

No. B232655

Los Angeles Superior Court Case No. BS125233

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION EIGHT**

NEIGHBORS FOR SMART RAIL,
A Non-Profit California Corporation,
Petitioner and Appellant,

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vs.

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**EXPOSITION METRO LINE CONSTRUCTION AUTHORITY;
EXPOSITION METRO LINE CONSTRUCTION AUTHORITY BOARD,**
Respondents,

**LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION
AUTHORITY; LOS ANGELES COUNTY METROPOLITAN
TRANSPORTATION AUTHORITY BOARD,**
Real Parties in Interest and Respondents.

On Appeal From the Superior Court of Los Angeles County
Honorable Thomas I. McKnew, Jr., Judge Presiding

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TO BE FILED IN THE COURT OF APPEAL

APP-008

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APPELLANT/PETITIONER: Neighbors For Smart Rail RESPONDENT/REAL PARTY IN INTEREST: Exposition Metro Line Construction Authority; Exposition Metro Line Construction Authority Board	FOR COURT USE ONLY
<p style="text-align: center;">CERTIFICATE OF INTERESTED ENTITIES OR PERSONS</p> (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE	
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1. This form is being submitted on behalf of the following party (name): Exposition Metro Line Construction Authority

2. a. There are no interested entities or persons that must be listed in this certificate under rule 8.208.
 b. Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1)	
(2)	
(3)	
(4)	
(5)	

Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: November 7, 2011

Robert D. Thornton
(TYPE OR PRINT NAME)

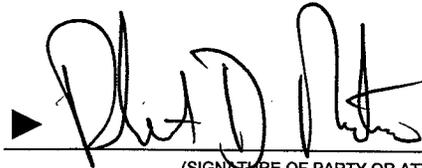

(SIGNATURE OF PARTY OR ATTORNEY)

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I. INTRODUCTION.

Los Angeles suffers from the worst traffic congestion and air quality in the nation. For that reason, over three decades ago, the citizens of Los Angeles County overwhelmingly endorsed a program to finance and build a comprehensive rail transit system. (30 AR 00888.) The rail transit system is the linchpin of the region's strategy to improve air quality through transit mobility, a strategy essential to the region's continued economic vitality and environmental health.

Over the next 20 years, the population of the Los Angeles Westside is projected to grow from 1.5 to 1.8 million persons. (736 AR 48078.) The number of jobs is also projected to increase by over 200,000. (*Ibid.*) The Expo Phase 2 Project ("Project") challenged in this lawsuit implements the regional and local transportation plans that address this projected growth and increase in employment. The Project is a component of the Southern California Regional Transportation Plan ("RTP") (439 AR 30061, 30069), the County-wide Long-Range Transportation Plan (3 AR 00022, 509 AR 33232), and the regional Air Quality Management Plan (3 AR 00022-23; 475 AR 31669) – all approved after extensive environmental studies.

The Final Environmental Impact Report ("FEIR"), challenged by Appellant Neighbors for Smart Rail ("NFSR") in this lawsuit, is the second EIR to evaluate alternatives for a light rail transit line on the Westside of Los Angeles ("Westside"). (5 AR 00141-77, 77 AR 12415.) The Project alternative selected by the Respondent, Exposition Metro Line Construction Authority ("Authority") reflects extensive public input obtained over the course of many years. (See 32 AR 901-942.) Prior to drafting the EIR, the Authority conducted four public meetings with over 700 people in attendance to solicit input on the Project's scope. (*Id.* 00902.) The Authority received and evaluated 1,800 written comments on proposed alternatives. (*Id.* 00905.) After circulation of the Draft EIR, the Authority conducted over 100 meetings with various cities, public agencies and

stakeholders, including three formal public hearings, business outreach meetings, and group presentations and alignment tours. (*Id.* 00916-25, 00928.) Before finalizing the EIR, the Authority received and responded to over 8,979 written and oral comments on the Draft EIR. (33 AR 00949.) The testimony and comments reflect overwhelming public support for the Project.

Despite over a decade of environmental analysis of transit alternatives connecting downtown Los Angeles with Santa Monica, NFSR demands further delay in a project that will employ thousands of Californians, provide much-needed traffic relief and reduce air pollution.

NFSR disagrees with the policy decision made by multiple agencies to establish light rail transit in the *existing* Exposition Corridor right-of-way adjacent to Cheviot Hills. Instead, NFSR wants the Project to depart from the existing right-of-way to avoid their neighborhood. Since NFSR knows that it cannot prevail in a challenge to this policy choice, it criticizes technical determinations and analytical methodologies approved by the region's transportation and air quality agencies and adopted by the Authority.

NFSR's challenge to the FEIR's traffic and air quality analysis is based on a claim that NFSR failed to raise during the lengthy administrative proceedings. The principal case NFSR relies upon to support this claim, *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351 ("*Sunnyvale*"), was decided five days before the trial court hearing in this action. *Sunnyvale's* assertion that the substantial evidence standard of review does not apply to the selection of the baseline is in conflict with the California Supreme Court decision in *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310 ("*CBE*") and several prior decisions of this Court. As such, the Court should not follow the reasoning of *Sunnyvale*.

NFSR's argument that CEQA required the FEIR to assume that any future increases in population and employment are the result of the Project defies common sense and ignores approved demographic projections. As the trial court concluded: "To analyze the project's effects on transportation assuming that the project's operation is the *only* change that will occur, is absurd." (3 JA 000718, emphasis added.)

NFSR's challenge must fail because the FEIR more than satisfies the "reasonable, good faith" disclosure requirements of the California Environmental Quality Act ("CEQA"), and because the Authority's findings are supported by substantial evidence, i.e., enough evidence to support a fair argument in favor of the Authority's decision to approve the Project.

II. STATEMENT OF FACTS.

A. Background to the Project.

1. Mid-City to Westside Transportation and Environmental Studies.

In 1999, Real Party in Interest, Los Angeles County Metropolitan Transportation Authority ("Metro") evaluated transportation alternatives for the Mid-City/Westside Study Area in its Mid-City/Westside Major Investment Re-Evaluation Study. Metro completed a Draft Environmental Impact Statement/Environmental Impact Report for transit alternatives in the Mid-City/Westside Study Area that evaluated seven alternatives for providing transit service from downtown Los Angeles to Santa Monica. (133 AR 16725.)

In 2005, Metro approved a modified light rail transit ("LRT") alternative ("Expo Phase 1 Project") from downtown Los Angeles to Culver City along Exposition Boulevard. (165 AR 18694; 168 AR 18840-67.) The Metro Board postponed additional environmental study of the extension of the LRT line to Santa Monica. (168 AR 18846.)

2. Notice of Preparation of the Draft EIR, Scoping Process and Identification of Alternatives.

On February 12, 2007, the Authority issued a notice of its intent to prepare an EIR for the Expo Phase 2 Project. (196 AR 20837-20849; 32 AR 00902.) Alternatives identified by the public in scoping meetings included an LRT alignment along the Exposition right-of-way; LRT alignment along Venice/Sepulveda; a bus rapid transit alignment along the Exposition right-of-way; No-Build; Transportation Systems Management; and, variations of the above alternatives. (9 AR 00288-90.)

3. Public Review of the Draft EIR.

On January 28, 2009, the Authority circulated the Draft EIR for the Expo Phase 2 Project. (78-85 AR 12416-14887; 521 AR 33407.) The Draft EIR evaluated six alternatives, including a “No-Build” alternative, transportation system management alternative (bus and other transportation improvements without major new capital investment), and four different LRT alignments (LRT1, LRT2, LRT3, and LRT4). Each of the LRT alignments was further broken down into segments (1, 1a, 2, 3, and 3a) for purposes of environmental analysis. (9 AR 00241, 00246-47, 00250-51.)¹

4. Preparation and Public Review of the Final EIR.

Agencies, individuals and interest groups submitted over 8,979 oral and written comments on the Draft EIR. (7 AR 00171.) The comments overwhelmingly supported extension of the light rail line to Santa Monica. (*Id.* 00175.) The Authority prepared a written response to every comment submitted on the Draft EIR. (See 33-43 AR 00943-8016.)

The Authority conducted additional environmental analysis on issues raised by the public, and identified five design options for the Project,

¹ See Exhibits A through D, attached, for maps of the approved Project alternative and Project stations within each segment.

including a grade-separated crossing at Sepulveda Boulevard, elimination of parking at the Expo/Westwood Station, a buffer design for the maintenance facility, retention of parking along Colorado Avenue, and redesign of the Colorado/4th Street station. (3 AR 00022; 101 AR 14952.) As NFSR concedes, the Authority further analyzed the Overland Avenue and Westwood Boulevard grade crossings in coordination with the Los Angeles Department of Transportation (“LADOT”). The additional analysis confirmed the conclusions of the Draft EIR that the Overland Avenue and Westwood Boulevard crossings would operate safely at grade with effects mitigated to a less-than-significant level. (101 AR 14953.)

As NFSR requested, the Authority also analyzed two grade-separated design options for Overland Avenue and Westwood Boulevard. (Metro’s Br., § III.C. [Alternatives].) Based on that additional analysis, the Authority decided not to pursue either of NFSR’s design options because neither would avoid or substantially lessen any significant impacts, but would instead cause significant impacts. (*Ibid.*)

On December 21, 2009, the Authority made the FEIR available for additional public reviews and comment. (707 AR 45927.)

5. Certification of the Final EIR and Project Approval.

On February 4, 2010, the Authority held a public hearing to consider certification of the FEIR and approved the Expo Phase 2 Project. (2 AR 00006.) Dozens of individuals and organizations, including NFSR, submitted written comments and appeared and testified at the hearing. (See, e.g., 727 AR 46941-90.) After consideration of all public comments, the Authority certified the FEIR. (2 AR 00005-07.) The Authority also adopted alternative LRT2, with modifications, and adopted detailed findings supporting the Authority’s decision, a Statement of Overriding Considerations and a Mitigation Monitoring and Reporting Program. (3 AR 00008-131.)

6. Trial Court Proceedings.

NFSR filed a petition for writ of mandate against the Authority and the Federal Transit Administration (“FTA”), challenging the agencies’ compliance with CEQA and the National Environmental Policy Act (“NEPA”). (1 JA 000001-21.) FTA removed the action to federal court. (*Id.* 000112-15). In response, NFSR amended its pleadings to exclude its NEPA cause of action, the parties stipulated to dismiss FTA and the court remanded the action to the Superior Court of California. (*Id.* 000157-63.) The Authority filed a demurrer to the third cause of action (concerning a challenge to the Expo Phase 1 Project) and NFSR dismissed its third cause of action. (*Id.* 000196-210, 000251-53.) Following briefing and oral argument, the trial court denied NFSR’s writ of mandate on all grounds. (3 JA 000716-25.) The trial court entered final judgment on March 4, 2011 (*id.* 000745-46), and NFSR filed a notice of appeal on April 25, 2011 (*id.* 000806-09).

III. STANDARD OF REVIEW.

The adequacy of an EIR is presumed; the appellant has the burden of proving otherwise. (Evid. Code, §664; *State of Cal. v. Super. Ct.* (1990) 222 Cal.App.3d 1416, 1419.) An appellate court’s review of the administrative record in a CEQA case is the same as the trial court’s; the issue is whether the decision of the public agency is supported by substantial evidence. (*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564.)

“Substantial evidence” is defined as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, *even though other conclusions might also be reached.*” (Guidelines,² §15384, subd. (a), emphasis added.) A court

² All references to “Guidelines” are to the State CEQA Guidelines, Cal. Code Regs., tit. 14, §§15000 et seq.

“may not set aside an agency’s approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable.” (*Western States Petroleum Assn. v. Super. Ct.* (1995) 9 Cal.4th 559, 573-574.) Disagreement among competing experts does not render an EIR inadequate. (Guidelines, §15151; *Browning-Ferris Indus. v. City Council* (1986) 181 Cal.App.3d 852, 863.) In applying the substantial evidence standard, a reviewing court must resolve reasonable doubts in favor of the administrative finding and decision. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514.) In other words, the question under the substantial evidence test is **not** whether there is substantial evidence to support the conclusions of the opponents of a project; the question is **only** whether there is substantial evidence to support the decision of the agency in approving the project. (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 407 (“*Laurel Heights I*”).)

A reviewing court must also bear in mind that “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* (1999) 70 Cal.App.4th 20, 26.) And an EIR that is deficient in one respect may nevertheless be adequate when viewed in its entirety. (*Al Larson Boat Shop, Inc. v. Bd. of Harbor Comms.* (1993) 18 Cal.App.4th 729.)

IV. NFSR HAS FAILED TO PROVE THAT ANY ASPECT OF THE FEIR IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The Court Must Reject NFSR’s Challenge to the Authority’s Use of a 2030 Baseline for Traffic and Air Quality/Greenhouse Gas Analysis.

1. NFSR Failed to Exhaust Its Administrative Remedies Regarding Its “Baseline” Argument.

Exhaustion of administrative remedies during the public comment period is a jurisdictional requirement. (Pub. Resources Code, §21177, subd. (a); *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199 .) The petitioner bears the burden of proving that the issue was timely raised before the lead agency. (*Porterville Citizens for Responsible Hillside Dev. v. City of Porterville* (2007) 157 Cal.App.4th 885, 909.) The purpose of issue exhaustion is to afford the agency the opportunity to correct any errors or show why it has not erred before the courts intervene. (*Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 282.) “To advance the exhaustion doctrine’s purpose ‘[t]he “exact issue” must have been presented to the administrative agency . . . [Citation].’” (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535.) “[G]eneralized environmental comments at public hearings,’ ‘relatively . . . bland and general references to environmental matters’ [citation], or ‘isolated and unelaborated comment[s]’ [citation] will not suffice [to preserve an issue for appeal under CEQA].” (*Id.* at p. 536.)

NFSR did not exhaust the issue of whether the Authority improperly analyzed impacts to traffic, air quality or greenhouse gas emissions against a 2030 No-Build baseline. (See App. Br., 10-20.) During the administrative proceedings, no one criticized the Draft EIR for using what Appellant is now calling a “hypothetical” 2030 baseline to analyze any of these impacts. As the trial court concluded, no one argued that the FEIR

should have addressed traffic impacts “upon the commencement of rail operations in 2015.” (2 JA 000512.) No one criticized the thresholds of significance for traffic or air quality impacts for measuring the significance of such impacts against 2030 conditions. In addition, no one raised the issue in terms of short-term vs. long-term impacts, as NFSR now does in light of the decision in *Sunnyvale*, which was certified for publication on December 16, 2010, just days before the hearing below. “If a party wishes to make a particular methodological challenge to a given study relied upon in planning decisions, the challenge must be raised in the course of the administrative proceedings.” (*San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 686-687.)

In a comment letter, NFSR raised what it characterized as a “baseline” issue (727 AR 46952), and reiterated the same in its Petition (1 JA 000011). But the “baseline” issue raised in the administrative process and the Petition had nothing to do with the use of 2030 No-Build traffic and air quality conditions to measure the significance of traffic and air quality impacts. Instead, NFSR complained that the Authority designed the Project to include improvements to area intersections to avoid any potentially significant impacts to traffic at intersections near three specific at-grade crossings (727 AR 46952-55, 46959; 1 JA 000011), a responsible practice that CEQA actually encourages. (*County of Orange v. Super. Ct.* (2003) 113 Cal.App.4th 1, 10; see also *County of Inyo v. City of Los Angeles* (1984) 160 Cal.App.3d 1178, 1185 [holding that projects “must be open for public discussion and agency modification during the CEQA process”].)

Not only did NFSR fail to exhaust its administrative remedies on the use of a 2030 No-Build baseline, but where it did address the use of a 2030 baseline, *it criticized the Authority for not using a 2035 baseline*. NFSR agreed with the Authority that “[t]he traffic study and corresponding air quality analysis *should be* based upon a 20-year planning horizon for

environmental analysis” (727 AR 46961, emphasis added); but it disagreed with the Authority’s use of 2006 regional planning data. Instead, NFSR argued that the Authority should have used 2008 data “that uses the year 2035 for its modeling and planning horizon for transportation planning in the region.” (*Ibid.*) NFSR also argued that, “[t]he Expo Phase II project should also use the year 2035 to evaluate the cumulative impacts of the proposed project and planned projects.” (*Id.* at 46962.)

Because NFSR cannot meet its burden of showing that the baseline issue was exhausted during the administrative proceedings, the issue may not be considered on appeal. As the United States Supreme Court observed regarding the exhaustion requirement under the parallel National Environmental Policy Act:

[A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that “ought to be” considered and then, after failing to do more to bring the matter to the agency’s attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters “forcefully presented.”

Vt. Yankee Nuclear Power Corp v. Natural Resources Defense Council, Inc. (1978) 435 U.S. 519, 553-554.) The Court of Appeal has similarly declared:

[A]ppellate review is limited to issues in the record at the administrative level. . . . “It was never contemplated that a party to an administrative hearing should . . . make only a perfunctory or ‘skeleton’ showing in the hearing and thereafter obtain an unlimited trial de novo, on expanded issues, in the reviewing court. [Citation.] The rule compelling a party to present all legitimate issues before the administrative tribunal is required in order to preserve the integrity of the proceedings before that body and to endow them with a dignity beyond that of a mere shadow-play.”

(*City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1019-1020, quoting *Bohn v. Watson* (1954) 130 Cal.App.2d 24, 37, cited by *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197.)

Even if NFSR could show that the issue was exhausted, which it cannot, use of 2030 conditions to determine the traffic and air quality impacts of a regional transit project is supported by substantial evidence.

2. The Court Should Not Retroactively Apply the New Standard of Review Described in *Sunnyvale*.

While the general rule is that judicial decisions are given retroactive effect, in cases where retroactive application of a judicial decision would unfairly undermine the reasonable reliance of parties on the previously existing state of the law, courts may consider giving only prospective application to that decision for reasons of fairness and public policy. (*Woods v. Young* (1991) 53 Cal.3d 315, 330; *Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 983.) Particular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the new rule. (*Woods, supra*, 53 Cal.3d at p. 330.) Reliance by litigants on a former rule and the unforeseeability of change support prospective application of judicial decisions. (*Ibid.*) Accordingly, courts do not apply full retroactivity to a decision when "the circumstances of a case draw it apart from the usual run of cases." (*Newman, supra*, 48 Cal.3d at p. 983; see *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 193.)

In conflict with prior case law, including the Supreme Court's opinion in *CBE, Sunnyvale* concluded that the selection of a post-approval baseline to determine the significance of traffic and air quality impacts is not subject to the substantial evidence standard of review. (190

Cal.App.4th at p. 1379.) This new rule stands in stark contrast to the long line of CEQA cases³ establishing that choice of baseline is a factual determination that must be upheld if it is supported by substantial evidence. The Authority relied on this unbroken line of cases. (3 AR 00016-17.) Thus, even if the Court were to determine that *Sunnyvale* limits a lead agency’s discretion in choosing a baseline, the Court should not apply the entirely new and unprecedented standard of review articulated in *Sunnyvale* to this case. (*Bloom v. McGurk* (1994) 26 Cal.App.4th 1307, 1315 [declining to follow reasoning of Third Appellate District regarding definition of “change in environment” under CEQA].)

3. The FEIR Disclosed Changes to Existing and Future Traffic and Air Quality Conditions.

NFSR claims that the FEIR fails to evaluate changes to existing traffic and air quality conditions in the Project study area. The trial court rejected this argument, finding that the FEIR “discussed *both* the existing and future conditions when analyzing traffic impacts.” (3 JA 000719, emphasis in original.) The FEIR directly compares existing measures of traffic performance (daily and peak vehicle miles traveled, daily and peak vehicle hours traveled, daily and peak average speed) against these performance measures under the project alternatives.⁴ The FEIR also

³ See, e.g., *CBE, supra*, 48 Cal.App.4th at p. 328; *Cherry Valley Pass Acres and Neighbors v City of Beaumont* (2010) 190 Cal.App.4th 316, 336-337; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 674; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270; *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99 (“*Save Our Peninsula*”).

⁴ See 3 AR 00017; 11 AR 00336-45, 00353-54; 72 AR 10737-40 [Performance Measures for Current Year and Project Alternatives for Year 2030], 10748-49 [LOS E/F Intersections for Current and Year 2030 No-Build Alternative].

compares existing and future air quality conditions,⁵ evaluating “the nature and magnitude of the change in the air quality environment due to implementation of the proposed project” using methods and significance thresholds recommended by the South Coast Air Quality Management District (“SCAQMD”).⁶ SCAQMD recommends that for a project that has a future planning horizon, an agency compare project operational emissions to the projected future baseline for the horizon year. (122 AR 15326.) The FEIR used this methodology to determine whether the Project would have significant effects on air quality. (59 AR 08303; see *Cadiz Land Co. v. Rail Cycle L.P.* (2000) 83 Cal.App.4th 74, 106 [upholding agency use of federal air quality standards to conclude that air quality impacts on agriculture were not significant].)

4. The Authority’s Use of Projected 2030 Conditions to Evaluate Traffic and Air Quality Effect Was Proper Because It Allowed for Informed Decision-Making.

“The purpose of an EIR is to give the public and government agencies the information needed to make informed decisions.” (*In re Bay-Delta Programmatic Env’tl. Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162.) Thus, the touchstone for determining an EIR’s compliance with CEQA is whether the EIR includes the information to allow an informed decision regarding the project’s environmental impacts. This larger purpose must be served by the baseline.

As it must, NFSR concedes that the FEIR evaluated the effects of the Project over time. (App. Br., 12.) Indeed, during the administrative process, NFSR urged the Authority to use a 2035 “baseline” to evaluate the

⁵ 13 AR 00495-510, 00515-18 [air quality analysis]; 59 AR 08294-95, 08310, 08391, 08406-09 [Existing Conditions], 08410-13 [No Build Conditions 2030], 08422-25 [Project 2030 Conditions], 08439-58 [Expo Construction 2011-2013].

⁶ 13 AR 00504; see 122 AR 15310-12, 15352-54 [SCAQMD CEQA Handbook].

traffic and air quality impacts. (727 AR 46962.) But for the first time at trial and again on appeal, NFSR mischaracterizes the projected 2030 baseline conditions as “hypothetical.” There is a profound difference between projected conditions supported by substantial evidence and “hypothetical” or “illusory” conditions, which are terms of art developed by the courts to address a very specific agency practice that did not occur in this case.

NFSR also concedes that in order to evaluate cumulative effects (such as traffic and air quality), the EIR necessarily must consider the anticipated growth in population and the traffic generated by that growth. (App. Br., 25-27.) But while conceding that the EIR is required to evaluate impacts in light of projected future conditions, NFSR argues that the Authority has no discretion to use that analysis to determine whether the effects of the Project are significant.

The trial court rejected NFSR’s argument: “[The Authority] apparently believes, as does this court, that the comparison of future conditions in this situation provides more meaningful information to the public and to the decisionmakers.” (3 JA 000719.)

NFSR’s argument is based on a fundamental misperception of the law and the nature of regional traffic and air quality impacts. CEQA requires agencies to consider the potential impacts of a project over time. CEQA recognizes that fact-based determinations (such as the identification of a significance threshold and the appropriate methodology to evaluate whether the significance threshold is exceeded) are within the agency’s discretion subject to review by the courts under the substantial evidence standard of review. (See Guidelines, §15064; *Eureka Citizens for Responsible Govts. v. City of Eureka* (2007) 147 Cal.App.4th 357, 371-373 [lead agency has discretion to choose its methodology].)

As demonstrated below, the FEIR provided a good faith disclosure of the changes in traffic and air quality conditions, both as they existed

prior to the preparation of the EIR and as they are projected to exist in 2030. Even if the Court disagrees with the Authority's methodology used to determine the significance of traffic and air quality impacts, it must uphold the Authority's decision because it is supported by substantial evidence.

NFSR contends that future conditions cannot, as a matter of law, provide the baseline for reviewing significance, relying on the argument in the Sixth District Court of Appeal's decision in *Sunnyvale*, *supra*, 190 Cal.App.4th 1351. But *Sunnyvale* conflicts with the Supreme Court's decision in *CBE* and prior decisions of this Court on the standard of review applicable to a public agency's selection of a baseline. (See fn. 3, *supra*.) As such, the Court should decline to follow *Sunnyvale*. In *CBE*, the Supreme Court applied the substantial evidence standard of review to a lead agency's selection of a baseline. *CBE*, not *Sunnyvale*, must govern this Court's review of the baseline selected by the Authority for assessing the significance of the environmental effects of the project on traffic and air quality.

Whether or not the selection of a baseline is subject to substantial evidence review, or is precluded as a matter of law, is an issue of decisive significance, as held by the Supreme Court:

Judicial review of these two types of error differs significantly: While we determine de novo whether the agency has employed the correct procedures, "scrupulously enforc[ing] all legislatively mandated CEQA requirements" (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 [276 Cal.Rptr. 410, 801 P.2d 1161]) we accord greater deference to the agency's substantive factual conclusions. In reviewing for substantial evidence, the reviewing court "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable," for, on factual questions, our task "is not to weight conflicting evidence and determine who has the better argument." (*Laurel Heights I*, *supra*, 47 Cal.3d at p. 393.)

(Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 435.)

The Supreme Court held, in *CBE*:

Neither CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline. Rather, an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can more realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence. (See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, supra*, 40 Cal.4th at p. 435.)

(*CBE, supra*, 48 Cal.4th at p. 328.)⁷ “[T]he agency has the discretion to resolve factual issues and to make policy decisions. If the determination of a baseline condition requires choosing between conflicting expert opinions or differing methodologies, it is the function of the agency to make those choices based on all of the evidence.” (*Save Our Peninsula, supra*, 87 Cal.App.4th at p. 120.)

An agency’s use of discretion in selecting a baseline has been explicitly reserved in the CEQA Guidelines. Section 15125, subdivision (a), states that the baseline will “normally” consist of conditions existing as of the time of the notice of preparation, or, where there is no notice of preparation, at the time environmental review is commenced. The Supreme Court, in *CBE, supra*, acknowledged the flexibility built explicitly into the Guidelines, stating:

Where environmental conditions are expected to change quickly during the period of environmental review for reasons other than the

⁷ The leading authorities on CEQA recognize that “a lead agency has considerable flexibility in defining the baseline.” (1 California Environmental Law & Land Use Practice (2010) Environmental Impact Reports, §22.04[5][a], p. 22-67; see 1 Kostka & Zischke, Practice Under the California Environmental Quality Act (2d ed. 2011) Project Description, Setting, and Baseline, §12.20, p. 599.)

proposed project, project effects might reasonably be compared to *predicted conditions* at the expected date of approval, rather than to conditions at the time analysis is begun.

(48 Cal.4th at p. 328, emphasis added.)

The Supreme Court has therefore acknowledged that *predicted* future conditions will in some cases serve as the baseline for assessment of environmental impacts. The Supreme Court’s reference to the expected date of project approval, as the context reveals, is merely illustrative of the Court’s broader ruling on the discretion enjoyed by public agencies in selecting an environmental baseline. There is nothing in the Court’s description of the example employed, or in any other portion of its holding, that could arguably be read to create a restriction that limits future predicted conditions to only those that will exist at or before the time of project approval.

Nevertheless, according to *Sunnyvale*, “nothing in the law authorizes environmental impacts to be evaluated only against predicted conditions more than a decade after EIR certification and project approval.”

(*Sunnyvale, supra*, 190 Cal.App.4th at p. 1380.) But *Sunnyvale* cites no legal authority for this proposition. Indeed, given the flexibility implicit in the Guidelines’ use of “normally,” and the Supreme Court’s application of substantial evidence review to selection of a baseline, the burden rests with those who contend that CEQA prohibits evaluation of environmental impacts against predicted conditions accruing later than project approval.

5. The *EPIC* Line of Cases Does Not Apply Where the Project Does Not Propose to Change an Approved Plan.

“Existing conditions,” as a baseline for evaluating the significance of environmental effects, was first developed in the case of *Environmental Planning & Information Council v. County of El Dorado* (“*EPIC*”) (1982) 131 Cal.App.3d 350, to address a very specific problem, a problem that

does *not* exist in this case: From time to time, public agencies attempt to compare the effects of a project to the level of development that had been *planned* or *authorized* (but not yet built) according to a previous general plan or permit.

The EIRs in the *EPIC* line of cases compared the effects of a new proposed plan against the effects of a prior (but not constructed) plan. For example, in *EPIC*, the approved general plan authorized a housing level that accommodated a population of 133,000. The housing level in the applicant's proposed plan would only accommodate a population of 28,200. (*Id.* at pp. 357-58.) On this basis, the EIR concluded that the new proposed plan would result in a "substantial population reduction" and a decrease in environmental impacts. (*Id.* at p. 357.) In reality, the applicant's proposed general plan amendments "actually call for substantial increases in population" in the area. (*EPIC, supra*, 131 Cal.App.3d at p. 358.)

EPIC and its progeny characterize the level of development in the approved (but *not* built) land use plans as "hypothetical conditions" because the plan that the applicant, in those cases, sought to amend did not exist and would never exist if the applicant's plan was approved. Instead, in this circumstance, EIRs should "compare what will happen if the project is built with what will happen if the site is left alone." (*Woodward Park Homeowners Assn. v. City of Fresno* (2007) 150 Cal.App.4th 683, 707.) As discussed in Section IV.A.6, *infra*, the FEIR's evaluation of traffic and air quality effects compared what will happen if the Project is built with what will happen if the Project is not built (i.e., if the Project site is left alone).

The *EPIC* line of cases have been applied only where a public agency used as a baseline a *prior plan or permit* that would be superseded by the approval of the proposed project. No court prior to *Sunnyvale* had ruled that *predicted* conditions, which, unlike the baseline conditions in *EPIC*, would remain unchanged after project approval, could not, as a matter of law, serve as the baseline for assessing the environmental impacts

of the project. Indeed, the logic embedded in the Guidelines and CEQA case law stands for precisely the opposite conclusion, i.e., that predicted conditions (such as population increases reflected in adopted demographic projections) **must** be factored into the baseline selected by the public agency for assessment of the significance of environmental effects over the life of the project.

For example, Guidelines section 15125, subdivision (e), to which *Sunnyvale* refers (though without discussion) reads:

Where a proposed project is compared with an adopted plan, the analysis shall examine the existing physical conditions at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced ***as well as the potential future conditions discussed in the plan.***

(Guidelines, §15125, subd.(e), emphasis added.)

This provision of the Guidelines was clearly adopted to avoid the plan-to-plan comparisons condemned in *EPIC* and its progeny, and cannot be interpreted as imposing a similar limit, as a matter of law, on the analysis of all project impacts.

Guidelines section 15064, subdivision (d) places additional emphasis on the need to consider future conditions in evaluating the significance of environmental effects:

In evaluating the significance of the environmental effect of a project, the lead agency shall consider direct physical changes in the environment which may be caused by the project and reasonably foreseeable indirect physical changes in the environment which may be caused by the project.

(Guidelines, § 15064, subd. (d).)

The need to consider future conditions is especially acute where the evaluation of cumulative effects is concerned. Section 15064, subdivision (h)(1) provides:

When assessing whether a cumulative effect requires an EIR, the lead agency shall consider whether the cumulative impact

is significant and whether the effects of the project are cumulatively considerable. An EIR must be prepared if the cumulative impact may be significant and the project's incremental effect, though individually limited, is cumulatively considerable. "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 probable future projects.

(Guidelines, §15064, subd. (h)(1).)

Therefore, the question of whether the incremental effects of a project are "cumulatively considerable" *requires* consideration of probable future projects, i.e., a baseline that can be determined only upon consideration of future conditions. Such future conditions must, as the Guidelines state, consider the effects of probable future projects.

The determination of whether a project will have cumulatively considerable effects also necessarily involves the consideration of predicted future conditions set forth in pertinent planning documents.⁸ As provided in section 15064, subdivision (h)(3):

A lead agency may determine that a project's incremental contribution to a cumulative effect is not cumulatively considerable if the project will comply with the requirements in a previously approved plan or mitigation program (including, but not limited to, water quality control plan, air quality attainment or maintenance plan, integrated waste management plan, habitat conservation plan, natural community conservation plan, plans or regulations for the reduction of greenhouse gas emissions) that provides specific requirements that will avoid or substantially lessen the cumulative problem within a geographic area in which the project is located. . . .

(Guidelines, §15064, subd. (h)(3).)

⁸ The FEIR analyzed the Project's consistency with broad regional policies and specific implementation measures, and also analyzed the Project's consistency with local land use planning documents. (See Metro Br., § III.A.1.)

The CEQA Guidelines specify a number of other factors to be considered in assessing the significance of an environmental effect that negate the suggestion that *as a matter of law*, agencies are restricted to considering conditions accruing no later than the time of project approval. For example, section 15065 mandates a finding of significant effect where the project “has the potential to achieve short-term environmental goals to the disadvantage of long-term environmental goals.” Section 15065 therefore compels the lead agency to consider future conditions in its evaluation of significance. *Sunnyvale*, by contrast, limits the analysis to short-term effects, and compels the exclusion of future conditions in direct contradiction of section 15065.

The selection of a baseline is a methodological determination, committed by the courts and the CEQA Guidelines to the discretion of the lead agency, and must be upheld so long as substantial evidence supports the agency determination.

6. Substantial Evidence Supports the Methodology the Authority Used to Determine the Significance of Traffic and Air Quality Effects.

a) Traffic Analysis.

Southern Californians know all too well that traffic congestion on the Westside is severe, and that traffic congestion is projected to get worse. It is well-documented that this traffic and the resulting air quality problems in Los Angeles are largely attributable to Los Angeles’ historic and continuing population and employment growth and the region’s historic reliance on the automobile as the primary mode of transportation. (See, e.g., 438 AR 29823-25, 29878-86; 126 AR 15937, 15940.)

Every applicable local, regional and state transportation and air quality agency recommends development of a modern transit system in the region to maintain mobility and comply with State and Federal air quality laws. (438 AR 29916-19; 126 AR 16018-19, 16073; 168 AR 18842-43,

469 AR 31460-61, 31466-67.) The FEIR discloses that, due to population and employment growth, traffic congestion and resulting air emissions will increase in the Project study area over the next twenty years. (8 AR 00218-34.) These increases are neither hypothetical nor speculative. For example, the FEIR documents that traffic at intersections in the Project study area will worsen over time if the Project is not built:

Twenty-eight of the ninety study area intersections currently operate at LOS E or F. . . . In 2030, with no additional transit investment, 38 of 90 study area intersections are projected to operate at LOS E or F

(8 AR 00233; see also 72 AR 10738-39.)

Conversely, the Project will contribute to a reduction in automobile emissions by *reducing* vehicle miles traveled and vehicle hours traveled.⁹ (11 AR 00353.) While the Project cannot be expected to, by itself, eliminate all congestion in the area, the Project will be one element of an integrated regional transit system that will serve to reduce reliance on the automobile and buses, which contribute to traffic congestion.

The FEIR's 103-page traffic study used state-of-the art traffic demand forecasting models (not challenged by NFSR) to define a study area that would capture substantive changes in traffic from implementation of the Project. (72 AR 10699, 10718-21.) It evaluated both potential local and regional impacts on the transportation system. (11 AR 00331; 72 AR 10699, 10718-21, 10724-80; see also 34 AR 01055.)

NFSR faults the Authority for including in the 2030 conditions improvements such as the "Interstate-405 Carpool Lane Widening Project, and Interstate-10/Robertson Boulevard interchange, and the Overland Avenue Bridge Widening." (App. Br., 14.) The Guidelines provide that

⁹ The FEIR also evaluated emissions from construction of the Project. (59 AR 8303.)

the EIR shall examine “what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community service.” (Guidelines, §15126.6(e)(2).) Consistent with the Guidelines, the No-Build alternative included transit services and roadway construction projects explicitly committed to be constructed by the year 2030, as defined in the SCAG RTP. (72 AR 10718-19.) These projects included the Interstate-405 Widening (***currently under construction***), and which was programmed and funded and are expected to occur, independent of and regardless of whether the Project was built.¹⁰ (*Ibid.*; 476 AR 32006, 32079.) The No-Build alternative also included full implementation of the Metro Rapid Bus program, which includes 28 routes across the county. Of the 28 routes, 27 of them were operating when the FEIR was approved and one (“Wilshire BRT”) was funded with a projected start date of 2015. (509 AR 33216, 33233.)

The traffic study evaluated ninety intersections on the Westside. (11 AR 00336-40.) The study area included all of the intersections adjacent to at-grade crossings and nearby intersections that could potentially be affected by a queue extending back from the at-grade crossings at the light rail tracks. (72 AR 10704-09.) The FEIR also calculated the average vehicular delay at the proposed crossings to evaluate the extent of additional traffic delay due to the at-grade crossings on the Project’s alternative alignments. (11 AR 00368-69; 72 AR 10735-37.)

The FEIR evaluated the impact of the Project using the Highway Capacity Manual (“HCM”) developed by the Transportation Research Board and approved by the Federal Transit Administration (“FTA”). (72 AR 10718.) The HCM is used widely to evaluate LRT projects where congested or oversaturated intersection conditions exist. (*Id.* 10716-18.)

¹⁰ The Overland Avenue Bridge Widening project was not included in the No-Build alternative. (See 9 AR 00317; 29 AR 00864.)

Relying on the advice of the traffic engineers, the Authority selected several thresholds of significance for evaluating traffic impacts. (11 AR 00351, 00355, 00371, 00377.) The Authority has the discretion to rely on the advice of experts in determining significance of traffic impacts. (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 362.)

With regard to localized traffic impacts, the FEIR used the HCM methodology to define a significant intersection impact:

If the project traffic is projected to cause deterioration in the level of service [“LOS”] to LOS E or worse . . . [or] if the intersection is already operating at LOS E or F and the project results in an increase in the average vehicle delay of 4 seconds or more at the intersection compared to the No-Build condition.

(11 AR 00350, 00375.)¹¹

The FEIR disclosed how traffic and air quality conditions are anticipated to change over time by clearly disclosing both existing and future traffic and air quality conditions. (See fns. 4, 5, *supra*.) Under NFSR’s argument, the FEIR would attribute to the Project *all* increases in traffic (and resulting air emissions) that will occur on the Westside between the date of the EIR’s Notice of Preparation (2007) and the Project’s planning horizon (2030). Under NFSR’s methodology, future traffic congestion and air emissions attributable to population and employment growth that are projected to occur, whether or not the Project is built, would be an impact of the Project. The trial court rejected this argument, stating that “[t]o analyze the project’s effects on transportation assuming that the project’s operation is the *only* change that will occur, is absurd.” (3 JA 000718, emphasis added.)

¹¹ This threshold of significance is more conservative than the 5-second value used for the Expo Phase 1 project and other Metro corridor projects. (34 AR 01056.)

The trial court is correct. First, the Project could not possibly be responsible for any increases in traffic that occur before the Project opens (projected to be 2015). If traffic and air emissions increase between 2007 and 2015, something other than the Project *must* be the cause of the increase. Second, the Project cannot be responsible for additional traffic that will be generated as a result of increases in population and employment. Third, as a light rail transit project, the Project will not generate additional automobile trips after the Project opens in 2015; rather, it will help *reduce* automobile trips. (72 AR 10738.) As the trial court concluded, the traffic study indicates that the Project will actually *improve* traffic conditions at four of five intersections that are projected to be more congested in the future should the Authority not construct the Project:

[R]espondents presented a summary illustrating how the level of service at the five worst intersections would be affected by “no build” and LRT alternatives. What is clear from the examples, and ostensibly clear to the preparers of the EIR, was that the level of service would worsen at these intersections no matter what.

(3 JA 000719; see *id.* 000713; Appendix, Exh. F.)

NFSR cites six out of the ninety intersections analyzed in the FEIR to criticize the Authority’s methodology in determining traffic effects. (App. Br., 16 & fn. 10.) These issues were not presented to the Authority during the comment period, and should not be entertained for the first time on appeal. Nevertheless, as demonstrated below, there is substantial evidence supporting the Authority’s determination that the Project will not have a significant effect on traffic at any of these six intersections.

Manning/I-10 Westbound (Intersection No. 69). As shown in the Project Map (Segment 1) attached hereto as Exhibit B, and the photo attached hereto as Exhibit E, the Project alignment nearest this intersection (located on the existing Exposition rail corridor right-of-way) is grade-separated (elevated). (See 9 AR 00252.) Thus, while traffic congestion at

this intersection is projected to get worse in the future, substantial evidence, and common sense, supports the Authority's finding that the Project will not have a significant effect on traffic at this intersection. The FEIR shows that traffic delays at this intersection will be reduced in the AM and PM peak periods in 2030 compared to conditions if the Project is not built. (11 AR 383, 386; see also 3 JA 713, 719.)

Bundy/Olympic, Bundy/Pico, Sawtelle/Pico (Intersection Nos. 26, 28, 34). As shown in Exhibit C (Project Map – Segment 2), the Project alignment at the LRT crossings nearest these intersections are grade-separated (elevated). (See 9 AR 00263-68; 72 AR 10730-32 [showing grade-separated LRT crossings at Bundy/Expo]; for Sepulveda grade-separation, see 118 AR 15030, 15032 and RJN, Exh. A (Resolution No. 11)].) Indeed, the FEIR indicates that traffic delays at the above intersections will be reduced in the AM peak period at each of the above intersections in 2030 compared to conditions if the Project is not built. (11 AR 00397-98.) In the PM peak period, traffic delays are reduced at Bundy/Olympic and are unchanged at Bundy/Pico in 2030. (11 AR 00399.) There is a 2.3 second increase in delay during the PM peak period at Sawtelle/Pico, but this slight increase is below the 4-second threshold of significance used in the traffic analysis. (11 AR 00400.)

As the FEIR clearly discloses, there is some slight reduction in the Level of Service between 2007 and 2030 during certain time periods for the above intersections. (Compare 11 AR 00388 with 11 AR 00397-398; see 3 JA 713, 719.) However, the fact that the average delay time at these intersections in 2030 goes down, does not change, or, in one instance, slightly increases, is substantial evidence supporting the Authority's finding that the Project will not have a significant traffic effect at these locations.

20th/Olympic (Intersection No. 15). While the traffic analysis projects that Level of Service at 20th/Olympic will be reduced between 2007 and 2030, the reduction in Level of Service occurs whether or not the

Project is built. (Compare 11 AR 00337 with 11 AR 00405, 00407; see 3 JA 713, 719.) More importantly, the traffic analysis indicates that the intersection of 20th Street and Colorado (Intersection No. 14), on the north side of the LRT crossing, remains at good Levels of Service (i.e., “B” or “C”) in 2030 with the construction of the Project. (11 AR 00405, 00407.) There is less than a 0.2-second increase in delay during the AM peak hour between 2007 and 2030 with the Project at 20th/Colorado. (Compare 11 AR 00337 with 11 AR 00405.) During the PM peak hour there is a very small 1.1-second increase in delay at this location between 2007 and 2030. (Compare 11 AR 00337 with 11 AR 00407.) The two intersections (20th/Olympic and 20th/Colorado) are located nearly equidistant to the rail crossing at 20th. (See 72 AR 10725.) As shown in Exhibit D (Project Map – Segment 3a), the Project will be grade-separated (elevated) immediately to the east of 20th at Olympic. (72 AR 10732.) Thus, there is substantial evidence supporting the Authority’s finding that the Project will not have a significant traffic impact at 20th/Olympic.

Barrington/Olympic (Intersection No. 29). The Level of Service at Barrington/Olympic during the AM peak hour remains unchanged from 2007 to 2030 with the construction of the Project. (Compare 11 AR 00338 with 11 AR 00398.) During the PM peak hour, the Level of Service is reduced one level (i.e. from “D” to “E”) between 2007 and 2030. (Compare 11 AR 00338 and 11 AR 00400.) However, the FEIR indicates that the Project will reduce traffic delays by an average of 3 seconds at this location compared to conditions if the Project is not built. (11 AR 00400.) Again, substantial evidence supports the Authority’s finding that the Project will not cause a significant traffic impact at Intersection No. 29.

b) Air Quality Analysis.

NFSR’s criticism of the methodology used to evaluate air quality impacts was not presented to the Authority during the comment period, and is, therefore, beyond the Court’s jurisdiction. It also fails on the merits.

The FEIR evaluates “the nature and magnitude of the change in the air quality environment due to implementation of the proposed project” using methods and significance thresholds recommended by the Air Quality Management District:

The analysis in this section focuses on the nature and magnitude of the changes in the air quality environment due to implementation of the proposed project. Air pollutant emissions associated with each alternative would result from construction activities, project operations, and project-related effects on traffic volumes. [A]ir quality impacts are estimated as they could affect the nearest sensitive uses. The net increase in project emissions generated by project operation activities and other secondary sources have been quantitatively estimated and compared to thresholds of significance recommended by the [SCAQMD].

(3 AR 00504; see 122 AR 15310-12, 15352-54.)

Agency use of adopted regulatory standards to define significance thresholds is a common practice that complies with CEQA. (See *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 933-934 [upholding determination that energy impact of project that met state energy efficiency standards complied with CEQA]; *Cadiz Land Co. v. Rail Cycle L.P.*, *supra*, 83 Cal.App.4th at p. 106 [upholding agency use of the federal air quality standards to conclude that air quality impacts on agriculture were not significant]; 1 Kostka & Zischke, Practice Under the California Environmental Quality Act (2d ed. 2011) Significance Standards Recommended by Regulatory Agencies, §13.14, pp. 621.1-627.)

c) Greenhouse Gas Analysis.

It is particularly ironic that NFSR challenges the Authority’s finding that the Project’s effects on climate change are less-than-significant. The state strategy to reduce greenhouse gas (“GHG”) emissions focuses on providing transit alternatives to automobiles. (See, e.g., 493 AR 32756, 32758.)

NFSR relies on CEQA Guideline section 15064.4, adopted in March 2010, *after* the approval of the Project, to challenge the Authority's determination that the Project would not have a significant effect on climate change. The Authority's analysis complies fully with the available guidance from the regulatory agencies regarding the evaluation of greenhouse gas emissions and is supported by substantial evidence.

Since the FEIR could not refer to a guideline that did not exist at the time, the FEIR followed the then most current guidance of the California Office of Planning and Research, the South Coast Air Quality Management District, and the California Air Pollution Control Officers Association in the evaluation of GHG emissions related to the Project. (14 AR 00524-26.) Using the recommended methodology, the FEIR calculates the gross annual emissions of GHGs for each alternative and compares GHG emissions for the alternatives. (*id.* 00527.) The FEIR concludes that the adopted Project alternative (LRT 2) would result in gross GHG emissions of *less than* 10,000 metric tons per year of GHGs – the significance threshold identified by the SCAQMD. (*id.* 00528.)

The Authority considered gross annual GHG emissions from the Project as well as the comparison of annual GHG emissions with and without the Project in making the determination that the Project would not have a significant effect with regard to climate change. (3 AR 00030, 14 AR 00528.) It is not an abuse of discretion to analyze GHG emissions under the selected threshold of significance. (Guidelines, §15064(b) [“The determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data”]; compare *id.*, §15064.4, subd. (a), effective March 18, 2010 [advising lead agencies to “make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project”].)

The Authority's choice of a threshold of significance for GHG analysis must be upheld as a proper exercise of the agency's discretion. (*Citizens for Responsible Equitable Envtl. Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 336.)

7. The Authority Properly Evaluated Whether the Project's Incremental Contribution to Traffic and Air Quality Impacts Will Be "Cumulatively Considerable."

To the extent that the Project has the potential to impact traffic (and air emissions from traffic), it is a cumulative impact. "Cumulative impacts" are "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." (Guidelines, §15355.) Traffic congestion and air quality in this context are quintessential cumulative impacts because they occur, not solely because of the Project, but because of population and employment growth and the combined effects of past, present and foreseeable future projects. (See Guidelines, §15130, subd. (b)(2).)

The Guidelines require agencies to determine whether a project's contribution to a significant cumulative impact is "cumulatively considerable." (Guidelines, §15130, subd. (a).) This means whether "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 probable future projects.*" (Guidelines, §15065, subd. (a), emphasis added.) "The mere existence of significant cumulative impacts *caused by other projects* alone shall not constitute substantial evidence that the proposed project's incremental effects are cumulatively considerable." (*Id.*, §15064, subd. (h)(4), emphasis added.) "An EIR may determine that a project's contribution to a significant cumulative impact [is] less than cumulatively considerable and thus is not significant." (*Id.*, §15130, subd. (a)(3).)

Thus, the Guidelines make it clear that whether a project's impact is "cumulatively considerable" necessarily requires an evaluation of the significance of the "incremental" contribution by the project. (See *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 799 ["when no environmental impacts cognizable under CEQA are added to the alleged environmental impacts of past projects, there is no cumulative increased impact"]; *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 788 [upholding EIR that concluded that "very small" contributions of pollutant by agriculture return flows to polluted river was not a significant impact].)

This is precisely the approach the Authority used to determine whether the Project's contribution to traffic congestion and air quality emissions were significant. (11 AR 00383-408; 59 AR 08303-10.) For example, the FEIR evaluated the extent to which cumulative traffic conditions in the Project study area in the future would be worse than they are today. (11 AR 00375-76.) It then determined whether the Project's incremental contribution to future conditions would be significant. (11 AR 00383-408.)

Because the Project will cross some intersections at-grade, the Project has the *potential* to contribute to a cumulative increase in the time it takes automobiles to travel through certain at-grade rail crossings along the Project alignment. The Project also has the potential to *improve* traffic conditions by reducing vehicle trips and providing a transit alternative to buses on congested streets. For that reason, the FEIR conducted an elaborate analysis of the potential effects of the Project, when combined with projected changes in population and resulting congestion, on traffic, air quality and greenhouse gas ("GHG") emissions. The FEIR used quantitative traffic and air quality models approved by the Federal and State transportation and air quality agencies. (11 AR 00345-48; 122 AR

15352-54.) Those models quantified the Project’s traffic and air quality effects at both a regional and a local level. (See Section IV.A.6.)

Based on these detailed studies, the Authority adopted a number of improvements (such as grade separations, additional lanes and signal synchronization) to minimize or avoid potentially significant cumulative impacts of the Project on regional and local (intersection) traffic. This, in turn, informed the air quality and GHG analyses. (11 AR 00383-408.) The Authority’s methodology to determine the significance of the Project’s contribution to cumulative effects on traffic, air quality and greenhouse gas emissions are consistent with the Guidelines and case law concerning the evaluation of cumulative effects.

8. The Cases Reviewing Road Projects and Residential/Commercial Development Upon Which NFSR Relies Are Inapposite.

NFSR relies on *Sunnyvale*, *supra*, 190 Cal.App.4th 1351, and *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48 (“*Madera Oversight Coalition*”), which involve construction of new roads and new residential and commercial development projects, respectively, to support its claim that CEQA requires use of “existing conditions,” without exception, to determine whether a project will have significant traffic and air quality effects. These cases are inapposite because they do not involve a transit project that reduces automobile trips and automobile emissions. They are also inapposite because the EIRs in those cases did not clearly disclose how traffic and air quality would change over time.

In *Sunnyvale*, the court invalidated the City’s approval of a new road, in part, because the City determined significance of traffic and air quality impacts of the project by comparing conditions on the estimated opening day of the project (2020) with and without the project. (*Sunnyvale*, *supra*, 190 Cal.App.4th at p. 1358.) New roads, by definition, provide

additional capacity for automobiles and, therefore, may result in direct and indirect increases in automobile trips and automobile emissions. Thus, it may be appropriate to determine whether a *road* project will have a significant impact on traffic and air quality by comparing conditions with the project to conditions as they exist prior to the date of project approval.

While the *Sunnyvale* court concluded that CEQA required the use of conditions at or before the time of approval of the road project to determine the significance of that project's traffic and air quality impacts, the court also concluded that the City's use of the 2020 baseline was not supported by substantial evidence, (*Sunnyvale, supra*, 190 Cal.App.4th at p. 1383), a conclusion that cannot be reached in this case.

In *Madera Oversight Coalition, supra*, the court invalidated the approval of a project that proposed to replace vineyards and 49 residences with 5,000 residential units and three million square feet of commercial and industrial development. (*Madera Oversight Coalition, supra*, 199 Cal.App.4th at p. 76.) Clearly, a residential/commercial project of that magnitude in a rural setting will generate substantial new automobile trips and traffic. In that factual circumstance, the court held that the City should have determined whether the traffic impacts were significant by comparing the traffic generated by the project against the traffic generated by the limited development already existing on the project site. Ultimately, the court concluded that it was "unable to state with certainty that existing conditions were used to determine the significance of the project's potential impacts on traffic." (*Id.* at p. 84.) Thus, facts here are dramatically different from *Sunnyvale* and *Madera Oversight Coalition*.

To summarize, NFSR failed to exhaust its administrative remedies with respect to the baseline issue and the Authority's selection of the traffic and air quality threshold of significance. But even if NFSR had exhausted its administrative remedies, the record demonstrates that the Authority did not abuse its discretion in choosing which study methods, baselines and

thresholds of significance it used; substantial evidence supports its conclusions.

Finally, if the Court were inclined to follow *Sunnyvale* and hold that a lead agency may not, as a matter of law, use as a baseline conditions predicted to exist at a time beyond project approval, it should not apply that new rule of law to the analyses of the Project's operational traffic and air quality impacts in Final EIR, which was prepared and certified nearly a year before *Sunnyvale*.

B. Substantial Evidence Supports the Authority's Findings Regarding Traffic Impacts on Sepulveda Boulevard.

NFSR claims that the FEIR is inadequate because it did not separately analyze the Project's traffic impacts of the *then proposed* at-grade crossing on Sepulveda Boulevard when "incidents" occur on Interstate 405 ("I-405"). (App. Br., 21.) NFSR's claim epitomizes the axiom, "no good deed goes unpunished."

The FEIR evaluated a grade-separation design option at Sepulveda. (3 AR 00022; 7 AR 00174; 9 AR 00258; 11 AR 00352, 00356; 72 AR 10729; 118 AR 15030, 15032.) The Authority subsequently approved the Sepulveda grade-separation as part of the Project.¹² The Authority's inclusion of the Sepulveda grade-separation in the Project eliminates any argument that the Project might somehow cause significant traffic problems on Sepulveda when there is a major traffic incident on I-405.

The FEIR's analysis of traffic impacts reflects extensive coordination with LADOT regarding potential traffic impacts on Sepulveda Boulevard. (11 AR 00359; 72 AR 12120-21.) The EIR analyzed potential traffic impacts on Sepulveda during AM and PM peak periods, and LADOT concluded that, with the mitigation measures, the Project would

¹² See RJN, Exh. A [Resolution No. 11].

not result in any significant impacts on Sepulveda whether the crossing was at-grade or grade-separated. (687 AR 38390-91.)

The cases NFSR cites are inapposite because in each, as contrasted with this case, the lead agencies overlooked potential project impacts. In *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners of the City of Oakland* (2001) 91 Cal.App.4th 1344, 1382, the court concluded that the EIR for the expansion of the Oakland International Airport did not analyze a direct effect of the expansion: adding 27,000 night-time flights over adjacent communities. In *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 430, the court invalidated an EIR for an oil refinery project because the EIR failed to evaluate an impact of the project at issue, the combined health effects of emissions from the refinery and offshore oil production.

Because the Authority analyzed traffic impacts resulting from the Project on Sepulveda Boulevard and added a grade-separation and other mitigation measures to the Project, there is substantial evidence supporting the Authority's finding that the Project will not have significant traffic impacts on Sepulveda Boulevard.

C. Substantial Evidence Supports the Authority's Mitigation Measures and Mitigation Findings.

1. The Authority Adopted CEQA-Authorized Mitigation Findings.

NFSR singles out five mitigation measures concerning parking, noise, safety, and construction impacts to claim that the FEIR's mitigation measures do not comply with CEQA. However, as the trial court determined (3 JA 000721-23), the Authority's findings regarding these mitigation measures fully comply with CEQA, and substantial evidence supports these findings. (3 AR 00054-56.)

CEQA requires an agency to find, based on substantial evidence, that project mitigation measures are required in, or incorporated into, the

project, *or* that the mitigation measures are the responsibility of another agency and have been, or can and should be, adopted by the other agency. (Pub. Resources Code, §21081; Guidelines, §15091, subd. (b).) If substantial evidence supports either of these findings, the Court must conclude that the EIR complies with applicable CEQA requirements. (Pub. Resources Code, §21081; *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1027 (“SOCA”); see also *Laurel Heights I, supra*, 47 Cal.3d at 407 [reviewing courts do not weigh conflicting evidence on effectiveness of mitigation].)

In this case, substantial evidence supports the Authority’s findings that (1) the mitigation measures “substantially lessen” significant effects of the Project relating to parking, noise, safety, and construction impacts, and/or, (2) the measures are within the jurisdiction of another agency and have been, or can and should be, adopted by the other agency.

2. Substantial Evidence Supports the Adequacy of Mitigation Measures to Reduce Spillover Parking Impacts.

The FEIR evaluated the effect of the Project on parking in the Project study area. (72 AR 10777-95.) It concluded that proposed parking for the Project may be less than the forecasted peak period demand at four of the proposed Project stations. (*id.* 10793-95.)

To minimize the potentially significant adverse environmental impacts resulting from a shortage of parking, the Authority adopted mitigation measure MM TR-4, establishing a program to monitor on-street parking activity of transit patrons prior to the opening of light rail service and the availability of parking for six months thereafter. (3 AR 00054-55; 11 AR 00413-14.) If parking availability exceeds an established performance standard (100% utilization of available parking spaces), Metro is *required* to work with the appropriate local jurisdiction and affected communities to implement a parking permit program. (3 AR 00113; see

also 34 AR 01063-64.) Such a program is a viable mitigation measure in neighborhoods that may not have adequate parking due to limited land availability. (35 AR 01768; 3 JA 000722.) A similar mitigation measure was adopted for the Expo Phase 1 Project (739 AR 48431) and permit programs already exist in several neighborhoods near the Project. (72 AR 10795.)

The FEIR explained that the parking supply at each of the Project stations is planned based on ridership forecasts as well as physical constraints and availability issues at each site. (34 AR 01186; 11 AR 00411; 72 AR 10793-95.) The FEIR identified parking demand for a fully mature transit system in 2030. The designated parking spaces at each station will not be at capacity on opening day. (72 AR 10793-95.) Adding more parking has environmental impacts: The Authority would either have to purchase more property for surface parking, which could have land use impacts, or provide structured parking. (34 AR 01186.) The Authority's approach to mitigating parking impacts avoids these other environmental impacts. The mitigation measure also includes options such as time-restricted, metered, or shared parking arrangements that will be implemented to achieve the performance standard in the event a permit parking program is not possible. (*Id.* 01063-64; 3 AR 00113.) To ensure implementation, Metro has agreed to reimburse local jurisdictions for the costs associated with implementing permit programs. (3 AR 00113.)

CEQA authorizes the use of performance standards in establishing mitigation measures based on future studies. (Guidelines, §15126.4; *SOCA, supra*, 229 Cal.App.3d at p. 1029.) Such an approach is especially appropriate when the results of later field studies are used to tailor a mitigation measure to fit actual environmental conditions. (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275 [approving measures calling for future field surveys for sensitive species and requiring construction of breeding ponds if species is found by survey]); *Nat'l Parks*

& Conserv. Assn. v. County of Riverside (1999) 71 Cal.App.4th 1341, 1366 [upholding deferred determination of placement of protection fences along railroad line until further study of migration patterns during project operation].)

In *SOCA, supra*, the court upheld as adequate a deferred mitigation measure to meet a performance standard of ninety percent parking usage based on the City's commitment to employ one or more mitigation measures it found to be effective at reducing parking impacts. (229 Cal.App.3d at pp. 1021, 1035.)

The FEIR for the Expo Project acknowledges the potential for spillover parking impacts with operation of a fully mature transit system. When and where spillover impacts will actually occur, however, can only be determined by monitoring parking conditions around the stations. (72 AR 10793-95.) If, after the start of service, parking utilization within any neighborhood increases to 100%, the Authority and Metro will implement an appropriate parking solution (e.g., permit, time-restricted parking, shared parking) to comply with the parking utilization performance standard. (3 AR 00113.) Just as in *SOCA*, this mitigation measure identifies a performance standard based on parking usage, defines the Authority's commitment (development of a parking management program), and describes the Authority's responsibility (financial contribution).

NFSR argues that because MM TR-4 requires Metro to work with local jurisdictions to implement the mitigation measure, there is no evidence it will be carried out. (App. Br., 32.) NFSR cites *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252. *Federation of Hillside & Canyon Associations* is inapposite. There, the court held that certain transportation mitigation measures were inadequate because the City relied on a document that mentioned the possibility of but did not **require** their implementation. (*Id.* at pp. 1255-1256.) Here MM TR-4 defines the Authority's requirement

that Metro implement and fund a parking management program in cooperation with the agencies having jurisdiction over parking management.

NFSR also argues that a permit program would not be adequate because it would not provide residents the “ability to park in their own neighborhood in substantially the same manner to which they are currently accustomed.” (App. Br., 33.) This argument fails for several reasons.

First, “[t]he social inconvenience of having to hunt for scarce parking spaces is not an environmental impact.” (*San Franciscans Upholding the Downtown Plan v. City & County of San Francisco, supra*, 102 Cal.App.4th at p. 697.) Although MM TR-4 identifies solutions to preserve parking for neighboring residents, CEQA only requires that the FEIR mitigate the physical impact on the environment, which it does.

NFSR also misstates the standard for adequacy of mitigation measures. Mitigation includes rectifying an impact by repairing, rehabilitating or restoring the affected environmental resource or compensating for the impact by providing substitute resources or environments. (Guidelines, §15370.) This standard is not equivalent to restoring the affected environment to where residents do not experience any change as a result of a project. A mitigation measure need only present a “viable solution” that will effectively mitigate an impact to a less than significant problem. (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1116). MM TR-4 is a viable solution in neighborhoods that may experience parking impacts. (See 35 AR 01768.)

Finally, parking mitigation programs are not at all similar to the mitigation in *Gray*. In *Gray, supra*, the project caused a decline in yield of potable water from private wells. The mitigation measure proposed was to rehabilitate wells to provide additional water; but there was no evidence in the EIR that the wells could provide more *potable* water. (167 Cal.App.4th at p. 1117.) Another option was to allow residents to tap into the project’s

wells, but those wells did not produce potable water. The court found the proposed mitigation was not adequate under CEQA because it “does not replace the lost water from private wells with a substantially similar quality of water.” (*Ibid.*) Indeed, the third option was to replace potable well water with bottled water, but the court found that it “defies common sense for the County to conclude that providing bottled water is an effective mitigation measure” for the loss of a landowner’s potable well-water. (*Id.* at p. 1118.)

The parking permit program stands in stark contrast to a plan to replace a resident’s entire supply of potable water with non-potable water or bottled water. The Authority is not proposing to eliminate parking at residents’ streets or homes; rather, MM TR-4 addresses environmental impacts resulting from a loss of *public* parking. A permit program is a commonly used, entirely feasible and effective solution to preserve public parking for residents in their neighborhoods. Moreover, reserving parking for local residents puts the residents in a position substantially similar to their current position without the Project.

3. Substantial Evidence Supports the Adequacy of Mitigation Measures to Reduce Impacts of Removed Parking.

The FEIR estimates that approximately 35 utilized parking spaces are proposed to be eliminated on the south side of Colorado Avenue between 14th and 4th Streets. Mitigation measures MM TR-9, MM TR-9(a), and MM TR-9(b) provide replacement parking lots to accommodate this loss of parking. (3 AR 00114, 11 AR 00431-32; 34 AR 01062.) Additional replacement options include implementation of diagonal parking on adjacent streets. (11 AR 00431-32.) NFSR claims this is inadequate because there is not substantial evidence that these measures are feasible. (App. Br., 33.)

There is substantial evidence in the record supporting the Authority's determination that these mitigation measures offer viable solutions to the loss of parking. (11 AR 00431-32; 3 AR 00054-55.) The measures themselves identify the location of parcels that the Authority intends to acquire. (11 AR 00431-32.)

The holding in *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 95, does not support NFSR's argument. Unlike the EIR at issue there, the FEIR includes a complete analysis of the environmental impact of reduced parking, identifies exactly how many replacement parking spaces will be needed, and specifies in detail potential mitigation measures that can replace those spaces. (11 AR 00431-32.)

NFSR claims "Expo's ability to acquire replacement lots is purely speculative" due to land costs. (App. Br., 33-34.) There is nothing "speculative" about Expo's ability to fund land acquisition. The citizens of Los Angeles County approved a sales tax measure to fund all of the Project's cost, including land acquisition. (30 AR 00888.) In any event, CEQA does not require that an EIR evaluate how a mitigation measure will be funded. (*Santa Clarita Org. for Planning the Env't. v. County of Los Angeles* (2007) 157 Cal.App.4th 149, 163; see also 1 Kostka & Zischke, *supra*, Effectiveness of Proposed Mitigation Measures, §14.9, p. 694; 3 JA 000722.)

There is substantial evidence to support the Authority's finding that the mitigation measures are feasible. Thus, NFSR has failed to prove that these mitigation measures are unsupported by substantial evidence.

4. Substantial Evidence Supports the Adequacy of Mitigation Measures to Reduce Noise and Vibration Impacts.

The FEIR discloses that there will be noise impacts resulting from operation of the Project in certain locations. (21 AR 00664.) The

Authority commits to implementing mitigation measure MM NOI-1 to reduce operational noise levels below the FTA moderate impact criteria at all identified receptors. (3 AR 00119-20.) MM NOI-1 includes well-established options for meeting this performance standard, including construction of sound walls, berms, track noise attenuation devices, and/or improving sound insulation if necessary. (21 AR 00674-75.) The Authority has committed to implementing at least one of these options at the final design stage of the Project to ensure that operational noise impacts are reduced to a less than significant level. (3 AR 00064-66.)

Despite the fact that the mitigation options and performance standards are clearly defined in the FEIR and the Authority's findings, NFSR claims that the Authority was required to detail how the Authority will provide sound insulation, if necessary, to impacted residences. CEQA does not require this level of specificity. (*SOCA, supra*, 229 Cal.App.3d at pp. 1028-1029 [agency can commit itself to eventually devising measures that will satisfy specific performance criteria]; *Laurel Heights I, supra*, 47 Cal.3d at p. 418 [upholding noise mitigation measure that included evaluation of noise control techniques to ensure compliance with noise performance standards after project was designed].)

The FEIR outlines specifically what the Authority will do to accomplish sound insulation for neighboring residents, if necessary to meet the performance standard: upgrade or replace existing windows and doors, weather strip windows and doors, and/or install a mechanical ventilation system so that windows do not need to be opened for ventilation. (21 AR 00675). Sound insulation is a well-established, proven mitigation measure, as reflected in the FTA's Transit Noise and Vibration Impact Assessment manual, which provides guidance for preparing and reviewing noise and vibration analyses of transit projects. (179 AR 19461-62.) The FTA manual states that sound insulation treatments in comparable situations reduce transit noise by five to twenty decibels. (*Ibid.*) At the location

where sound insulation is proposed, Project noise will exceed FTA moderate thresholds by only three to six decibels. (21 AR 00669-74.) Therefore, sound insulation, if necessary, will mitigate noise impacts to less-than-significant levels. The Mitigation Monitoring and Reporting Plan identifies the parties responsible for implementing, enforcing, and monitoring the mitigation measure. (3 AR 00119-20.) The Authority has also clearly articulated specific performance standards. (*Id.*; 21 AR 00675.)

NFSR also argues that the mitigation measure is inadequate because it “would not restore the affected residents to the position that they are currently accustomed to.” (App. Br., 36.) As discussed in Section IV.C.2., above, this is not the applicable standard for the adequacy of mitigation measures. (See Guidelines, §15370.)

There is substantial evidence to support the Authority’s findings that the mitigation measures for noise impacts reduce the impacts to a less than significant level.

5. Substantial Evidence Supports the Adequacy of Mitigation Measures to Reduce Safety Impacts.

The FEIR acknowledges that emergency vehicles traveling on streets that intersect the Project’s eight to ten at-grade crossings may experience some delay. (11 AR 00369.) To address this impact, mitigation measure MM SAF-1 requires Metro to provide a detailed description of its emergency response procedures to the appropriate community safety providers in the cities of Culver City, Santa Monica, and Los Angeles, and to conduct drills in order to properly implement the procedures. (3 AR 00123; 24 AR 00727.) Additionally, Metro must encourage the adjacent cities to update their emergency response procedures to address the Project. (24 AR 00727.)

The Authority found that implementation of MM SAF-1 will reduce impacts to the delivery of community safety services to a less-than-significant level by providing a fast, controlled and coordinated response to

the various types of emergencies. (3 AR 00069-70; 24 AR 00727.) The FEIR also notes that the cities of Los Angeles, Pasadena, South Pasadena, and Long Beach have all successfully implemented the procedures identified in MM SAF-1 on other Metro rail lines. (34 AR 01071.)

NFSR claims that there is “great uncertainty” whether MM SAF-1 will be implemented because it “depends upon actions by other governmental agencies.” (App. Br., 37.) But, CEQA expressly allows adoption of mitigation measures that are under the jurisdiction of another agency. (Pub. Resources Code, §21081; Guidelines, §15091, subd. (b).) In addition, MM SAF-1 also requires that Metro educate the community safety providers in Metro’s emergency response procedures and practice such procedures with local agencies before Project operation. (24 AR 00726-27.)¹³

Therefore, substantial evidence to supports the Authority’s finding that MM SAF-1 will reduce safety impacts to a less-than-significant level.

6. Substantial Evidence Supports the Adequacy of Mitigation Measures to Reduce Construction Impacts.

The FEIR includes eighteen mitigation measures that address construction impacts. (3 AR 00123-31.) MM CON-1 ensures at least one lane of traffic in each direction on access cross streets during construction, or a detour route for motorists if one lane of traffic is not feasible; MM CON-2 establishes Worksite Traffic Control Plans and Traffic Circulation Plans; and MM CON-3 keeps designated major or secondary highways open during construction unless the local jurisdiction approves closure after meeting performance criteria for traffic circulation. (*Id.* 00123-24; 28 AR 00823-24; 34 AR 01072; 35 AR 01796.) The Authority adopted a finding

¹³ NFSR mischaracterizes MM SAF-1 as “deferred” mitigation. (App. Br., 31, 37.) It is not.

that these mitigation measures would reduce the impact of closure of traffic lanes during construction to a less-than-significant level. (3 AR 00071-72.)

NFSR's claim that MM CON-2 does not include a performance standard is without merit. (App. Br., 38.) Regulatory approval of a mitigation program is an adequate performance standard. (*Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 794.) The Authority has committed to formulating Worksite Traffic Control Plans and Traffic Circulation Plans in coordination with each of the cities impacted by the Project before the start of construction. These plans must meet the performance standards established by the existing Work Area Traffic Control Handbook and Manual on Uniform Traffic Control Devices. (28 AR 00823-24.)

Courts have upheld similar mitigation measures. (*Endangered Habitats League, supra*, 131 Cal.App.4th at p. 794 [upholding mitigation measure requiring a fuel modification plan in compliance with existing County guidelines].) Here, the mitigation measures require the Authority to work with adjacent jurisdictions to formulate detailed traffic control and circulation plans that comply with criteria in identified manuals utilized by the relevant municipality, while maintaining designated "Safe Routes to School" wherever possible and providing at least one lane of traffic in each direction and/or providing for a detour route. (28 AR 00823-24.) These measures include performance criteria that are consistent with the standards enunciated in *Endangered Habitats League* and *SOCA*.

NFSR argues that MM CON-2 is deficient because it does not address the potential safety impacts that may arise where maintaining designated Safe Routes to School would not be possible. (App. Br., 38.) NFSR cites an LADOT comment letter submitted in response to the Draft EIR. (*Ibid.*; see 34 AR 01186.) At that time, MM CON-2 did not include a requirement that the Worksite Traffic Control Plans and Traffic Circulation Plans be designed to maintain designated Safe Routes to School. The

Authority revised the mitigation measure to incorporate LADOT's recommendation and found that the measure, as amended, lessened the impact of the construction of the Project to insignificant levels. (28 AR 00823-24; 3 AR 00070-72.)

NFSR argues that MM CON-3 is inadequate because it does not include standards for when a jurisdiction may grant approval to close a designated Major or Secondary Highway. (App. Br., 38.) To the contrary, MM CON-3 incorporates multiple performance standards that must be satisfied before a Major or Secondary Highway may be closed during construction. MM CON-3 mandates that no designated Major or Secondary Highway will be closed to vehicular or pedestrian traffic except at night or on weekends unless approval is granted by the jurisdiction in which it is located. (3 AR 00124.) MM CON-3 works in concert with the other construction mitigation measures discussed above. MM CON-3 requires the Authority to comply with the Worksite Traffic Control Plans and Traffic Circulation Plans formulated in coordination with each of the cities the Project impacts. Thus, there are multiple levels of performance standards that the Project must meet before a Major or Secondary Highway can be closed during construction.

Substantial evidence supports the viability and efficacy of each of the mitigation measures NFSR has challenged. Thus, NFSR has failed to meet its burden of proof.

D. The FEIR's Discussion of Growth-Inducing Impacts Is Adequate.

Per California Rules of Court Rule 8.200(a)(5), the Authority hereby joins in the argument regarding the issues identified in this Section and those below and set forth in Metro's Responding Brief at Section III.A., filed concurrently.

E. Substantial Evidence Supports the FEIR’s Evaluation of Cumulative Impacts on Traffic.

See, Metro’s Responding Brief at Section III.B., filed concurrently.

F. The Evaluation of Project Alternatives Complies with CEQA.

See, Metro’s Responding Brief at Section III.C., filed concurrently.

G. Recirculation Is Not Required Because the New Information Does Not Disclose Any New Significant Impacts.

See, Metro’s Responding Brief at Section III.D., filed concurrently.

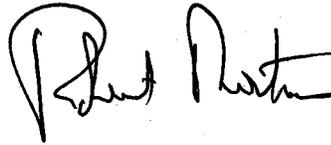
V. THE COURT MUST LIMIT THE SCOPE OF ANY MANDATE.

If the Court determines that there is any ground for reversal based on a prejudicial inadequacy of one or more findings, the Court’s order “shall include only those mandates which are necessary to achieve compliance with [CEQA] and only those specific project activities in noncompliance with [CEQA].” (Pub. Resources Code, §21168.9, subd. (b).) For instance, if the inadequacy only concerns the impacts of one component of the Project, the Court should sever that component and allow the rest to proceed. (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1180.) Otherwise, the peremptory writ of mandate shall be limited to “specific action as may be necessary to bring the determination, finding, or decision into compliance [with CEQA].” (Pub. Resources Code, §21168.9, subd. (c).)

VI. CONCLUSION.

For the reasons stated above, and for the reasons stated in Metro's brief, the appeal must be rejected.

Dated: November 9, 2011 Nossaman LLP



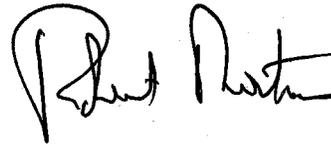
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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.504(d)(1))

The text of this brief consists of 13,944 words as counted by the Microsoft Word version 2003 word processing program used to generate the brief.

Dated: November 9, 2011 Nossaman LLP



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EXHIBIT “A”

EXHIBIT A

**PROJECT MAP
SHOWING APPROVED PROJECT**

SOURCES: 3 AR 00018-19; 9 AR 00252-74.

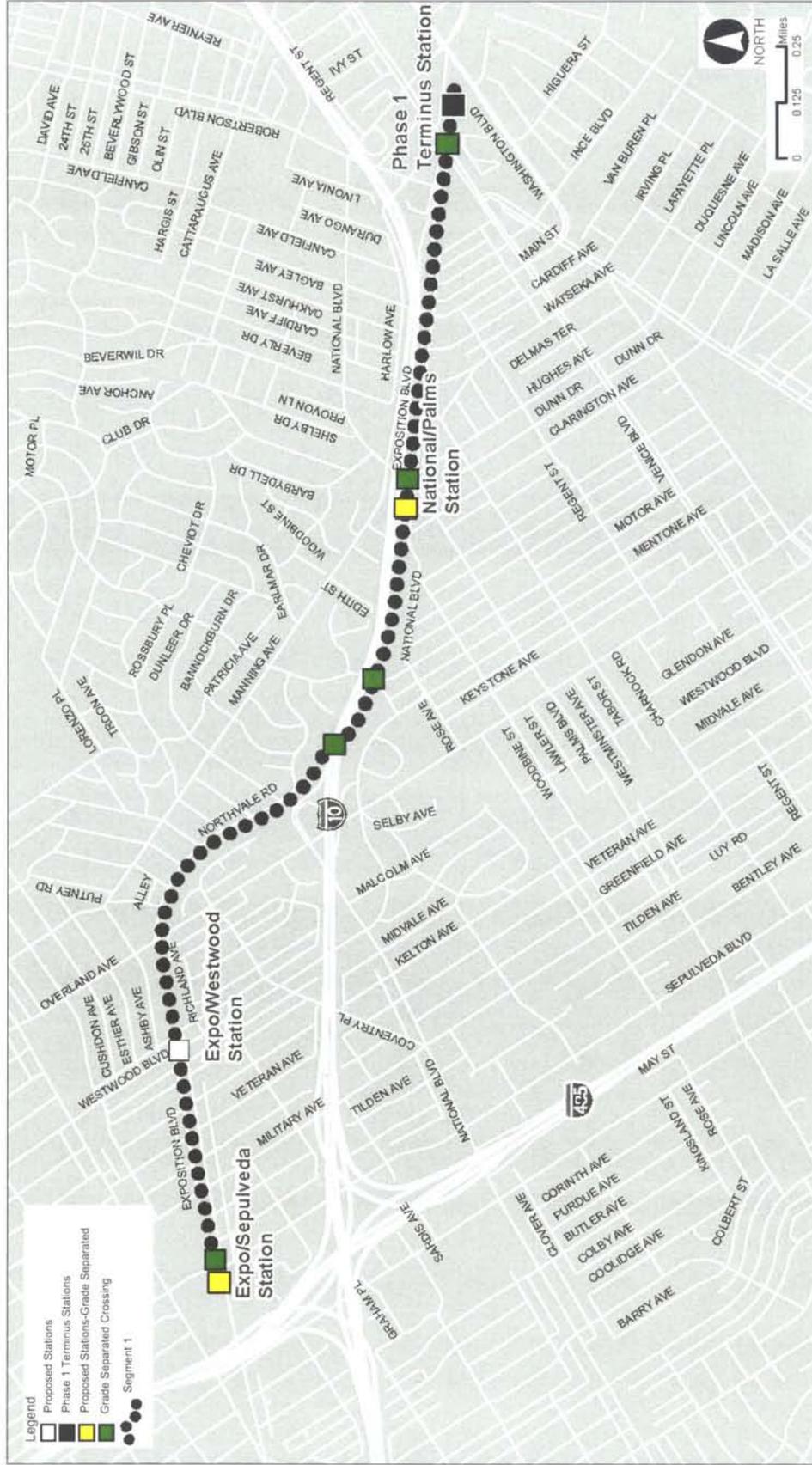
EXHIBIT “B”

EXHIBIT B

PROJECT MAP – SEGMENT 1
SHOWING APPROVED PROJECT WITH PROJECT STATIONS, GRADE-SEPARATED
PROJECT STATIONS AND GRADE-SEPARATED CROSSINGS

SOURCES: 3 AR 00022; 9 AR 00252-59; 118 AR 15030, 15032.

2. Project Alternatives



Source: Metro, 2008; DMJM Harris, 2008

Figure 2.4-2 Segment 1: Expo ROW

Sources: 9 AR 00252-59; 3 AR 00022;
118 AR 15030,15032

EXHIBIT “C”

EXHIBIT C

PROJECT MAP – SEGMENT 2
SHOWING APPROVED PROJECT WITH PROJECT STATIONS, GRADE-SEPARATED
PROJECT STATIONS AND GRADE-SEPARATED CROSSINGS

SOURCES: 3 AR 00022; 9 AR 00258, 00263-68, 00271-74; 118 AR 15030, 15032.

2. Project Alternatives



Source: Metro, 2008; DMJM Harris, 2008

Figure 2.4-4 Segment 2: Sepulveda to Cloverfield

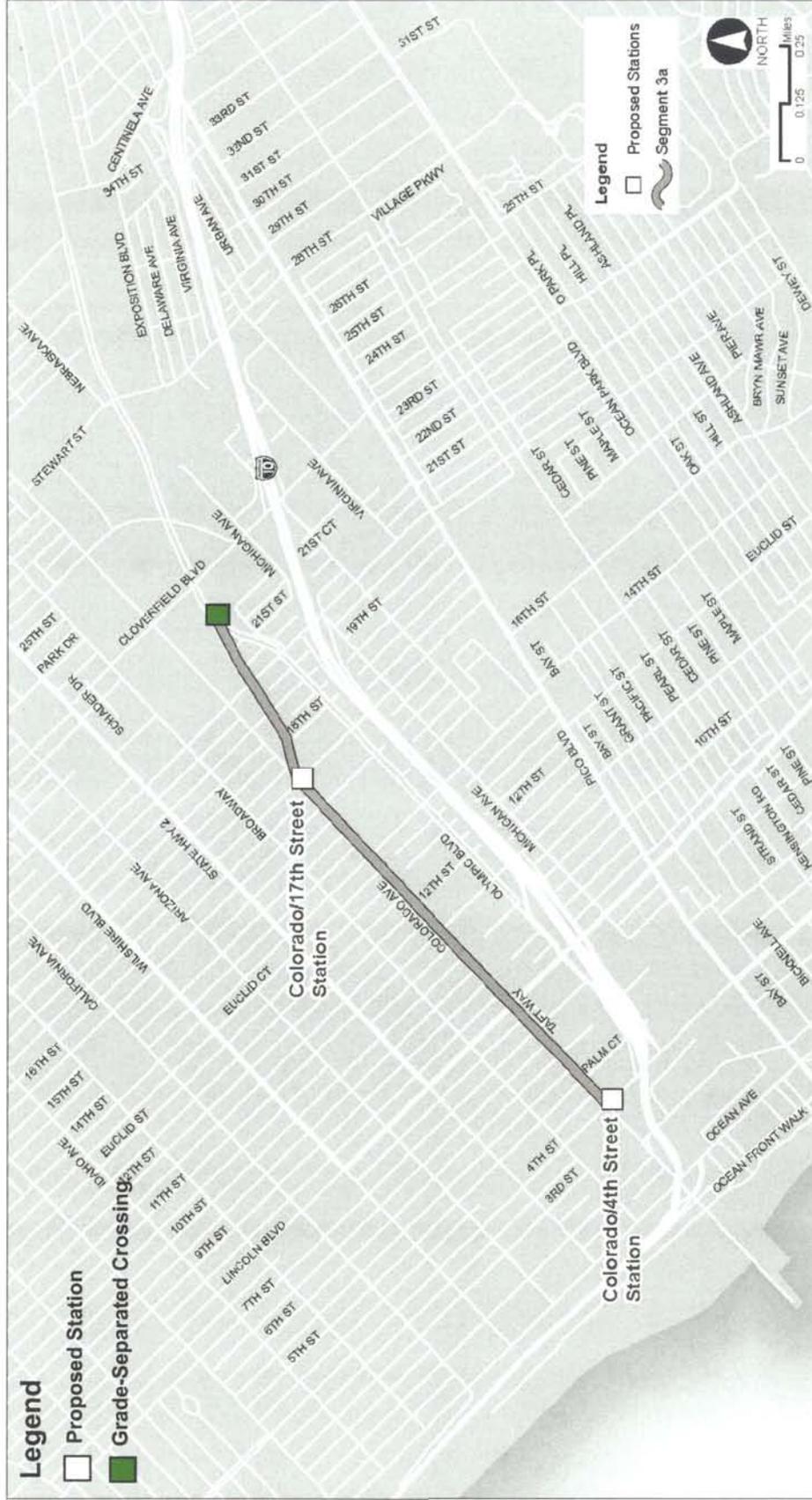
Sources: 9 AR 00258, 00263-68,
00271-74; 3 AR 00022; 118 AR 15030, 15032

EXHIBIT “D”

EXHIBIT D

PROJECT MAP – SEGMENT 3a
SHOWING APPROVED PROJECT WITH PROJECT STATIONS AND GRADE-
SEPARATED CROSSINGS

SOURCE: 9 AR 00271-74.



Source: Metro, 2008; DMJM Harris, 2008

Figure 2.4-6 Segment 3a: Colorado

Source: 9AR 00271-74

EXHIBIT “E”

EXHIBIT E

**PHOTOGRAPH OF LRT CROSSING AT
EXPO BOULEVARD AND NATIONAL/PALMS**



Exposition Blvd., West of National/Palms, South of I-10, Looking East

SOURCE: 58 AR 08210.

EXHIBIT “F”

**COMPARISON OF LEVEL OF SERVICE FOR PROJECT INTERSECTIONS
THAT WORSEN FROM CURRENT LOS D OR BETTER
TO LOS E OR F IN YEAR 2030 NO-BUILD CONDITIONS***

Segment No.	Intersection No.	Intersection	AM/PM	Current LOS	No Build LOS 2030	LRT LOS 2030	Change in Delay (sec.)
3a	15	20 th Street/Olympic Blvd.	AM	D	E	E	0.8
2	28	Bundy Drive/Pico Blvd.	AM	C	E	E	-2.2
2	29	Barrington Ave./Pico Blvd.	PM	D	E	E	-3.0
1	52	Westwood Blvd./Exposition Blvd. (s)	AM	C	E	B	-30.1
1	69	Manning Ave./I-10 WB/National Blvd.	PM	D	E	E	-1.1

*Source: 72 AR 10706-08 [FEIR Table 2-1, Existing Study Area Intersection Conditions], 10757 [FEIR Table 5-10, Segment 1 Study Area Intersections—Year 2030 LOS (AM Peak Hour)], 10759-60 [FEIR Table 5-11, Segment 1 Study Area Intersections—Year 2030 LOS (PM Peak Hour)], 10770 [FEIR Table 5-16, Segment 2 Study Area Intersections—Year 2030 LOS (AM Peak Hour)], 10778 [FEIR Table 5-22, Segment 3a Study Area Intersections—Year 2030 LOS (AM Peak Hour)].

PROOF OF SERVICE

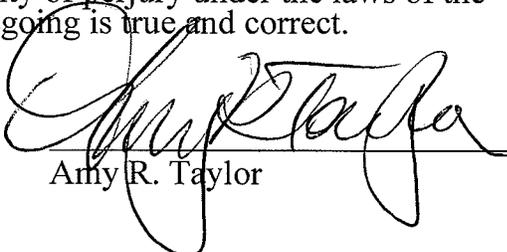
The undersigned declares:

I am employed in the County of Orange, State of California. I am over the age of 18 and am not a party to the within action; my business address is 18101 Von Karman Avenue, Suite 1800, Irvine, CA 92612.

On November 8, 2011, I served the foregoing **RESPONDENTS' BRIEF** on parties to the within action as follows:

SEE ATTACHED SERVICE LIST

- (By U.S. Mail) On the same date, at my said place of business, a true copy thereof enclosed in a sealed envelope, addressed as shown on the attached service list was placed for collection and mailing following the usual business practice of my said employer. I am readily familiar with my said employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service, and, pursuant to that practice, the correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, on the same date at Irvine, California.
 - (By Personal Service) By causing RS Professional Services to deliver a true copy thereof enclosed in a sealed envelope by hand to the offices of the addressee.
- Executed on November 8, 2011.
- (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.


Amy R. Taylor

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