the comment process, the Citizens proposed an alternative to the Plan that would achieve the S.B. 375 greenhouse-gas-reduction targets without the many significant and unavoidable impacts of the Plan: “The Bay Area Citizens Transportation and Housing Alternative.” AR003156-AR003159. This alternative would achieve the S.B. 375 greenhouse-gas-reduction targets, one of the Plan’s “basic objectives,” by relying in part on the projected improvements, over the life of the Plan, in the transportation sector’s efficiency and fuel composition. AR003156. *Cf.* AR001689. The alternative would also secure additional greenhouse gas reductions by supporting expanded and improved bus service. AR003156. It would avoid all the significant adverse environmental impacts, as well as additional costs and limitations on citizens’ housing preferences, associated with the Plan’s unnecessary adherence to a high-density development and rail-heavy transit vision. Thus, the Final Report was required to include the Citizens’ alternative in its alternatives analysis. *See* Cal. Code Regs. tit. 14, § 15126.6(c), (f).

Nevertheless, the Final Report rejects the Citizens’ alternative. AR003651. It contends that the Citizens should have proposed their alternative before the comment period on the Draft Report. *Id.* Yet CEQA does not require that proposed alternatives be submitted prior to the circulation of the draft environmental impact report. *See Cal. Native Plant Soc’y*, 177 Cal. App. 4th at 987-95 (considering whether a final report’s alternatives analysis was defective because it did not include a reasonable range of alternatives and whether the response to another alternative proposed in a comment letter on the draft report was sufficient); 1 Stephen L. Kostka & Michael H. Zischke, Practice Under the California Environmental Quality Act § 8.20 (2d ed. Mar. 2013) (noting that the proper CEQA practice is for members of the public to submit comments during the public comment period on a draft environmental impact report).

1 The Final Report also asserts that existing alternatives already incorporate important aspects
2 of the Citizens' alternative. AR003651. But this too is untrue: neither the Plan nor the existing
3 alternatives correctly interpret S.B. 375 and the meaning of its greenhouse-gas-reduction targets.
4 *See supra* Argument Part I. They all adopt development plans of significantly higher density than
5 the status quo and the Citizens' proposal, and they all sharply limit how and where Bay Area
6 residents can live, regardless of their preferences.

7 Accordingly, consideration of the Citizens' proposal would serve CEQA's informational
8 purpose and improve the Agencies' decision-making, because the Agencies would have before
9 them an alternative that would achieve the Plan's basic objectives without many of the Plan's
10 significant environmental impacts. *Cf.* Cal. Code Regs. tit. 14, § 15126.6(f) ("The range of
11 alternatives required . . . is governed by a 'rule of reason' that requires . . . those alternatives
12 necessary to permit a reasoned choice."); *Mann v. Cmty. Redevelopment Agency*, 233 Cal. App. 3d
13 1143, 1150 (1991) ("The key issue is whether the selection and discussion of alternatives fosters
14 informed decisionmaking and informed public participation."). Therefore, the Agencies lacked
15 substantial evidence, and therefore prejudicially abused their discretion, in rejecting the Citizens'
16 alternative for consideration in the Final Report.

17 IV

18 THE AGENCIES FAILED TO PROCEED IN THE 19 MANNER REQUIRED BY LAW IN, AND LACKED 20 SUBSTANTIAL EVIDENCE TO SUPPORT, THE FINAL REPORT'S RESPONSE TO THE CITIZENS' COMMENTS

21 CEQA requires that the lead agency respond to comments submitted on the draft
22 environmental impact report. The lead agency must address major environmental issues raised in
23 recommendations and objections contained in comment letters that are at variance with the lead
24 agency's position. Cal. Code Regs tit. 14, § 15088(c). The response must give reasons why
25 specific comments and suggestions were not accepted, using good-faith, reasoned analysis. *Id.*
26 Conclusory statements that are not supported by factual information will not suffice. *Id.* The
27 purpose behind the detailed written response requirement is to ensure that the lead agency fully
28 consider the environmental consequences of a decision before it is made, that the decision be well-

1 informed and open to public scrutiny, and that public participation in the environmental review
2 process be meaningful. *See City of Long Beach v. Los Angeles Unified Sch. Dist.*, 176 Cal. App.
3 4th 889, 904 (2009).

4 The Final Report violates the CEQA respond-to-comment obligation by failing to address
5 the Citizens' proposal. As noted above, *supra* Argument Part III, the Final Report rejects the
6 Citizens' alternative on two explicit grounds: it was not submitted prior to the circulation of the
7 Draft Report, and existing alternatives incorporate various aspects of the alternative. But, again
8 as noted above, CEQA does not require that additional alternatives be proposed prior to the Draft
9 Report's circulation. Moreover, all the other alternatives assume the same erroneous interpretation
10 of S.B. 375, and therefore all erroneously adopt some variation of the Plan's high-density
11 prescription. Finally, the Citizens' alternative would achieve the Plan's basic objectives without
12 the significant impacts of the Plan or its other alternatives derived from their high-density
13 development reliance. Hence, the Agencies failed to meaningfully evaluate the Citizens'
14 alternative and explain why it should not be considered, and therefore prejudicially abused their
15 discretion.

16 CONCLUSION

17 The purpose of CEQA is to inform the decision-maker and the general public. Here, the
18 Agencies have failed to meet that basic charge. Therefore, the Citizens request that their motion
19 for judgment on the writ be granted.

20 DATED: March 10, 2014.

21 Respectfully submitted,

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