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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

BAY AREA CITIZENS, a non-profit corporation, Petitioner, v. ASSOCIATION OF BAY AREA GOVERNMENTS, a joint powers agency; METROPOLITAN TRANSPORTATION COMMISSION, a local area planning agency, and DOES 1 through 50, Respondents.	No. RG13690631 **REPLY TO RESPONDENTS' OPPOSITION BRIEF** DATE: June 12, 2014 TIME: 1:30 p.m. ASSIGNED FOR ALL PURPOSES TO: JUDGE EVELIO GRILLO DEPARTMENT 31

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INTRODUCTION

A core purpose of the California Environmental Quality Act (CEQA), Pub. Res. Code §§ 21100-21177, is to promote informed public decision-making. *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, 43 Cal. 4th 1143, 1162 (2008). Respondents Association of Bay Area Governments and Metropolitan Transportation Commission have violated that key purpose in promulgating a Final Environmental Impact Report that does not comport with reality. In their opposition brief, the Agencies try to cast this case as essentially a dispute over the facts, but the characterization is inaccurate. As even the Agencies recognize, this lawsuit focuses on a *legal* dispute over the correct interpretation of Senate Bill 375 and the regional greenhouse gas reduction targets that the California Air Resources Board has promulgated thereunder. The Agencies contend that S.B. 375 requires them to ignore the greenhouse gas reductions attributable to the Low Carbon Fuel Standard, the California Clean Cars Standards, and the Advanced California Clean Cars Standards (collectively "Statewide Vehicle Emission Standards"). In contrast, Petitioner Bay Area Citizens contends that the law does not require the Agencies to ignore these measures. Whichever side is correct, the controversy is legal not evidentiary, and therefore should not be resolved under the substantial evidence standard.

Beyond the standard of review, the Agencies broadly criticize the Citizens for attempting to disable what the Agencies term a regulatory "three-legged stool" that comprises the Statewide Vehicle Emission Standards as well as S.B. 375 measures. Not so. Assuming *arguendo* that the Legislature has in fact established such a regulatory "three-legged stool" for reducing greenhouse gas emissions, nothing in the Citizens' arguments would preclude the Agencies or the Board from fully using each of these "legs." Rather, the Citizens simply demand that, whatever approach is taken to reduce greenhouse gas emissions, the Agencies faithfully adhere to CEQA's core purpose of informed and transparent public decision-making.

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ARGUMENT

I

THE AGENCIES MISPERCEIVE AND MISAPPLY THE STANDARD OF REVIEW

The Agencies contend that this case should be reviewed exclusively under the deferential substantial evidence standard. *See* Respondents' Opposition Brief (ROB) at 9. The Agencies are mistaken.

The correct CEQA standard of review depends on whether the matter in dispute concerns the law or the facts. *See Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 435 (2007) ("In evaluating an [environmental impact report] for CEQA compliance, then, a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts.").

As the Agencies' own brief makes clear, the heart of this case depends on the correct interpretation of *law*, namely, S.B. 375. *See, e.g.*, ROB at 15 ("Petitioner's argument . . . is based on its core misunderstanding of the requirements of SB 375."); *id.* at 16 ("Petitioner's challenge . . . is again based on its misinterpretation of SB 375."); *id.* at 18 ("Petitioner's argument . . . is based on its faulty interpretation of the requirements of SB 375."). The interpretation of law is, naturally, a question of law that a court reviews de novo. *State Water Resources Control Bd. Cases*, 136 Cal. App. 4th 674, 722 (2006) (in an appeal from an administrative decision, "questions of law," such as "[t]he proper interpretation of a statute," "are subject to de novo review"). It is *not* subject to substantial evidence review, which is limited to questions of *fact*[1] derived from an administrative record. *See, e.g., City of Maywood v. Los Angeles Unif. Sch. Dist.*, 208 Cal. App. 4th 362, 385 (2012) ("Courts are not to determine whether the

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[1] *See, e.g., Cedillo v. Workers' Comp. Appeals Bd.*, 106 Cal. App. 4th 227, 232 (2003) (a court reviews an agency's "statutory interpretations de novo and where an examination of a factual determination is required, . . . for substantial evidence").

[environmental impact report]'s ultimate conclusions are correct but only whether they are supported by substantial evidence in the record . . . .") (quotations omitted).

It therefore follows that an administrative record cannot limit a court's power to interpret the law. *Cf. Nolan v. City of Anaheim*, 33 Cal. 4th 335, 340 (2004) ("[W]hen the language [of a statute] is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part."); *Hewlett v. Squaw Valley Ski Corp.*, 54 Cal. App. 4th 499, 526 (1997) ("[A]n erroneous administrative construction does not govern the court's interpretation of the statute."). And although an agency's interpretation of a statute may, depending on the circumstances, be entitled to some degree of deference,[2] the ultimate responsibility for determining a statute's meaning rests with the *independent* judgment of the court. *See Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 7 (1998) ("Courts must, in short, independently judge the text of the statute . . . ."). Hence, to ask whether substantial evidence in the administrative record supports the Agencies' interpretation of S.B. 375 is to pose the wrong question.[3] *Cf. Masonite Corp. v. County of Mendocino*, 218 Cal. App. 4th 230, 238 (2013) (where an agency determination under CEQA is based on a legal conclusion, that conclusion "is not a question of fact reviewed for substantial evidence but rather is an issue of law that [the court] review[s] de novo").

To be sure, some of the Citizens' claims depend *in part* on factual assertions. *See* Petitioner's Memorandum of Points & Authorities (P&As) at 21 ("no project" alternative); *id.* at

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[2] Deference, however, is not owed to the Agencies' interpretation of S.B. 375 and the regional targets, for two reasons. First, neither the targets' nor the statute's text supports the Agencies' interpretation. *See* Petitioner's Memorandum of Points & Authorities at 11-12 & n.3. Second, the Agencies' interpretation is unreasonable. *See id.* at 11-15. *See also infra* Part III. *Cf. Rick's Elec., Inc. v. Cal. Occupational Safety & Health Appeals Bd.*, 80 Cal. App. 4th 1023, 1034 (2000) (administrative interpretation not entitled to deference if clearly erroneous).

[3] Even the Agencies impliedly recognize that the substantial evidence standard does not govern their interpretation of S.B. 375. Judicial notice is improper in a substantial evidence case. *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 573-74 n.4 (1995). Yet the Agencies do not oppose the Citizens' request for judicial notice. *See* ROB at 13 n.6. Hence, the Agencies' agreement on the relevance of the materials proposed for judicial notice demonstrates that, even by the Agencies' reasoning, the issue in question is not subject to substantial evidence review.

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23 (reasonable range of alternatives); *id.* at 24 (response to comments). But the factual assertions critical to these claims are *undisputed*. For example, the Citizens' contention that the Final Report's analysis of the "no project" alternative is defective is based on the *undisputed* fact that the analysis does not take into account the impacts of the Statewide Vehicle Emission Standards when predicting what the world will look like if the Plan is not implemented. *See* ROB at 16 (acknowledging that the Agencies assessed the "no project" alternative "without inclusion of the reductions under" the State Standards). Similarly, the Citizens' contention that the Final Report should have analyzed the Citizens' alternative is based on the *undisputed* fact that the S.B. 375 targets will be met (thus fulfilling a basic Plan objective) *if* the State Standards are taken into account. *See* ROB at 12 & n.5 (noting that the S.B. 375 targets could have been reached "solely through the statewide clean technology initiatives").

Finally, to bolster their argument in favor of substantial evidence review, the Agencies contend that the Citizens have failed to identify the omission of information required by CEQA or necessary to a more informed discussion, factors that are relevant to de novo review. *See* ROB at 8. The Agencies' assertion, however, merely presumes that their interpretation of S.B. 375 is correct. But if, as the Citizens contend, the Agencies are wrong about S.B. 375, it necessarily follows that they have failed to facilitate informed decision-making.[4] *See* P&As at 15. For in that case, the significant impacts attributable to the Plan's (and its alternatives') reliance on high-density development would be unnecessary to achieve the Plan's greenhouse gas reduction objective, therefore rendering many of the Plan's significant impacts avoidable. *See infra* Part V. *See also* P&As at 20. *Cf. Kings County Farm Bureau v. City of Hanford*, 221 Cal. App. 3d 692, 731 (1990) (CEQA requires public agencies "to avoid or minimize environmental damage when feasible") (citing Cal. Code Regs. tit. 14, § 15021).

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[4] The Agencies contend that the Citizens failed to alert the Court to the evidence that the Agencies would use to support their defenses. ROB at 9-10. That is incorrect: Several pages of the Citizens' memorandum of points and authorities anticipate and then refute the Agencies' arguments and evidence. *See* P&As at 16-18.

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II

THE CITIZENS HAVE ADMINISTRATIVELY EXHAUSTED ALL THEIR CLAIMS

The Agencies argue that the Citizens failed to exhaust the argument that the Agencies' interpretation of S.B. 375 and the regional targets is inconsistent with S.B. 375's requirement that the Board "take into account" the Statewide Vehicle Emission Standards when setting and updating the regional greenhouse gas reduction targets. ROB at 11. *Cf.* Gov't Code § 65080(b)(2)(A)(iii)-(iv). The Agencies' objection is without merit, for two reasons.

First, the Agencies seek to knock down a straw man. The Citizens' main argument is that, as a matter of plain meaning, neither S.B. 375 nor the regional targets require the Agencies to ignore the Statewide Vehicle Emission Standards. *See* AR003127-AR003129 (Citizens' comment letter noting that the plain language of S.B. 375 does not require the Agencies to ignore the Statewide Vehicle Emission Standards, and that, regardless, CEQA requires a factually accurate and honest assessment of real-world impacts.). The Citizens' citation to S.B. 375's "take into account" mandate is simply to demonstrate the unreasonableness of the Agencies' competing interpretation (raised in the Agencies' *response* to the Citizens' comments), which would effectively nullify the "take into account" provision. *See* P&As at 11-12 & n.2. *Cf. Kurtin v. Elieff*, 215 Cal. App. 4th 455, 483 (2013) ("Courts . . . must prefer statutory interpretations which harmonize and reconcile potentially conflicting statutory meanings.").

Second, CEQA's exhaustion requirement would still be satisfied even if the Citizens' main objection to the Agencies' actions depended on the "take into account" mandate. CEQA does not require a party to set forth in the administrative process every argument as to why an agency's actions are unlawful. Instead, the statute merely requires that the commenting party alert the agency to the "alleged grounds for noncompliance." Pub. Res. Code § 21177(a). *See Cal. Native Plant Soc'y v. City of Rancho Cordova*, 172 Cal. App. 4th 603, 616 (2009) ("[L]ess specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding. This is because [i]n administrative proceedings, [parties] generally are not represented by counsel. To hold such parties to knowledge of the technical rules of evidence and to the penalty

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of waiver for failure to make a timely and specific objection would be unfair to them.") (internal quotation marks omitted); *Save Our Residential Environment v. City of West Hollywood*, 9 Cal. App. 4th 1745, 1750 (1992) (CEQA plaintiff need not have "identif[ied] the precise legal inadequacy" during the administrative process). Here, during the public comment period, the Citizens made clear to the Agencies the Citizens' principal "ground for [the Agencies'] noncompliance" with CEQA: Plan Bay Area's high-density mandates are unnecessary to achieve the regional targets, *see* AR003150, because S.B. 375 does not force the Agencies to ignore the Statewide Vehicle Emission Standards, *see* AR003127.[5] CEQA does not require that the Citizens have set forth every reason—such as S.B. 375's "take into account" mandate—why the Agencies' contrary position is unreasonable. Moreover, it is clear that the Citizens' comments gave the Agencies the required opportunity to evaluate and respond to the Citizens' interpretation of S.B. 375. *Cf. N. Coast Rivers Alliance v. Main Mun. Water Dist. Bd. of Directors*, 216 Cal. App. 4th 614, 631 (2013). After all, the Final Report contains a lengthy purported defense of the Agencies' competing statutory interpretation. *See* AR001688-AR001690. Therefore, the Citizens have satisfied CEQA's exhaustion requirement.

III

THE AGENCIES' INTERPRETATION OF S.B. 375 IS WITHOUT MERIT

The critical legal question raised by the Citizens' action is how, under S.B. 375, the Agencies are to draft a sustainable communities strategy that will achieve the regional greenhouse gas reduction targets. The Agencies answer that, for various reasons, the Statewide Vehicle Emission Standards must be ignored. Their supporting arguments are unconvincing.

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[5] It is worthwhile to note that, even under the Agencies' own truncated (and illegal) analysis, the performance difference between the "no project" alternative and the Plan's high-density mandates is statistically insignificant. *See* AR003170. For example, the Final Report predicts that by 2040, the "no project" alternative will result in 84,000 daily tons of carbon dioxide, whereas in the same year implementation of the Plan's high-density mandates will result in 83,000 daily tons. *See* AR004001. That is a difference of about 1%. Moreover, according to the Agencies, the Plan hits the targets only because of various measures contained within the Agencies' Climate Policy Initiative, which does *not* include the Plan's high-density land-use prescriptions. *See* AR004002.

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First, the Agencies rely on S.B. 375's statement of purposes, which notes that greenhouse gas reductions in addition to those attributable to the Statewide Vehicle Emission Standards are necessary to meet the A.B. 32 goal of 1990 levels by 2020. ROB at 11-12 (citing S.B. 375, § 1(c)). But whether such reductions are necessary to meet the A.B. 32 goal does not mean that they are necessary to meet *the S.B. 375 targets* that the Board has set. *See* RJN Exh. C at 3 (Board resolution asserting that "SB 375 exists independently of AB 32 as a means for the State to reduce greenhouse gas emissions"). Moreover, the statute's purposes cannot provide a substantive mandate. *See Carter v. Cal. Dep't of Veterans Affairs*, 38 Cal. 4th 914, 925 (2006) (statements of legislative purpose "do not confer power, determine rights, or enlarge the scope of a measure"). Rather, the pertinent statutory mandate is the Board's obligation to take account of the Statewide Vehicle Emission Standards when setting the targets. *See* Gov't Code § 65080(b)(2)(A)(iii).

Second, the Agencies contend that the Board's A.B. 32 Scoping Plan supports their interpretation of S.B. 375, and that the Citizens' interpretation would lead to impermissible double-counting under the Scoping Plan. ROB at 12. But the relevant administrative history does not support the Agencies' argument. To begin with, S.B. 375 requires that the Board, *at some point* in the target-setting process, take into account the expected greenhouse gas emission reductions from the Statewide Vehicle Emission Standards. *See* Gov't Code § 65080(b)(2)(A)(iii). Now, the Board's consideration *could* have occurred—as the Agencies suggest—during the Scoping Plan process. *See* ROB at 12-13. But the documentation of that process reveals that no such incorporation occurred. Rather, in assigning a five metric ton carbon dioxide equivalent figure to S.B. 375 measures, the Board's Scoping Plan *exclusively* considers the ability of changed land-use patterns and similar land-use tools to reduce vehicle miles traveled. *See* AR008819 ("The [Board] estimate of the statewide 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."). Hence, during the Scoping Plan process the Board did exactly what the Agencies did here: ignore—*i.e.*, not take into account—the Statewide Standards when estimating the greenhouse gas emission reduction from S.B. 375 measures. Accordingly, the *only* way that the Board could have satisfied its S.B. 375 obligation to take the Statewide Standards into

account is, as the Citizens contend, in setting the targets.[6] And if the Board impliedly took the Statewide Standards into account in setting the targets, then the Agencies' refusal to take them into account would be inexplicable and therefore arbitrary.

The Agencies respond, however, that the Board made clear in setting the targets that the Statewide Vehicle Emission Standards are to be ignored in determining whether a sustainable communities strategy meets the targets. ROB at 13. The Agencies contend that the critical language supporting their position—in the Board staff's draft report—was not excised entirely, as the Citizens contend, *see* P&As at 13, but instead was moved from a footnote in the draft report to the main text of the final report accompanying the approved targets. *See* ROB at 13-14. But the text that the Agencies cite in the final report is *not* the text deleted from the draft staff report's footnote. The latter says expressly that the Statewide Vehicle Emission Standards are not to be considered. RJN Exh. D at 4. In contrast, the final report text that the Agencies rely on states only that the benefits of S.B. 375 reductions attributable to "regional land use and transportation strategies" will be "magnified" when the Statewide Standards are taken into account. *See* ROB at 13-14 (citing RJN Exh. E at 3). That is far from the same language excised from the draft staff report. And, in any event, the final report's language does not support the Agencies' position; for the real-world impact of land-use and transportation strategies that reduce vehicle miles traveled will be "magnified" by the State Standards regardless of how the Board "scores" this impact under the Scoping Plan.

Third, the Agencies try to explain away the recommendations within the Regional Target Advisory Committee Report. The Agencies contend that the Report's direction to the Board to provide the Agencies with information on the Statewide Vehicle Emission Standards was only intended to show the Agencies "what additional emission reductions will be achieved under the SB

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[6] The Agencies correctly observe, ROB at 8, that an agency is presumed to have complied with the law. *See* Evid. Code § 664; *McBail & Co. v. Solano County Local Agency Formation Comm'n*, 62 Cal. App. 4th 1223, 1228 (1998) (noting the presumption of regularity for administrative action). Hence, given that the Board is required to take into account the Statewide Vehicle Emission Standards at *some point* in the target-setting process, and given that the Board did *not* take the Statewide Standards into account during the Scoping Plan process, the Court should presume that the Board fulfilled its legal duty by taking the Statewide Standards into account when setting the regional targets.

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375 plans." ROB at 13. But this explanation makes no sense in light of the Agencies' actions. After all, the Agencies deliberately *ignored* the greenhouse gas reductions from the Statewide Standards for the Plan's CEQA documentation. *See* AR001688-AR001690. Hence, the only relevant purpose for providing estimates of the Statewide Standards' emission reductions to the Agencies as part of the process of developing a sustainable communities strategy is, as the Citizens contend, to allow the Agencies to use that information when determining whether the Plan will in fact meet the regional targets.

Fourth, the Agencies note that during a June, 2013, Board hearing (which occurred *after* the circulation of the Draft Environmental Impact Report and the close of the public comment period thereon), the Board's staff provided a technical review of the Plan, concluding that the Plan would meet the regional targets and that the Plan correctly excludes consideration of the Statewide Vehicle Emission Standards. ROB at 14. The Agencies' reliance on this presentation is unavailing.[7] To begin with, the Citizens' chief criticism is not that the Plan will fail to meet the targets, but instead that the Plan—including its high-density development vision—is *unnecessary* to meet the targets.[8] *See* P&As at 1; AR003150. Further, the Board's staff cannot by mere declaration change the duly adopted regional targets. *See* Gov't Code § 11340.5(a) (prohibition on regulations that have not been subjected to notice-and-comment procedure). And *nothing* in the published version of those targets supports the Board staff's conclusion that the targets exclude consideration of the Statewide Standards. *See* RJN Exh. B at 1 (approved version of targets expressed simply as a per capita percentage reduction from 2005 levels, *without* any further limitation).

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[7] The Agencies cite *Center for Biological Diversity v. Department of Fish & Wildlife*, 169 Cal. Rptr. 3d 413 (2014), and *Environmental Council of Sacramento v. City of Sacramento*, 142 Cal. App. 4th 1018 (2006), for the proposition that the Board staff's technical evaluation provides substantial evidence supporting the Agencies' interpretation of S.B. 375 and the targets. ROB at 14-15. Their citation, however, is inapposite, because these decisions concern challenges to agency fact-finding, *see Ctr. for Biological Diversity*, 169 Cal. Rptr. 3d at 427; *Envtl. Council of Sacramento*, 142 Cal. App. 4th at 1028, whereas the issue here is the Agencies' interpretation of a law (S.B. 375) and the regional targets adopted thereunder.

[8] Moreover, even by the Agencies' own analysis, the import of the Plan's high-density mandate on reducing greenhouse gas emissions is minimal. *See infra* note 5.

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Finally, the Agencies contend that the Citizens' position would disable their "three-legged stool" of the Statewide Vehicle Emission Standards (two legs) and S.B. 375 (third leg). *See* ROB at 10. To the contrary, it is the Agencies' position that threatens to convert their purported stool into a single peg by requiring that S.B. 375 sustainable communities strategies completely ignore the impacts of the Statewide Standards. In short, if the Agencies are dissatisfied with the targets, their remedy lies with the Board, *cf.* Gov't Code § 65080(b)(2)(A)(iv), not in a misinterpretation of S.B. 375 and CEQA.

IV

REGARDLESS OF S.B. 375, THE AGENCIES HAVE VIOLATED CEQA

In their memorandum of points and authorities, the Citizens explained that the Agencies have violated CEQA's core mandate of facilitating informed public decision-making, regardless of how one interprets S.B. 375. Specifically, the Citizens noted that CEQA requires a *factually* accurate forecast, even if the *legal* relevance of that forecast may be limited. *See* P&As at 21. The Citizens also provided numerous record examples of how, throughout the planning process, the Agencies repeatedly communicated to the public that one of the Plan's basic objectives was to meet the S.B. 375 regional targets, which were expressed *without* any limitation. *See* P&As at 14-15.

In response, the Agencies contend that the Citizens have improperly conflated the process for identifying the environmental baseline with that for assessing the "no project" alternative. ROB at 17-18. Not so. Whatever the accuracy of the Agencies' assessment of the environmental baseline,[9] CEQA still requires that the "no project" alternative include a factually accurate forecast. *See Planning & Conservation League v. Dep't of Water Resources*, 83 Cal. App. 4th 892, 917-18 (2000) (analysis of the "no project" alternative is a "factually based forecast"). *Cf.* Cal. Code Regs. tit. 14, § 15126.6(e)(3)(C) (analysis of the "no project" alternative requires a projection of what would reasonably be expected to occur in the foreseeable future if the project were not approved). Yet the Agencies essentially admit that the Plan's "no project" alternative is factually *inaccurate*

[9] *Cf.* P&As at 21 (noting that greenhouse gas levels nationwide are probably already at 1990 levels).

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because it entertains a contrary-to-fact world in which the Statewide Vehicle Emission Standards do not exist. *See* ROB at 16. Even if S.B. 375 compels the Agencies to ignore the Statewide Standards for purposes of S.B. 375 compliance, that is no reason to conclude that S.B. 375 compels the same contrary-to-fact analysis for purposes of CEQA. *Cf. Envtl. Protection Info. Ctr. v. Cal. Dep't of Forestry & Fire Protection*, 44 Cal. 4th 459, 514 (2008) (implied amendment of a statute is disfavored).

The Agencies add, however, that CEQA itself requires them to ignore the Statewide Vehicle Emission Standards in assessing the "no project" alternative. They reason that, because the CEQA Guidelines require the evaluation of comparative impacts, and because the other Plan alternatives similarly ignore the greenhouse gas reduction impacts of the Statewide Standards, therefore the "no project" alternative must also ignore them for consistency's sake. *See* ROB at 16 (citing Cal. Code Regs. tit. 14, § 15126.6(e)(1)). The Agencies have the argument backwards. Precisely because the "no project" alternative must be factually accurate, the analysis of the other project alternatives also must be factually accurate and must convey to the public what the world will look like if those alternatives are implemented, including consideration of the Statewide Standards. Accordingly, the Agencies have violated CEQA's core informational purposes, regardless of how one interprets S.B. 375.

V

THE AGENCIES' OTHER ARGUMENTS IMPROPERLY PRESUME THE CORRECTNESS OF THEIR INTERPRETATION OF S.B. 375

In responding to the Citizens' challenges to various elements of the Final Report, the Agencies by and large resort to question-begging, rejecting the Citizens arguments through reliance on their faulty interpretation of S.B. 375. For example, the Agencies contend that their selection of the Plan's basic objectives was reasonable, but they merely recite, among other things, the Plan's legislatively mandated requirement that the Plan meet the S.B. 375 targets. ROB at 15-16. Of course, the Agencies understand that objective as excluding consideration of the Statewide Vehicle Emission Standards. *Id.* at 1-2. Whether that is an accurate assessment of one of the Plan's basic objectives depends on a legal interpretation of S.B. 375. Similarly, the Agencies defend their

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failure to incorporate the Advanced California Clean Cars Standards (part of the Statewide Vehicle Emission Standards) into their computer modeling processor on the legal ground that S.B. 375 precludes consideration of those Statewide Standards.[10] ROB at 15. In the same vein, the Agencies' defense of their response to the Citizens' comments assumes that exclusion of the Statewide Standards is proper and therefore no serious consideration need be given to comments that rely on them. *See* ROB at 22-23. And the Agencies contend that the "no project" alternative, as well as the Citizens' proposed alternative, would not achieve the S.B. 375 targets, but again that conclusion is based principally on ignoring the Statewide Standards. *See* ROB at 17, 19.

To be sure, the Agencies also assert that the Citizens' alternative would otherwise be infeasible, ROB at 20-21, but the Agencies' own findings contradict that conclusion. For example, the Agencies contend that there is no evidence that the Citizens' alternative would achieve the S.B. 375 targets. ROB at 20, 22. Yet the main approach of the Citizens' alternative to achieve those targets is reliance on the Statewide Vehicle Emission Standards, *see* AR003156, which the Agencies themselves acknowledge *will* achieve the targets, *see* ROB at 12 (to meet the S.B. 375 targets, "the Agencies could have simply concluded the Bay Area meets its emissions reduction targets solely through the statewide clean technology initiatives"). The Agencies contend that the Citizens' alternative would not reduce any of the Plan's significant impacts, but the Agencies' own findings contradict that conclusion as well. The Agencies acknowledge that the Plan's high-density approach will have *dozens* of significant impacts. *See* AR003528, AR000352-AR000414. Moreover, the Agencies admit that the Citizens' alternative rejects high-density development in favor of a "less dense land use pattern." ROB at 21. Hence, it necessarily follows that the Citizens' alternative (which rejects such government-mandated high-density planning) will avoid

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[10] The Agencies also defend their failure on the ground that CEQA does not require an agency to conduct every test suggested by commentors. *See* ROB at 15 (citing Cal. Code Regs. tit. 14, § 15204(a)). But CEQA *does* require that an agency make an honest effort to use the best available means to assess environmental impacts. *See* Cal. Code Regs. tit. 14, § 15144 ("While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can."). The Agencies had ample time (over a year) to make at least a tentative effort to estimate the impact of the Advanced California Clean Cars Standards. *See* P&As at 18-19.

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most if not all the Plan's high-density-related significant impacts.[11] *See* P&As at 21. Accordingly, none of the Agencies' arguments has merit.[12]

VI

THE CITIZENS' LAWSUIT APPROPRIATELY CHALLENGES ACTS OF THE AGENCIES, NOT THE BOARD

The Agencies contend that the Citizens' real beef is with the Board, not the Agencies. ROB at 23-24. The Agencies are mistaken, for at least two reasons.

First, none of the Citizens' claims depends upon a finding that the Board has violated the law. Under S.B. 375, the Board is required to promulgate targets and determine whether a sustainable communities strategy will achieve the targets. *See* Gov't Code §§ 65080(b)(2)(A)(iii)-(iv), 65080(b)(2)(J). As the Citizens have demonstrated, the targets that the Board produced contain *no* discussion of the limitation that the Agencies seek to impose on themselves. The Board has promulgated *no* regulation requiring the Agencies to ignore the Statewide Vehicle Emission Standards.[13] The most that can be said for the Agencies' position that "the Board made us do it" is that a single Board staffer has publicly agreed with the Agencies' methodology. But again, that conclusion is not inconsistent with the Citizens' position, which acknowledges that the Plan may very well meet the targets in spite of its high-density mandates simply because the emission reductions from the Statewide Standards are so large.

Second, even if the Citizens had a legal dispute with the Board over the latter's S.B. 375 activities, the Agencies would still have independent obligations to the general public to produce

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[11] For example, the Citizens' alternative would avoid all the significant impacts attributable to the Plan's reliance on rail and other major transportation (and high-emission) projects. *Compare* AR00599-AR00607 (construction emission impacts), AR00611-AR00615 (rail corridor impacts) *with* AR003157 (Citizens' alternative recommending "[d]e-emphasis of expansion of expensive and low cost-effective rail transit.").

[12] The Agencies also somewhat peculiarly suggest that the Citizens' alternative would *increase* greenhouse gas emissions, but again that assertion is based on the disputed interpretation that S.B. 375 forbids consideration of the Statewide Vehicle Emission Standards. *Cf.* ROB at 21.

[13] The Agencies acknowledge that the Board's target-setting and other activities under S.B. 375 are subject to the California Administrative Procedure Act, including its prohibition of underground regulations. *See* ROB at 24 n.7.

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factually accurate and meaningful CEQA documents. The Agencies should not be allowed to use another agency's purportedly illegal actions to shirk this critical responsibility. *See* Pub. Res. Code § 21005 ("[N]oncompliance with [CEQA's] information disclosure provisions" may violate CEQA "regardless of whether a different outcome would have resulted if the public agency had complied with those provisions.").

CONCLUSION

CEQA requires informed public decision-making. The Agencies' contrary-to-fact CEQA documentation violates that basic CEQA purpose. The Court should grant the writ to correct this critical error.

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Respectfully submitted,

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