SHUTE, MIHALY & WEINBERGER LLP
ATTORNEYS AT LAW

E. CLEMENT SHUTE, JR.*
MARK I. WEINBERGER (1948-2005)
FRAN M. LAYTON
RACHEL B. HOOPER
ELLEN J. GARBER
TAMARA S. GALANTER
ANDREW W. SCHWARTZ
ELLISON FOLK
RICHARD S. TAYLOR
WILLIAM J. WHITE
ROBERT S. PERLMUTTER
OSA L. WOLFF
MATTHEW D. ZINN
CATHERINE C. ENGBERG
AMY J. BRICKER
GABRIEL M.B. ROSS
DEBORAH L. KEETH
WINTER KING
KEVIN P. BUNDY
*SENIOR COUNSEL

396 HAYES STREET
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE: (415) 552-7272
FACSIMILE: (415) 552-5816
WWW.SMWLAW.COM

AMANDA R. GARCIA
JEANNETTE M. MACMILLAN
ISAAC N. BOWERS
HEATHER M. MINNER
ERIN B. CHALMERS
KRISTIN B. BURFORD

LAUREL L. IMPETT, AICP
CARMEN J. BORG, AICP
URBAN PLANNERS

August 27, 2009

Mr. Ian Peterson
State of California
Natural Resources Agency
1416 9th Street
Suite 1311
Sacramento, CA 95814

Re: Proposed CEQA Guidelines Amendments for Greenhouse Gas Emissions

Dear Mr. Peterson:

Shute, Mihaly & Weinberger LLP has been closely following the development of the proposed CEQA Guidelines amendments for greenhouse gas emissions ("amendments") required by SB 97. We appreciate the opportunity to comment on the amendments.

We are concerned that, in some instances, the proposed amendments do not provide sufficient guidance and specificity to assist public agencies in addressing climate change in their CEQA documents. Although we have concerns about a number of the proposed guidelines, we are most concerned with the proposed amendment adding section 15064.4 as discussed below.

**15064.4. Determining the Significance of Impacts from Greenhouse Gas Emissions.**

We agree with the proposed addition of section 15064.4 to address the determination of significance of impacts from greenhouse gas emissions. However, the proposed amendments to section 15064.4 do not provide adequate guidance to ensure that lead agencies will require the most accurate analytical methods to identify and estimate emissions from a proposed project.

Under well established case law, an agency must use its best efforts to analyze impacts, even in the absence of a generally accepted methodology. See, e.g., *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners of the City of Oakland*, 91 Cal. App. 4th 1344, 1350 (Cal. Ct. App. 2001). The Court noted that "*an agency must use its best efforts* to *find out and disclose all that it reasonably can*." *Id.* at 1370–71 (citing CEQA Guidelines §§ 15144 and 15145, and adding italics). Similarly here, quantification of greenhouse gas emissions is crucial to ensure that a reasonable estimate of new project emissions is a part of the analysis to determine significance of impacts and constitutes the "best effort" an agency can employ. Section 15064.4 should be strengthened to include a hierarchy of analytical methods, such that modeling and other quantitative methods are implemented whenever possible, and qualitative analysis is used only as a last resort. In addition, the amendments should clarify the text in section 15064.4(a)(2) by providing an example of how "performance-based standards" could be used to determine the significance of impacts from greenhouse gas emissions. Specifically, we recommend the following changes:

15064.4. Determining the Significance of Impacts from Greenhouse Gas Emissions.

(a) The determination of the significance of greenhouse gas emissions calls for a careful judgment by the lead agency consistent with the provisions in section 15064. A lead agency should make a good-faith effort, based on available information, to describe, calculate and/or estimate the amount of greenhouse gas emissions resulting from a project. A lead agency shall estimate quantifiable emissions, including but not limited to transportation- and energy consumption-related emissions, through models or other methodologies to the extent practicable. ~~A lead agency shall have discretion to determine, in the context of a particular project, whether to:~~

(1) ~~Use a model or methodology to quantify greenhouse gas emissions resulting from a project, and which model or methodology to use.~~ The lead agency has discretion to select the model it considers most appropriate provided it supports its decision with substantial evidence. The lead agency should explain the limitations of the particular model or methodology selected for use. ~~; or~~ A lead agency may rely on qualitative analysis and/or performance based standards to supplement quantitative methods when there is no available method for quantifying greenhouse gas emissions.

~~(2) Rely on a qualitative analysis or performance based standards.~~

Without this modification to ensure that agencies use quantitative methods of calculating emissions whenever such methodologies are available, the proposed Guidelines amendment represents a step backwards from current practice and the requirements of CEQA. Many public agencies are already quantifying greenhouse gas

calculations. For example, CAPCOA has issued extensive discussion of then-current analytical methodologies for calculating estimated greenhouse gas emissions and preference for such methodologies. *See* CAPCOA, CEQA and Climate Change (January 2008) at 59-70. Further, the Attorney General has issued many letters directing lead agencies to use quantitative methods when analyzing the impacts of greenhouse gas emissions. *See,* e.g., letter to the County of San Bernardino dated October 23, 2006 at 5-6, attached as Exhibit A.

As drafted, however, the proposed Guideline amendments would allow agencies to avoid quantification of greenhouse gas emissions at their discretion. This result will not only interfere with full disclosure of the potential environmental impacts of a proposed project, it will also hinder the effectiveness of mitigation measures. Without a quantification of greenhouse gas emissions, mitigation will almost certainly be more qualitative and will not be geared towards measurable reductions in greenhouse gas emissions. Yet, trial courts are already requiring public agencies to identify performance standards for reductions in greenhouse gas emissions and to identify how the mitigation measures will actually achieve these standards. See, e.g., *Sierra Club v. City of Tulare*, Tulare County Superior Court No. 08-228122 attached as Exhibit B.

Thank you for providing this opportunity to comment on the draft CEQA Guidelines amendments for greenhouse gas emissions. Please feel free to contact us should you have questions about the foregoing comments.

Very truly yours,
SHUTE, MIHALY & WEINBERGER LLP

Sarita Candy
for:
MATTHEW D. ZINN

CARMEN J. BORG, AICP

cc: Christopher Calfee, Special Counsel

# EXHIBIT A

*BILL LOCKYER*
*Attorney General*

*State of California*
*DEPARTMENT OF JUSTICE*

1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Public: 916/324-5437
Telephone: 916/324-5475
Facsimile: 916/324-5437
E-Mail: Susan.Durbin@doj.ca.gov

October 23, 2006

County of San Bernardino
Land Use Services Department, Advance Planning Division
385 North Arrowhead Avenue, First Floor
San Bernardino, CA 92415-0182
Attn: James Squire

RE: DEIR on San Bernardino County General Plan Revision

**TRANSMITTED BY FACSIMILE AND U.S. MAIL**

Dear Mr. Squire:

The Attorney General of the State of California submits the following comments regarding the San Bernardino County General Plan Revision Draft Environmental Impact Report ("DEIR"). The Attorney General provides these comments pursuant to his independent power and duty to protect the natural resources of the State from pollution, impairment, or destruction in furtherance of the public interest. (*See* Cal. Const., art. V, § 13; Cal. Gov. Code, §§ 12511, 12600-12; *D'Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974).) These comments are made on behalf of the Attorney General and not on behalf of any other California agency or office. While these comments focus on some of the air quality and global warming issues raised by the DEIR, they are not an exhaustive discussion of all issues.

## I. Introduction

The Plan is described as being San Bernardino County's "blueprint" for land use and development through 2030. The Plan projects population growth of about 25% by 2030 (DEIR, p. I-1), in an area that already accounts for about ten percent of the total daily trips made in the entire region. (Circulation and Infrastructure Background Report, p. 2-34.) However, the environmental analysis in the DEIR fails to adequately analyze air quality impacts and contains no analysis at all of the impact of the Plan on climate change; both omissions violate the California Environmental Quality Act ("CEQA"), Pub. Resources Code §§ 21000, et seq. As the DEIR acknowledges, San Bernardino County already has a critical air pollution problem, with state air quality standards for ozone and fine particulate matter having been exceeded on 91 days and 82 days, respectively, in 2002. (Conservation Background Report, p. 6-94.) Even though the County receives transported air pollution from the rest of the South Coast Air Basin, and from the San Joaquin Valley (Conservation and Background Report, p. 6-92), the County itself

contributes very significantly to this problem, with a very large rate of trips per day per resident, and an abysmally low rate of transit use. (Circulation and Infrastructure Background Report, p. 2-34.) The large amounts of land available for development present the probability that this problem will grow more severe during the lifetime of the General Plan revision. The environmental and public health concerns raised by the projected increases in vehicular travel under the proposed plan deserve, and CEQA requires, serious and thorough environmental analysis.

We note that the Legislature has recently enacted, and Governor Schwartzenegger has signed, AB 32, the landmark law to control and reduce the emission of global warming gases in California. We are extremely concerned that this legislation was not addressed in any way by either the draft General Plan revision or the DEIR. AB 32 requires both reporting of greenhouse gas emissions and their reduction on a brisk time schedule, including a reduction of carbon dioxide (CO2) emissions to 1990 levels by 2020. Local governments will be called upon to help carry out the legislation's provisions, and its General Plan revision is the appropriate place for the County to identify both CO2 and other greenhouse gas sources, as well as actions for mitigation of the increases in emissions in greenhouse gases resulting from actions set forth in the General Plan revision. Because global warming is perhaps the most serious environmental threat currently facing California, the DEIR should and must address the issue, provide full environmental disclosure of the effects on greenhouse gas emissions that the General Plan revision will cause, and adopt serious and real mitigation measures for those effects and emissions.

**II. The General Plan Should Address and Include Measures to Reduce Greenhouse Gas Emissions, and the DEIR Should Discuss The Plan's Impact On Climate Change.**

The General Plan revision projects that San Bernardino County's population will grow overall by about 25% by 2030, and the background documents indicate that the areas covered by Community Plans will experience about a 50% increase in population during that time. (DEIR App.C, p. 5.) The Plan relies upon on vehicular travel and improvements to freeways, roads and streets to deal with the travel needs of this expanded population, and acknowledges that the land uses permitted in the General Plan will increase traffic and may result in a substantial increase in vehicle trips unless mitigated. (DEIR, p. IV-169.) However, the DEIR never analyzes one of the most important environmental impacts of vehicle emissions -- greenhouse gases and resulting climate change.

Climate change results from the accumulation in the atmosphere of "greenhouse gases" produced by the burning of fossil fuels for energy. Because greenhouse gases (primarily, carbon dioxide("$CO_2$"), methane and nitrous oxide) persist and mix in the atmosphere, emissions anywhere in the world impact the climate everywhere. The impacts on climate change from

greenhouse gas emissions have been extensively studied and documented. (*See* Oreskes, Naomi, *The Scientific Consensus on Climate Change*, 306 Science 1686 (Dec. 3, 2004) [review of 928 peer- reviewed scientific papers concerning climate change published between 1993 and 2003, noting the scientific consensus on the reality of anthropogenic climate change]; J. Hansen, *et al.*, *Earth's Energy Imbalance: Confirmation and Implications,* Sciencexpress (April 28, 2004) (available at http://pubs.giss.nasa.gov/abstracts/2005/HansenNazarenkoR.html ) [NASA and Department of Energy scientists state that emission of $CO_2$ and other heat-trapping gases have warmed the oceans and are leading to energy imbalance that is causing, and will continue to cause, significant warming, increasing the urgency of reducing $CO_2$ emissions].)

In AB 32, the Legislature recognized California's particular vulnerability to the effects of global warming, making legislative findings that global warming will "have detrimental effects on some California's largest industries, including agriculture, wine, tourism, skiing, recreational and commercial fishing, and forestry." (Health and Saf. Code section 38501, subd. (b).) San Bernardino County will feel the effects of climate change in many of these areas, particularly given the importance to the County of its Mountain area's economic dependence on tourism, skiing, recreational fishing, and recreational second homes. (Economic Development Background Report, App. A, pp. 57-59.)) The Legislature also found that global warming will "increase the strain on electricity supplies necessary to meet the demand for summer air-conditioning in the hottest parts of the State." (Health and Saf. Code, section 38501, subd. (b).) Since San Bernardino, and especially its Desert areas, are among the parts of the State that do experience hot weather, the County will suffer acutely from any electricity shortages caused by the strains of global warming, as it will also feel the economic and public health damages from decreased snowpack and increased air pollution that a changed climate will bring -- indeed, is already bringing.

To prevent these harms, AB 32 mandates that emissions of greenhouse gases to 1990 levels must be required by whatever regulatory scheme the Air Resources Board, the agency charged with carrying out the statute, ultimately adopts. (Health and Saf. Code section 38530.) Governments are not exempt from AB 32. The County, its cities, and the businesses within its borders will all have to comply with the regulations and plans that will be adopted to achieve the reduction of greenhouse gas emissions mandated by this legislation.

Nor is AB 32 the first state-wide recognition of the ravages global warming may wreak on California. In Executive Order S-3-05, issued on June 1, 2005, Governor Schwarzenegger recognized the significance of the impacts of climate change on the State of California, noting that "California is particularly vulnerable to the impacts of climate change." And, even before AB 32, the Legislature recognized the severe impacts that come from climate change, as well as a "projected doubling of catastrophic wildfires due to faster and more intense burning associated with drying vegetation." (Stats. 2002, ch, 200, Section 1, subd. (c)(4), enacting Health & Saf.

Code § 43018.5) In the particular realm of vehicular travel and emissions from cars and truck, the California legislature went on to recognize that "passenger vehicles and light-duty trucks are responsible for *40 percent of the total greenhouse gas pollution in the state.*" (*Ibid.*, subd. (e)(emphasis added).) Our knowledge of the existence and severity of the problem of greenhouse gas emissions and global warming is not new, but was apparent and recognized before the draft General Plan revision was issued by the County.

Despite the existence of Executive Order S-3-05 and the pendency of AB 32 during the time that the General Plan revision was being prepared, the County does not even mention the issue in its General Plan revision, although that revision is meant to cover the next quarter century. Nor does the DEIR analyze, on even the most superficial level, emissions of carbon dioxide, climate change or global warming, despite the obvious connection between such emissions and land use planning, transportation planning, or even air quality. No mitigation for emissions of greenhouse gases is proposed or adopted.

Under CEQA, an environmental impact report must identify and focus on the "significant environmental effects" of a proposed project. (Public Res. Code section 21100(b)(1); Cal. Code Regs., tit. 14, §§ 15126(a), 15126.2(a), 15143.) "'Significant effect on the environment' means a substantial, or potentially substantial, adverse change in the environment." (Public Res. Code section 21068). CEQA also provides that the CEQA guidelines "shall" specify certain criteria that *require* a finding that a project may have a significant effect on the environment:

> "(1) A proposed project has the potential to degrade the quality of the environment, curtail the range of the environment, or to achieve short-term, to the disadvantage of long-term, environmental goals.
>
> (2) The possible effects of a project are individually limited but cumulatively considerable. As used in this paragraph, "cumulatively considerable" means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.
>
> (3) The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly."
> (Public Res. Code section 21083(b).)

The CEQA Guidelines, Cal. Code of Regs., tit. 14, section 15064, subdivision (h)(3), provide that an agency may conclude that an environmental effect is not cumulatively considerable if it complies with an existing plan to meet environmental standards, such as a state implementation plan or a basin plan. The DEIR itself includes as one of its significance criteria for air quality

the potential of the project to "[v]iolate any air quality standard or contribute substantially to an existing or projected air quality violation."[1/] Here, the plans to reduce global warming are still to be formulated, but after the passage of AB 32, we know, as stated above, that a reduction of emissions of greenhouse gases to 1990 levels will be required by whatever regulatory scheme is ultimately adopted. (Health and Saf. Code section 38550.) This provision of the Guidelines does not exempt the County from doing a CEQA analysis of this issue.

In other words, if the General Plan revision could allow emissions of greenhouse gases to significantly affect the environment, directly, indirectly, or cumulative, then the EIR on the revision must analyze the issue, disclose all that can feasibly be found out and disclosed, and adopt all feasible mitigation measures. The DEIR reports that currently, San Bernardino generates about 5.2 million person trips per day (about 10.35 trips per household per day), and that over 84 % of the work trips are made by car. (Circulation and Infrastructure Background Report, p. 2-34.) Given that the DEIR projects an increase in population of about 436,500 people by 2030, vehicular miles traveled by the year 2030 can be expected to grow substantially. Considering that about 40% of greenhouse gas emissions come from motor vehicles, the revision clearly "has the potential to degrade the environment" as to greenhouse gases and global warming. (*See ibid.*, subd. (b)(1).) Moreover, the cumulative effects of this project on greenhouse gas emissions, when taken in consideration with the impacts statewide of increased population and vehicular travel over the next quarter century, are undeniable. (*See ibid.*, subd. (b)(2).) When considering the impacts of climate change on California, it is impossible to ignore that the impacts of this project will have either direct or indirect effects on human beings. (*See ibid.*, subd. (b)(3).) Given the scope of the General Plan revision, the projected increase in population and vehicle travel it projects, and the fact that it projects a steady and large increase in population, there is no question that the impacts of the General Plan revision on greenhouse gas emissions and climate change may, and likely will, have significant cumulative environmental impacts for California. These impacts should have been considered, analyzed, and mitigated in the DEIR.

Such an analysis is possible; the data are obtainable. Carbon dioxide emissions from cars can be quantified. In fact, under AB 32, an inventory of greenhouse gas emissions *must* be done in time to allow the 1990 level of such emissions to be determined by the statutory deadline of January 1, 2008. (Health and Saf. Code sections 38530, 35850.)[2/] This is such a short time that such an emissions inventory should begin immediately. However, current information on the

---

1. DEIR, p. IV-27.

2. The emissions inventories in the current documentation do not include greenhouse gases. (DEIR, p. IV-33; Conservation Background Report, p. 6-93.)

greenhouse gas emissions of cars, trucks and buses could be used to compile an estimated inventory. Once such an estimated inventory is completed, the projections of increased driving that are in the General Plan revision could be used to estimate future growth in greenhouse gas emissions associated with the revision. The California Air Resources Board has information that could be applied to the projected increase in driving. The impacts could be assessed as to their cumulative impact on climate change, assuming (as is highly probable based on the population growth in the General Plan revision and the widely distributed nature of that growth) that there would be a considerable impact from the increase in $CO_2$ resulting from the increased driving. (*See* Cal. Code Regs., tit. 14, § 15130(a) ["an EIR shall discuss cumulative impacts of a project when the project's incremental effect is cumulatively considerable."] *See also* Cal. Code Regs., tit. 14, § 15065(a)(3) ["'Cumulatively considerable' means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probably future projects."].)

Moreover, and most importantly, the General Plan revision could and should include mitigation for these impacts. The Governor has recognized, "mitigation efforts will be necessary to reduce greenhouse gas emissions and adaptation efforts will be necessary to prepare Californians for the consequences of global warming." (Executive Order S-3-05, June 1, 2005.) The County can both require mitigation measures from businesses and entities within its jurisdiction, through alternations to its building codes or permit requirements; e.g., it might require solar heating capabilities for all new development, or require that carbon sequestration credits be purchased for development of a certain size. The County could take direct action to offset its own carbon emissions, or those of its residents, by providing for increased public transportation service, increased support of alternative fuels and technologies, installation of electric vehicle charging stations, and other affirmative steps to reduce the transportation impacts of $CO_2$. These are real, achievable and available mitigation measures that could be considered when San Bernardino County recognizes its obligations to analyze greenhouse gas emissions and their impact on climate change as part of its long term transportation planning. As it currently stands, we believe that the draft EIR on the General Plan revision does not comply with CEQA.

**III. The DEIR Does Not Adequately Discuss The General Plan Revision's Impact On Air Quality.**

Besides its complete failure to analyze the effects of the General Plan revision on global warming, the DEIR also fails adequately to analyze the revision's effects on conventional air pollutants.

Air pollution is already at critical, health-endangering levels in San Bernardino County. The federal standard for ozone was exceeded on 21 days in 2002, while the state ozone standard

was exceeded on 91 days.[3] Similarly, the federal and state standard for respirable particulate matter was exceeded on 98 days in 2002. (*Id.*) And, while emissions trends for most pollutants show modest decreases, particulate matter emissions are projected to *increase*, in spite of the extraordinary measures being taken by the South Coast Air Quality Management District (SCAQMD).[4] The DEIR recognizes harm to air quality as one of the significant environmental effects of the General Plan revision that cannot be fully mitigated.[5]

The Air Quality section of the DEIR is extremely troubling. Air quality is well known to already damage the public health in the South Coast Air Basin, with children suffering decreased lung function simply by growing up in the area. (See Bustillo, M., "Smog Harms Children's Lungs for Life, Study Finds," Los Angeles *Times*, Sept. 9, 2004, https://www.latimes.com/news/yahoo/la-me-smog9sep09,1,6309811.story. ) The DEIR recognizes that the increased driving that the General Plan revision projects will further damage air quality. (DEIR, p. I-21.) Yet, this effect, although recognized as significant, receives almost no analysis or discussion in the DEIR. Effects on air quality are discussed in a bare couple of pages, in the most general terms, such as statements that new growth will occur that will cause more driving, which will in turn create more pollutant emissions. The extremely brief, non-detailed discussion of air quality is very much out of proportion to the importance, and the probable public health impacts, of the expected effects. The CEQA Guidelines require that the discussion of significant effects of a project should include discussion of direct and indirect effects, impacts on public health, and effects on the resource base. (14 Cal. Code of Regs., tit. 14 sec. 15126.2.) In general, an EIR should contain discussions sufficient to advise the decision makers and the public of the nature and importance of the environmental effects being discussed, not merely the ultimate conclusion that an effect is significant. (*Assn. of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1390 ("The EIR must contain facts and analysis, not just the bare conclusions of the agency. . . . . An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." [Internal citations and quotation marks omitted.]) As we read the DEIR, it does not conform to this standard.

Where, as here, the environmental effect is harm to human health, the EIR must clearly set out the relationship between the effects of the project and the health damage that can be expected. The CEQA Guidelines, at section 15126.2, subdivision (a), require an EIR to discuss, among other things, health and safety problems caused by the physical changes that the proposed

---

3. Conservation Background Report, p. 6-94.

4. Conservation Background Report, p. 6-95.

5. DEIR, p. IV-27.

project will precipitate. The DEIR here gives its conclusion that the General Plan revision will have significant and unavoidable adverse impacts on air quality, but it does not actually discuss or disclose what those impacts can be expected to be on the health of the County's residents. The EIR is required by CEQA to do so. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1219-1220.) The summary table in the DEIR that merely sets out general health effects from exposure to pollutants[6] is not sufficient; actual levels of exposure expected from execution of the General Plan revision, correlated with actual populations that will be exposed and the probable health impacts on them, is required. CEQA is not just a formal exercise, where the County can state that an effect is significant and, having set out this conclusion as though it were a magic formula, move on. The EIR must spell out what that significant effect will really consist of, to allow both the decision makers and the residents whose health, and whose children's health, will be affected, to know and understand the health damage that will result from the choices in the General Plan revision. The DEIR does not do this, and must be revised so that it does.

The DEIR also fails to adopt adequate mitigation for the significant adverse effects on air quality that it does identify. The mitigation measures for the County's own emissions are few and minor. Many of these mitigation measures in the DEIR seem to be measures that are *already* required by the South Coast Air Quality Management District (SCAQMD), including its requirements that publicly owned vehicle fleets must shop from among clean-fuel vehicles. Measures that the County is already legally obliged to take should be considered part of the General Plan revision, not mitigation for its effects. The SCAQMD Fleet Rules already require public agency vehicle fleets to acquire clean-fuel vehicles. Where the County is already legally obligated to undertake pollution-reducing measures, these measures should be considered to be part of the project, not as mitigation. Such measures do not lessen or avoid the environmentally harmful effects of a project, because they must already be incorporated into the project as originally designed.[7]

CEQA forbids public agencies to approve projects that will harm the environment until and unless the agency has adopted *all* feasible mitigation for that harm. (Public Res. Code section 21002, 21081, subdivision a.) The County must explore all feasible mitigation that could be adopted to lessen the effects of the General Plan revision, and cannot rely upon those features

---

6. DEIR, pp. IV-31-32.

7. The same principle applies to greenhouse gas emission reductions. AB 32 mandates that regulatory programs adopted under its aegis require greenhouse gas emissions reductions that are *in addition* to reductions already required by law. (Health and Saf. Code section 38560.5, subdivision (d)(2).

of the project that are already required by law to substitute for the mitigation CEQA requires. The DEIR should be revised to adopt all feasible mitigation for its air quality effects.

**Conclusion**

The General Plan revision is the blueprint for development in this growing, vital area of Southern California for the next 24 years, and both current residents and the half-million additional residents expected in the County by 2030 will have to live with the choices the County makes in this revision. CEQA requires that the County fully disclose, both to the decision makers and the public, all the environmental harm that may result from this blueprint. This disclosure must include the environment effects on air quality and global warming, areas in which the DEIR is currently woefully deficient, or even totally silent. We urge the County to thoroughly revise the DEIR in these areas to bring it into compliance with CEQA.

Thank you for the opportunity to offer these comments. Any questions may be directed to the undersigned. We also request a copy of the final EIR when it is issued.

Sincerely,

SUSAN DURBIN
Deputy Attorney General

For BILL LOCKYER
Attorney General

cc:
Kurt Weis, General Counsel
SCAQMD

# EXHIBIT B

TULARE COUNTY SUPERIOR COURT

STATE OF CALIFORNIA

Sierra Club,

Petitioner,

and

City of Tulare, et. al.,

Respondents.

Case No.: 08 - 228122

Order Granting Petition in Part For Writ of Mandate

This matter came on regularly for hearing on February 11, 2009 in Department 6 of the Tulare Superior Court, located at 221 S. Mooney Blvd., Visalia, California, the Honorable Patrick J. O'Hara presiding. Kara K. Ueda appeared on behalf of the Respondent, City of Tulare. Petitioner, Don Manro appeared on his own behalf. Babak Naficy appeared on behalf of Petitioner, the Sierra Club.

This case was consolidated with Manro v. City of Tulare, et. al., case no. 08-228094 as both cases challenge the validity of Resolution No. 08-13 of the City of Tulare (City) adopting Findings, A Statement of Overriding Considerations, and Certifying a final programmatic environmental impact report (EIR) in connection with its adoption of Resolution No. 8-14, approving the 2030 General Plan Update (GPU), specifically revising the land use, circulation, and conservation elements of the general plan.

The court having reviewed the record of the proceedings in this matter, the briefs

submitted by counsel, and the arguments of counsel, and the matter having been submitted for decision, the Court finds that Resolution No. 08-13 of the City of Tulare (City) adopting Findings, A Statement of Overriding Considerations, and Certifying a final programmatic environmental impact report (EIR) in connection with its adoption of Resolution NO. 8-14, approving the 2030 General Plan Update (GPU), specifically revising the land use, circulation, and conservation elements of the general plan; fails to comply with the provisions of the California Environmental Quality Act on certain issues as presented herein.

## PROCEDURAL STATUS

Petitioners argue that the City violated the California Environmental Quality Act (CEQA); Mr. Manro concurs and also brings this action under the Planning and Zoning Law, Division 1 of Title 7 of the Government Code, section 65000, et. seq.

Only parties who objected to the agency's approval of the project either orally or in writing may thereafter file a petition. (CEQA Guideline § 21177(b)). A petitioner who has standing to sue may litigate issues raised by others. (Guideline § 21177(a)). Both Petitioners objected to the agency's approval of the project, and have standing to sue, and may litigate any issued raised by others.

After the court issued its tentative ruling, in which the court analyzed the two petitions together and in sequence of the parties' arguments in their opening briefs, the City asked for separate judgments. Therefore, the court complies with the City's request, and issues this ruling on the Sierra Club's Petition, and a separate ruling on Mr. Manro's Petition.

However, in doing so, the court adopts a different format. The parties' briefs addressed different issues rather than following the outline of the petitions as to each cause of action, thus the court followed that format in its tentative. Now the court's analysis will address each cause of action as presented in the petitions, as the pleadings control.

### The Administrative Record

The parties lodged the administrative record, and then prepared their briefs. No one at that point evidently had any argument with the administrative record, and thus the court

considered it agreed upon to be final and complete.

However, at the first hearing of this matter, Petitioner, the Sierra Club made an oral motion to augment the record by admitting the declaration of Dr. Gordon Nipp.

Sierra Club acknowledged that normally only the administrative record is available for review in CEQA but requested Dr. Nipp's declaration be admitted as to Respondent's affirmative defense of Sierra's failure to exhaust its administrative remedies, which Sierra Club argued is an exception to the general rule. Petitioner cited to footnote 5 in Western States Petroleum Ass'n v. Superior Court, 9 Cal 4th 559, 575 (Cal. 1995), which provides as follows:

> "n5 These commentators propose several limited exceptions to the general rule excluding extra-record evidence in traditional mandamus actions challenging quasi-legislative administrative decisions. Specifically, they suggest that courts should admit evidence relevant to (1) issues other than the validity of the agency's quasi-legislative decision, such as the petitioner's standing and capacity to sue, (2) affirmative defenses such as laches, estoppel and res judicata, (3) the accuracy of the administrative record, (4) procedural unfairness, and (5) agency misconduct. (Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, op. cit. supra, § 23.55, pp. 967-968.) Because none of these exceptions apply to the case at bar, we need not consider them."

The City did not object to the declaration of Dr. Nipp being admitted so long as the declaration of Lucy Sylvester was also admitted on their oral motion. Sierra Club moved to strike Ms. Sylvester's declaration but provided no authority for doing so, and no explanation as to why Mr. Nipp's declaration should be admitted and not Ms. Sylvester's (which was only submitted to counter the allegations in Mr. Nipp's declaration). However, at the second oral argument Sierra Club objected "on the basis that it contradicts the city's certification earlier of the record that does not include the documents that they now try to use to augment it." In any event, the declarations go to the fact of whether or not Sierra Club was given direct notice of the Final EIR (FEIR) in time to comment on the FEIR's failure to adequately describe the existing environmental setting with respect to biological resources and, that as a consequence, the biological impacts are deficient. Sierra Club argued that since they did not get notice of the Final EIR in time to comment, they have standing to bring this issue before the court. Sierra Club did not argue that it, or anyone, had presented this issue during the comment period on the draft EIR.

Sierra only raised it after the City certified the FEIR.

On Sierra's oral motion to admit the declaration of Dr. Nipp, the court finds an exception to the general rule and grants the motion. On Respondent City of Tulare's oral motion to admit Lucy Sylvester's declaration if Dr. Nipp's declaration was granted, the court grants the motion, and thus, denies Sierra Club's motion to strike Lucy Sylvester's declaration. Having admitted these declarations, the court considers the administrative record to be final and complete.

Having admitted the declarations, the court finds that it does not help Sierra. Sierra Club argues that the public was not properly notified of the availability of the Final EIR, and thus the City cannot legitimately complain that Sierra Club failed to exhaust its administrative remedies relative to issues raised for the first time in the Final EIR, citing to Endangered Habitats League, Inc. v. State Water Resources Control Board (1997) 63 Cal.App.4th 227.

However, the City is not required to submit the Final EIR for public review but may do so in its discretion. (14 Cal Code Regs 14089(b)). CEQA requires public review only at the draft EIR stage. (Public Resources Code § 21092). Endangered Habitats League, Inc., supra, is distinguishable, as its discussion of the exhaustion doctrine refers to where an effective administrative remedy is wholly lacking. In that case, when the master drainage plan was originally filed in 1986, it alluded to further environmental review, which was never done. The county gave no notice and provided no opportunity to be heard on the question of implementation, which was the second tier of environmental review.

Therefore, as to the City's argument that Sierra Club did not exhaust its administrative remedies as to the biological impacts, the court finds that Petitioner Sierra Club did not exhaust on that issue and is thus barred from raising it as an issue in this review.

But even if the Sierra Club had raised the specific issue of the draft EIR's failure to adequately describe the existing environmental setting with respect to biological resources at the public hearings, the City's citation to the administrative record at pages 448-450 (AR: 448-450) and Appendix F, AR: 1335, supports with substantial evidence that the draft EIR considered the existing biological setting sufficient for a GPU. A GPU is broad in scope and more environmental review will be required for each specific project within the GPU.

## STANDARD OF REVIEW

The court finds Public Resources Code § 21168.5 sets forth the standard of review in this case. Under section 21168.5, judicial review "extends only to whether there was a prejudicial abuse of discretion." An abuse of discretion is established "if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Laurel Heights Improvement Assn. v. Regents of the University of California (1988) 47 Cal. 3d 376, 392 (Laurel Heights I).) As a result of this standard, "The court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document." (County of Inyo v. City of Los Angeles (1977) 71 Cal.App.3d 185, 189 [139 Cal.Rptr. 396].)

"An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and consider meaningfully the issues raised by the proposed project." (Laurel Heights Improvement Assn. v. Regents of the University of California (1988) 47 Cal. 3d 376, 405 (Laurel Heights I)). "[N]oncompliance with the information disclosure provisions. . . which precludes relevant information from being presented. . . may constitute a prejudicial abuse of discretion. . . regardless of whether a different outcome would have resulted if the public agency had complied with those provisions." (Public Resources Code § 21005(a)). The trial court may not exercise its independent judgment on the omitted material by determining whether the ultimate decision of the lead agency would have been affected had the law been followed. (Rural Land Owners Association v. City Council (1983) 143 Cal. App. 3d 1013, 1023).

The court must presume the agency complied with the law and petitioners bear the burden of proving otherwise. (Save Our Peninsula Committee v. Monterey County Board of Supervisors (2001) 87 Cal. App. 4th 99, 117). "CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive." (Dry Creek Citizens Coalition v. County of Tulare (1977) 70 Cal. App. 4th 20, 26, citing CEQA Guidelines, § 15151).

"The substantial evidence standard is applied to conclusions, findings and determinations. It also applies to challenges to the scope of an EIR's analysis of a topic, the methodology used

for studying an impact; and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions." (Bakersfield Citizens for Local Control v. City of Bakersfield (2004) 124 Cal. App. 4th 1184, 1198).

## DISCUSSION

Sierra Club makes multiple arguments as to the City's failure to comply with CEQA. Thus, the court reviews the administrative record to see if a prejudicial abuse of discretion is established because the City has not proceed in a manner required by law, or if the determination or decision is not supported by substantial evidence.

**I. Sierra Club's First Cause of Action is "Failure to Impose Adequate Mitigation Measures to Address Significant Adverse Environmental Impacts."**

Sierra Club alleges the mitigation measures are inadequate as to: (1) agricultural resources; (2) aesthetics; (3) air quality; (4) biological resources. Sierra Club only presented argument in its brief as to issue 1, agricultural resources, and global climate change, which was addressed in its petition under issue 3, air quality. The court has found Sierra Club is precluded from raising issue 4, biological resources for failure to exhaust its administrative remedies. Thus, the court only addresses mitigation issues as to agricultural resources and global climate change.

First, the City argues that Sierra Club did not exhaust their administrative remedies as to the argument regarding mitigation measures as to agricultural conversion and global warming. However, these issues were raised in the public hearings on the draft EIR as the City responded to Sierra Club's comments on these issues in the FEIR. The City complains that after it responded to Sierra Club in the FEIR that Sierra Club did not comment further that the City's responses were inadequate before the adoption of the FEIR. Thus, the City argues Sierra Club is precluded from bringing these arguments now as no one raised them before the public agency before its adoption of the FEIR. Sierra Club argues that it is not required to comment on the FEIR so long as it had previously raised the issue sufficiently for the City to be aware of the deficiency.

The court finds that this argument also goes to the sufficiency of the responses to comments

in the FEIR (Sierra Club's Fifth Cause of Action). The court finds that Sierra Club exhausted on these issues as it raised them sufficiently in the comment period on the draft EIR, and is not barred from raising them herein.

In the FEIR the City adopted mitigation Policy COS -3.12 and 3.13 in response to Sierra Club's comments. Sierra Club argues these mitigation measures are inadequate as a matter of law, and did not adequately respond to their comments as to a standard for mitigation regarding the ratio of agricultural resources.

The City admits that it was required to identify feasible and "fully enforceable" mitigation measures. However, the city ignores CEQA's prohibition against deferral of the formulation measures unless it can be shown that practical considerations prevent formulation of mitigation measures, in which case the agency can satisfy CEQA by (1) committing to eventually devising such measures, and (2) articulate specific performance criteria at the time of project approval. (San Joaquin Raptor Rescue Center v. County of Merced (2007) 149 Cal.App.4th 645, 670).

The proposed agricultural policies set forth in Conservation and Open Space (COS) -3.12 and 3.13 fail under this standard in part because they do not include "specific performance criteria. In this context, the essential missing specific performance criteria is the relationship (i.e. the ratio) between the number of farmland acres converted and the number of acres that must be set aside. Therefore, there is no mandatory ratio to guide future development.

Sierra Club commented that the City should adopt a ratio and the City did not adequately respond to this comment. Responses should explain rejections of the commentors' proposed mitigations and alternatives. Evasive, conclusory responses and mere excuses are not legally sufficient. (Cleary v. County of Stanislaus (1981) 118 Cal.App.3rd 348, 355-360, (failure to adequately respond to any significant public comment is an abuse of discretion); Guidelines §15088(b)).

The center-piece of the City's global warming mitigation measures is policy COS-7.2, pursuant to which, the City hopes to develop a plan ("Plan") to identify and reduce Green House Gases (GHG) emissions. The FEIR hopefully promises that the Plan will explain how the City will inventory GHG emissions, establish GHG levels in 1990 and 2020, and "set a target for the

reduction of emissions attributable to the City's discretionary land use decisions and its own internal government operations." AR 3:747. COS-7.2 is an inadequate mitigation measure because it impermissibly defers the formulation of mitigation measure and does not include any specific performance criteria. (San Joaquin Raptor Rescue Center v. County of Merced (2007) 149 Cal.App.4th 645, 670).

The court agrees with Sierra Club that the City failed to impose adequate mitigation measures to address significant adverse environmental impacts as to agricultural resources and global climate change. This is a failure to proceed in the manner required by law and is a prejudicial abuse of discretion. In each case, the City made a finding that the significant adverse impact was "unavoidable" despite the proposed mitigation measures. The City's findings, that these impacts are "unavoidable," are not supported by substantial evidence because feasible mitigation measures exist, and were suggested to the City that could reduce the significance of these environmental impacts. The City's responses to Sierra Club's comments as to the mitigation measures were insufficient. It was a failure to proceed in the manner required by law and a prejudicial abuse of discretion.

The court issues the Writ of Mandate setting aside the City's approval of the GPU and the certification of the Final EIR as to the City's failure to adequately impose mitigation measures as to the issues of agricultural resources and global climate change, and orders the City to comply with CEQA.

**II. Sierra Club's Second Cause of Action is "Failure to Adequately Analyze Project Impacts on Water Supplies."**

The court agrees with Sierra Club. Although the City relies exclusively on a groundwater basin that is in overdraft, the EIR found that the City's water supplies could adequately support the projected population increase under the Update without exacerbating the overdraft. AR 2:310-315. To reach this conclusion, the EIR relies exclusively on a draft Urban Water Management Plan (UWMP) and a poorly defined groundwater recharge program. AR 3:315.

Our Supreme Court set forth the necessary criteria for discussion as to impacts on water

supplies in a proper EIR in Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 432, as follows:

> "First, CEQA's informational purposes are not satisfied by an EIR that simply ignores or assumes a solution to the problem of supplying water to a proposed land use project. Decision makers must, under the law, be presented with sufficient facts to "evaluate the pros and cons of supplying the amount of water that the [project] will need." (Santiago County Water Dist. v. County of Orange, supra, 118 Cal. App. 3d at p. 829.) Second, an adequate environmental impact analysis for a large project, to be built and occupied over a number of years, cannot be limited to the water supply for the first stage or the first few years. While proper tiering of environmental review allows an agency to defer analysis of certain details of later phases of long-term linked or complex projects until those phases are up for approval, CEQA's demand for meaningful information "is not satisfied by simply stating information will be provided in the future." (Santa Clarita, supra, 106 Cal.App.4th at p. 723.) As the CEQA Guidelines explain, "Tiering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR or negative declaration." (Cal. Code Regs., tit. 14, § 15152, subd. (b).) Tiering is properly used to defer analysis of environmental impacts and mitigation measures to later phases when the impacts or mitigation measures are not determined by the first-tier approval decision but are specific to the later phases. For example, to evaluate or formulate mitigation for "site specific effects such as aesthetics or parking" (id., § 15152 [Discussion]) may be impractical when an entire large project is first approved; under some circumstances analysis of such impacts might be deferred to a later-tier EIR. But the future water sources for a large land use project and the impacts of exploiting those sources are not the type of information that can be deferred for future analysis. An EIR evaluating a planned land use project must assume that all phases of the project will eventually be built and will need water, and must analyze, to the extent reasonably possible, the impacts of providing water to the entire proposed project. (Stanislaus Natural Heritage, supra, 48 Cal.App.4th at p. 206.) Third, the future water supplies identified and analyzed must bear a likelihood of actually proving available; speculative sources and unrealistic allocations ("paper water") are insufficient bases for decision making under CEQA. (Santa Clarita, supra, 106 Cal.App.4th at pp. 720–723.) An EIR for a land use project must address the impacts of likely future water sources, and the EIR's discussion must include a reasoned analysis of the circumstances affecting the likelihood of the water's availability. (California Oak, supra, 133 Cal.App.4th at p. 1244.) Finally, where, despite a full discussion, it is impossible to confidently determine that anticipated future water sources will be available, CEQA requires some discussion of possible replacement sources or alternatives to use of the anticipated water, and of the environmental consequences of those contingencies. (Napa Citizens, supra, 91 Cal.App.4th at p. 373.) The law's informational demands may not be met, in this context, simply by providing that future

development will not proceed if the anticipated water supply fails to materialize. But when an EIR makes a sincere and reasoned attempt to analyze the water sources the project is likely to use, but acknowledges the remaining uncertainty, a measure for curtailing development if the intended sources fail to materialize may play a role in the impact analysis. (See id. at p. 374.)."

The City's EIR does not adequately analyze project impacts on the water supply as it does not comply with the criteria as set forth in Vineyard. The City's reliance on 12,500 Acre Foot per Year (AFY) surface water deliveries from the Tulare Irrigation District (TID) is misplaced and inadequately explained. The City was required to identify alternatives to this potential supply because the future availability of this water cannot be confidently determined. The EIR did not offer any analysis or facts to show that this water will actually materialize. The only evidence the City offered is that once, in 2006, the City was able to purchase 11,000 acre feet. This is not substantial evidence. CEQA requires evidence and analysis to support the conclusion that water supplies will materialize. The EIR violates CEQA because the conclusion that sufficient surplus surface water supplies will be available to TID for purchase by the City is not supported by substantial evidence. This is a prejudicial abuse of discretion.

The court issues the Writ of Mandate setting aside the City's approval of the GPU and the certification of the Final EIR as to the City's failure to adequately analyze the project impacts on water supplies, and orders the City to comply with CEQA.

**III. Sierra Club's Third Cause of Action is "Violation of Water Code §10910, et. seq.: Failure to Prepare a Water Supply Assessment."**

This cause of action was not argued in Sierra Club's brief; therefore the court determines that Sierra Club abandoned this argument.

**IV. Sierra Club's Fourth Cause of Action is "Inadequate Alternatives Analysis."**

The court agrees with Sierra Club that the City failed to discuss a reasonable range of alternatives. CEQA requires that "The alternatives shall be limited to ones that would avoid or substantially lessen any of the significant effects of the project." (Guidelines, sec. 15126.6, subd. (f)). The EIR must compare the merits of each feasible alternative and explain in some detail how the alternatives were selected. (Guidelines, sec. 15126.6). Significantly, the discussion of

alternatives must include sufficient information about each alternative to allow evaluation and comparison of alternatives to the Project. (Guidelines, sec. 15126.6(d)); Association of Irritated Citizens v. County of Madera (2003) 207 Cal.App.4th 1383, 1400).

There is no project alternative that would require less conversion of farmland or a reduced population scenario. None of the alternatives, other than the no project alternative, provide a scenario that might substantially reduce any of the significant effects of the Project. The range of alternatives is, therefore, unreasonably narrow. This is a failure to proceed in the manner required by law. Additionally, the City's adoption of alternative 1 is not supported by substantial evidence. Both of these constitute a prejudicial abuse of discretion.

However, as to Sierra Club's argument that the City should have adopted Alternative 4, not alternative 1, the court disagrees. The court's role does not include reweighing the evidence that was before the agency. The court may not substitute its judgment for that of the people and their local representatives and may not set aside an agency's certification of an EIR "on the ground that an opposite conclusion would have been equally or more reasonable." (Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553, 564).

The court issues the Writ of Mandate setting aside the City's approval of the GPU and the certification of the Final EIR as to its failure to adequately present and analyze a reasonable range of project alternatives, and orders the City to comply with CEQA.

**V. Sierra Club's Fifth Cause of Action is "Inadequate Response to Comments."**

The court agrees with Sierra Club. CEQA Guideline § 15088(c) provides that the written responses shall describe the disposition of significant environmental issues raised (e.g. revisions to the proposed project to mitigate anticipated impacts or objections). In particular, the major environmental issues raised when the Lead Agency's position is at variance with recommendations and objections raised in the comments must be addressed in detail giving reasons why specific comments and suggestions were not accepted. There must be good faith, reasoned analysis in response. Conclusory statements unsupported by factual information will not suffice.

See the discussion in the First Cause of Action. Additionally, the City's responses to the Farm

Bureau comments were inadequate. With respect to mitigation measure COS-3.10, the Farm Bureau argued that protesting the formation of new Williamson Act contracts within the planning area would not mitigate the impacts on important farmlands and Williamson Act lands in the planning area. AR 3:636, comment 03-35. The City's response completely ignores the Farm Bureau's complaint that the EIR describes COS-3.10 as a policy intended to conserve agricultural resources, when in fact, by protesting Williamson Act contracts, which are intended to protect farmlands and prevent their premature conversion, COS-3.10 would have the opposite effect. The City's responses to the Farm Bureau's comments relative to the EIR's alternatives analysis are no better. This is a failure by the agency to proceed in the manner required by law constituting an abuse of discretion.

The court issues the Writ of Mandate setting aside the City's approval of the GPU and the certification of the Final EIR as to its inadequate responses to Comments, and orders the City to comply with CEQA.

**VI. Sierra Club's Sixth Cause of Action is "Inadequate Analysis of Project Impacts."**

Although Sierra Club set forth several issues in its Petition under this cause of action, its opening brief only argued the inadequate analysis of project impacts as to the issue of global climate change. Thus, the court only discusses that issue finding the other issues abandoned.

The court agrees with Sierra Club on this issue. Although the City devoted subchapter 6.2 of the EIR to the issue of Climate Change (AR 2:403-410), it failed to show where in that section it analyzed stationary sources for GHG. The City appears to be arguing that it was not required to do so because no guideline specifically requires it; and the analysis of the Project's GHG emissions from stationary sources was unnecessary in light of the City's conclusions that the Project's impact on global warming is significant and unavoidable.

Under CEQA's general requirements, the City was required to estimate the Project's overall emissions, including stationary and non-statutory sources. Contrary to this requirement, the EIR only calculated the emissions from vehicular traffic. No explanation is given for why this calculation could be done without information about specific projects but the same could not be done for stationary sources. Sierra Club has shown that analytical models exist to calculate

emissions from stationary sources without the specific information as to later specific projects the City claims are necessary for this analysis. This is a failure to proceed in the manner required by law and is an abuse of discretion.

Before assessing the significance of the Project's impact on global warming the City was required to calculate the Project's GHG emissions using best available tools. (Berkley Keep Jets Over the Bay v. Board of Port Commissioners (2001) 91 Cal.App.4th 1344, 1371). Guideline section 15144 ("agency must use its best efforts to find out and disclose all that it reasonably can" about the Project's impacts).

The court issues the Writ of Mandate setting aside the City's approval of the GPU and the certification of the Final EIR as to its analysis of global climate change, and orders the City to comply with CEQA.

**VII. Sierra Club's Seventh Cause of Action is "Failure to Adequately Describe Project Goals and Objectives."**

This argument was not set forth in Sierra Club's opening brief; therefore the court considers Sierra Club abandoned this argument.

**VIII. Sierra Club's Eighth Cause of Action is "Finding Not Supported by Substantial Evidence."**

The court finds that this is not a cause of action but this argument is subsumed within the argument regarding the mitigation measures. Sierra Club argues that the City's finding that the significant impacts to the agricultural resources and air quality were "unavoidable," despite the proposed mitigation measures, is not supported by substantial evidence. See the discussion under section one regarding mitigation measures.

## CONCLUSION

For the reasons stated herein, and on the specific causes of action as stated herein, the court issues the Writ of Mandate setting aside the City's approval of the GPU and the certification of the Final EIR, and orders the City to comply with CEQA. Sierra Club shall

prepare a judgment and preemptory writ of mandate according to the court's ruling. The Writ shall include that this court does not direct respondent to exercise its lawful discretion in any particular way (Public Resources Code § 21168.9(c)) and this court will retain jurisdiction over respondent's proceedings by way of a return to this peremptory writ of mandate until the court has determined that respondent has complied with the provisions of CEQA (Public Resources Code § 21168.9(b). The judgment and writ shall be prepared in compliance with California Rule of Court, rule 3.1312.

March 12, 2009

Patrick J. O'Hara
Superior Court Judge