SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

Date: 07/15/2008 Time: 11:51:50 AM Dept: 29

Judicial Officer Presiding: Judge Timothy Frawley
Clerk: L. Young

Bailiff/Court Attendant: NONE
ERM:
Reporter: NONE,

Case Init. Date: 11/12/2007

Case No: 07CS00967

Case Title: ENVIR COUNCIL OF SAC. ET AL VS. CA DEPT OF TRANSPORT. ET AL

Case Category: Civil - Unlimited

Causal Document & Date Filed:

Appearances:

RULING AFTER HEARING

Petitioners Environmental Council of Sacramento and Neighbors Advocating Sustainable Transportation ("Petitioners") challenge Respondent California Department of Transportation's ("Caltrans") June 21, 2007, approval and certification of a Final Environmental Impact Report ("Final EIR") for the Sacramento 50 Bus/Carpool Lanes and Community Enhancement Project under the California Environmental Quality Act ("CEQA"). Petitioners seek a writ of mandate directing Caltrans to set aside its certification of the EIR and approval of the Project.

The Project, as approved, proposes to build approximately 13 miles of High Occupancy Vehicle ("HOV") lanes, in the east-bound and west-bound directions, within the existing median of U.S. Highway 50 from Sunrise Boulevard to Watt Avenue, plus various transportation-related "community enhancements" related to the highway improvements. Currently, within the Project boundaries, the number of lanes in each direction varies from three to six lanes.

The concept for the Project was conceived several years ago and has been incorporated into a number of regional transportation studies and reports since 1996-97. (14 AR 4640-4673; 23 AR 8638; 11 AR 3716-3724.)

In June 2005, a Notice of Preparation of a Draft EIR for the Project was filed with the California Office of Planning and Research (State Clearing House). (21 AR 8078-8086.)

On December 13, 2006, Caltrans released the Draft EIR for a 60-day public review and comment period. (2 AR 508-775.) The Draft EIR identified two "build" alternatives (Alternatives 10d-1 and 10d-3) and a "No Build" alternative. (2 AR 513-514.) Alternative 10d-1 provides for the construction of HOV lanes from Sunrise Boulevard to the Oak Park interchange in downtown Sacramento. Alternative 10d-3, which is the approved Project, provides for the construction of the HOV lanes from Sunrise Boulevard to Watt Avenue. The No Build Alternative provides no improvements to Highway 50. The Draft EIR also identifies and discusses various other alternatives that were initially considered but then eliminated for various reasons. (2 AR 526-535.) Petitioners and others provided comments on the Draft EIR. (1 AR 339

through 2 AR 472.)

In June 2007, Caltrans issued the Final EIR. The Final EIR includes Caltrans' responses to the comments on the Draft EIR. (2 AR 473-507.) The Final EIR concludes that the Project will not result in any significant environmental impacts after mitigation. (1 AR 9-13; 4 AR 1419.)

On June 21, 2007, Caltrans certified the Final EIR and approved the Project. Caltrans adopted findings that the Project will not have a significant effect on the environment. (4 AR 1419; 1 AR 1.)

Caltrans filed a Notice of Determination under Public Resources Code § 21152 with the State Clearing House on June 25, 2007, commencing CEQA's 30-day period of limitations. (1 AR 1.) On the final day of that period, Petitioners filed the instant petition for writ of mandate, alleging that Caltrans violated CEQA.

Discussion

In determining whether an administrative body failed to comply with CEQA, the Court considers whether there was a prejudicial abuse of discretion. (Western States Petroleum Assn. v. Superior Court (1995) 9 Cal.4th 559, 568; Pub. Res. Code § 21168.5.) Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. (Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553, 564.)

Under the substantial evidence test, the court does not decide whether the agency's determinations were correct, but only whether they are supported by substantial evidence in the record. (Id.; see also Association of Irritated Residents v. County of Madera (2004) 107 Cal.App.4th 1383, 1391.)

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." (Cal. Code Regs., tit.14, § 15384.) Substantial evidence includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. (Id.) Substantial evidence does not include "[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment . . . ." (Id.)

In applying the substantial evidence standard, the reviewing court does not reconsider or reweigh the evidence before the agency. The court must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision. (Western States Petroleum, supra, at p.571 [finding the power of the court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding]; Laurel Heights Improvement Ass'n v. Regents of University of California (1988) 47 Cal.3d 376, 393.) A court should not set aside an agency's conclusion merely because an opposite conclusion would be equally or more reasonable. (Laurel Heights, supra, at p.393.)

In addition to reviewing whether an agency's factual determinations are supported by substantial evidence, a court may rule that an agency has prejudicially abused its discretion by failing to proceed in the manner required by law. (Pub. Res. Code §§ 21005, 21168, 21168.5; see also Rural Landowners Assn. v. City Council (1983) 143 Cal.App.3d 1013, 1022.) While an agency's factual determinations are subject to deferential substantial evidence review, questions of interpretation or application of the requirements of CEQA are matters of law, and are reviewed de novo. (Save Our Peninsula Committee v. Monterey County Bd. of Supervisors (2001) 87 Cal.App.4th 99, 119.) Thus, a reviewing court must adjust its review to the nature of the alleged defect, depending on whether the claim is predominantly a dispute over proper procedure or a dispute over the facts. (Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 435.)

An agency fails to proceed in the manner required by law if its analysis is based on an erroneous interpretation of CEQA's requirements or if it has failed to comply with the standards in CEQA for an adequate EIR.

When reviewing the adequacy of an EIR, a court does not pass upon the correctness of the EIR's environmental conclusions, but upon its sufficiency as an informational document. (Laurel Heights

Improvement Ass'n v. Regents of University of California (1988) 47 Cal.3d 376, 392.) An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project. (Association of Irritated Residents v. County of Madera (2004) 107 Cal.App.4th 1383, 1390.) Failure to disclose relevant information in an environmental impact report (EIR) may constitute a prejudicial abuse of discretion regardless of whether a different outcome would have resulted if the agency had disclosed the information. (Laurel Heights, supra, at p.392; Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692, 711-712; see also Association of Irritated Residents, supra, at p.1391 [existence of substantial evidence supporting agency's ultimate decision on a disputed issue is not relevant when assessing violation of the information disclosure provisions of CEQA].)

However, the absence of information in an EIR is not per se a prejudicial abuse of discretion. (Pub. Res. Code § 21005; Al Larson Boat Shop, Inc. v. Bd. of Harbor Commissioners (1993) 18 Cal.App.4th 729, 748; Association of Irritated Residents, supra, at pp.1391-92.) In reviewing the adequacy of an EIR, courts do not look for technical perfection, but for "adequacy, completeness, and a good faith effort at full disclosure." (Cal. Code Regs., tit.14, § 15151; Sequoyah Hills Homeowners Ass'n v. City of Oakland (1993) 23 Cal.App.4th 704, 712; Association of Irritated Residents, supra, at pp.1390-1391; see also Al Larson Boat Shop, supra, at p.748 [standard is "rule of reason"].) The sufficiency of an EIR is determined according to what is reasonably feasible. (Id.) The EIR need not be perfect so long as it provides agencies with sufficient information to enable them to make a decision that intelligently takes account of the environmental consequences of the proposed project. (San Francisco Ecology Center v. City and County of San Francisco (1975) 48 Cal.App.3d 584, 594.) A prejudicial abuse of discretion occurs only if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process. (County of Amador v. El Dorado County Water Agency (1999) 76 Cal.App.4th 931, 946; Al Larson Boat Shop, supra, at p.748.)

Although the Legislature intended CEQA to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language, an EIR is presumed adequate and the plaintiff in a CEQA action has the burden of proving otherwise. (See Al Larson Boat Shop, supra, at p.740.)

Petitioners in this case raise a number of procedural and substantive challenges to Caltrans' EIR. The Court separately addresses each of these challenges below.

The Project's Operational Impacts on Air Quality

The first issue presented relates to whether the EIR adequately discloses and analyzes the Project's operational impacts on air quality. Petitioners claim the EIR is insufficient as an informational document because the EIR fails to adequately analyze the Project's operational impacts on emissions of NOx, PM10, and PM2.5.

The law is settled that an EIR is intended to be an informational document. The purpose of an EIR is to provide public agencies and the public with detailed information about the effects a proposed project is likely to have on the environment, identify alternatives to the project, and indicate the manner in which those significant effects can be mitigated or avoided. (Pub. Res. Code § 21002.1; see also Pub. Res. Code §§ 21002, 21061, 21100.) In this manner, the EIR is intended to act as an "environmental 'alarm bell,' [alerting] the public and its responsible officials to environmental changes before they have reached ecological points of no return." (County of Inyo v. Yorty (1973) 32 Cal.App.3d 795, 810; see also Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 392 [EIR intended to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action].)

CEQA requires the agency to focus the discussion in the EIR on those potential effects on the environment which the agency has determined are or may be significant. Lead agencies may limit discussion on other effects to a brief explanation as to why those effects were determined not to be significant and therefore not discussed in detail in the EIR. (Pub. Res. Code §§ 21002.1, 21100(c); Cal. Code Regs., tit. 14, § 15128.) Determining whether a project may have a significant effect on the environment, therefore, plays a critical role in the CEQA process. (Cal. Code Regs., tit. 14, § 15064.)

CEQA defines significant effects to mean substantial, or potentially substantial, adverse changes in the environment, including the land, air, water, minerals, flora, fauna, noise, historic and cultural sites, and aesthetics. (Pub. Res. Code §§ 21060.5, 21068, 21100, 21151; Cal. Code Regs., tit. 14, §§ 15126.2, 15360, 15382.)

There is no "gold standard" for determining whether a given environmental impact is significant. (Protect the Historic Amador Waterways, supra, at p.1107.) A precise definition of significant effects is not possible because the significance of an activity varies according to a project's environmental setting. (Cal. Code Regs., tit. 14, § 15064.) The determination of whether a project may have a significant effect on the environment calls for judgment on the part of the public agency, based to the extent possible on scientific and factual data. (Id.)

In this case, Petitioners challenge the methodology and scope of analysis used by Caltrans to assess the Project's air quality impacts. Petitioners contend that Caltrans improperly relied exclusively on a federal Clean Air Act conformity analysis to evaluate whether there will be significant air quality impacts from the Project. Further, Petitioners contend there is no evidence or rationale supporting Caltrans' decision to limit the scope of its analysis in this manner. Petitioners claim that because Caltrans relied on federal Clean Air Act conformity as the sole threshold of significance, Caltrans failed to analyze and disclose critical information about the Project's impacts on emissions of PM10, PM2.5, and NOx, including what those impacts are and how much of the regional emissions budgets they constitute.

Caltrans admits that it relied exclusively on a federal Clean Air Act conformity approach to evaluate the Project's air quality impacts, but denies that its conformity-based approach violates CEQA. The initial question presented, therefore, is whether a federal Clean Air Act conformity approach is sufficient to meet the requirements of CEQA.

Before proceeding to address this issue, some background on the federal Clean Air Act is required.

The Clean Air Act establishes a joint state and federal program to control the nation's air pollution. The Act requires the EPA to establish national ambient air quality standards ("NAAQS"), which establish the maximum limits of pollutants allowed in the outside ambient air. (42 U.S.C. § 7409.) The EPA must designate areas that meet the standards ("attainment areas") and those that do not meet the standards ("non-attainment areas"). (42 U.S.C. § 7407.) The Sacramento region has been designated by the EPA as a "non-attainment" area for PM10 and O3, but as "attainment" for PM2.5.

Under the Clean Air Act, states implement, attain, and enforce the NAAQS through regional state implementation plans ("SIPs"). (42 U.S.C. §§ 7409, 7410.) Each SIP identifies the total allowable amount of emissions necessary to attain and maintain the NAAQS for each pollutant, and allocates the total allowable emissions between stationary, mobile, and other sources. (42 U.S.C. § 7410; 40 C.F.R. § 93.101.) Federally approved transportation projects located in non-attainment areas must conform to the SIP. (Id.)

The Clean Air Act also requires conformity findings for metropolitan transportation plans ("MTPs") and metropolitan transportation improvement programs ("MTIPs"). MTPs describe the policies and strategies for accommodating current and future travel demand in the region. An MTP typically includes all of the federally-sponsored and regionally-significant transportation projects planned for the region over a period of years, usually at least 20 years. An MTIP describes specific transportation projects that are consistent with the MTP. The regional planning organization – in this case, SACOG – is required to ensure that the MTPs and MTIPs conform to the mobile source emissions budgets established in the SIP. (42 U.S.C. § 7506.)

Here, Caltrans relied exclusively on the Project's conformity with federal Clean Air Act standards to evaluate whether the Project will have any significant air quality impacts. Petitioners argue that while a Clean Air Act conformity-based approach may be sufficient to analyze the Project's cumulative air quality impacts, it is not sufficient to discharge Caltrans' duty to analyze and disclose the Project's specific traffic-based emissions. The Court agrees.

While regulatory environmental standards can provide an appropriate benchmark for determining whether a particular impact is significant, compliance with environmental laws is not enough to support a finding of no significant impact under CEQA. (Californians for Alternatives to Toxics v. Department of

Food and Agriculture (2005) 136 Cal.App.4th 1, 17.)

In Californians for Alternatives to Toxics, the Court of Appeal addressed the question whether the Department of Food and Agriculture (DFA) could forgo environmental analysis of the statewide use of pesticides for a disease control program by relying on the Department of Pesticide Regulation's (DPR's) certified regulatory program. In its EIR, DFA did not independently evaluate the environmental impacts of the project's use of pesticides. Instead, DFA determined that compliance with DPR's existing regulatory scheme was adequate to ensure the project would not result in any significant adverse environmental impacts. Specifically, DFA reasoned that because all pesticide applications must be in compliance with DPR's existing regulatory program, and because the DPR pesticide program was approved as meeting the requirements of CEQA with respect to the use of pesticides, the use of pesticides by DFA according to approved label directions also must comply with CEQA. (Id. at p. 17.)

The Court of Appeal held that DFA's reliance on DPR's regulatory program was not sufficient to comply with CEQA. As the lead agency, DFA was responsible for presenting the facts, data, and analysis necessary to meaningfully assess the environmental impacts of its project. (Id. at p.13; see also Whitman v. Board of Supervisors (1979) 88 Cal.App.3d 397, 411 [requiring specificity and detail in EIRs since a conclusory statement affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives]; Cal. Code Regs., tit. 14, § 15147.) The Court held that DFA fell short of its duty under CEQA by deferring to DPR's regulatory scheme as a substitute for performing its own evaluation of the environmental impacts of its program. (Californians for Alternatives to Toxics, supra, at pp.16-17.) According to the Court, DFA could not rely solely on compliance with an existing regulatory program to conclude that its proposed project would not result in significant adverse impacts. (Id. at p. 17.) "Compliance with the law is not enough to support a finding of no significant impact under the CEQA." (Id.)

The Court in Californians for Alternatives to Toxics acknowledged that DFA's duty to analyze the effects of pesticide use must take account of DPR's existing regulatory scheme, but the Court stated that this does not require *DFA* to duplicate the work of DPR. The Court suggested DFA could satisfy its duty under CEQA by considering DPR's existing data in the context of the specific project proposed by DFA. (Id. at pp. 16, 18.) DFA's EIR, however, contained only conclusory statements, unsupported by any data or environmental analysis. Thus, the Court ruled that DFA's EIR was inadequate. (Id. at pp. 13, 17.)

As a general rule, an EIR "must contain facts and analysis, not just the bare conclusions of a public agency." (Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 711, 736, quoting Santiago County Water Dist. v. County of Orange (1981) 118 Cal.App.3d 818, 831; Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal. (1988) 47 Cal.3d 376, 404 [same].) While an agency's opinion concerning matters within its expertise may be of value, the public and decision-makers, for whom the EIR is prepared, should also have before them the basis for that opinion so as to enable them to make an independent, reasoned judgment. (Kings County Farm Bureau, supra, at p. 736; Californians for Alternatives to Toxics, supra, at p. 13 ["EIR should set forth specific data, as needed to meaningfully assess whether the proposed activities would result in significant impacts"]; Citizens to Preserve Ojai v. County of Ventura (1985) 176 Cal.App.3d 421, 429 [EIR should be prepared with a sufficient degree of analysis to make a decision which intelligently takes account of environmental consequences]; see also Citizens Assoc. for Sensible Dev. of Bishop Area v. County of Inyo (1985) 172 Cal.App.3d 151, 171 [initial study must disclose the data or evidence upon which the person conducting the study relied].)

Caltrans' EIR fell short of these standards. In its EIR, Caltrans determined that because the Project is included in the MTP and MTIP and will not violate any federal "hot spot" requirements, the Project is in conformity with the SIP. The EIR assumes that conformity with the SIP is sufficient to ensure the Project's emissions of PM10, PM2.5, and O3 will conform to regional air quality standards and, therefore, be less than significant. (1 AR 151-157.) The EIR does not, however, disclose or analyze the specific traffic-based emissions that would be generated by the Project. Nor does the EIR disclose or attach the MTP/MTIP, the SIP, or the air quality data and model used by SACOG to determine the MTP/MTIP's conformity with the SIP. Rather, similar to the DFA in Californians for Alternatives to Toxics, Caltrans relied on compliance with the federal Clean Air Act regulatory scheme in lieu of performing its own independent analysis of the specific environmental consequences of its Project. As discussed above, this is not sufficient under CEQA. Compliance with environmental laws alone is not adequate to support a finding of no significant impact under CEQA.

Further, the record does not contain any evidence or analysis showing that a comprehensive analysis of the Project's actual traffic-based emissions would be infeasible or speculative. (See, e.g., 2 AR 486, 489, 503.)

As a post hoc rationalization for its failure to analyze the specific traffic-based emissions generated by the Project, Caltrans argues that a project-specific analysis of the Project's air quality impacts is unnecessary because (1) a federal Clean Air Act conformity analysis is functionally equivalent to CEQA's air quality requirements; and (2) HOV lanes are a federally recognized transportation control measure. Aside from the fact that Caltrans did not rely on these arguments in limiting the scope of its EIR, both of these arguments miss the mark.

Caltrans has not cited any authority to show that compliance with the Clean Air Act conformity analysis excuses compliance with CEQA. CEQA, unlike NEPA, does not exempt "functional equivalent" environmental schemes from its requirements. Insofar as CEQA may provide an exemption for agencies with functionally equivalent environmental responsibilities, it is only under the express statutory provision for "certified regulatory programs" set forth in Public Resources Code § 21080.5. (Mountain Lion Foundation v. Fish & Game Com. (1997) 16 Cal.4th 105, 121; City of Coronado v. California Coastal Zone Conservation Com. (1977) 69 Cal.App.3d 570, 582; see also Pub. Res. Code § 21080.5.) Here, nothing in CEQA suggests that a federal Clean Air Act conformity determination may be submitted in lieu of an EIR pursuant to the exemption in Public Resources Code § 21080.5.

Caltrans' second argument is also flawed. In essence, Caltrans argues that because the intended purpose of HOV lanes is to encourage carpooling, it is reasonable to assume the Project will reduce congestion, increase travel speeds, and decrease overall emissions. However, even if there is substantial evidence to support a determination that carpool lanes encourage carpooling, Caltrans has not cited any substantial evidence to support its assertion that encouraging carpooling means overall vehicle miles traveled and/or vehicle emissions will decrease or remain the same. Indeed, Caltrans admits that its EIR did not attempt to analyze (quantitatively or qualitatively) the Project's impacts on overall VMT, and, as discussed above, Caltrans did not independently evaluate the Project's specific traffic-based emissions. In contrast, there is evidence in the record suggesting that building HOV lanes can increase vehicle miles traveled and related emissions. (See discussion, infra.) In any event, as Petitioners contend, the EIR's failure to consider this issue – the potential of the Project to induce additional vehicle travel (i.e., new trips or longer trips) – is one of the primary reasons that the EIR is inadequate as an informational document.

Thus, Caltrans abused its discretion by relying on the Project's (purported) conformity with the SIP as a substitute for performing and presenting its own evaluation of the Project's environmental impacts. To be sufficient, the EIR must disclose and analyze the Project's specific traffic-based emissions.

In addition to failing to analyze and disclose the Project's specific traffic-based emission impacts, Caltrans also abused its discretion by relying on conformity with federal regulatory standards to foreclose consideration of potentially significant environmental impacts.

California courts have held that an agency cannot rely on established regulatory standards to foreclose consideration of substantial evidence that the project might have a significant environmental effect. (Protect the Historic Amador Waterways v. Amador Water Agency (2004) 116 Cal.App.4th 1099, 1109.) In preparing an EIR, an agency may use established regulatory standards as a measure of whether a certain environmental effect normally will be considered significant, but the agency cannot use the fact a particular environmental effect meets a threshold of significance as an automatic determinant that the effect is not significant. The agency must consider and resolve any substantial evidence of a fair argument that a certain environmental effect may be significant notwithstanding that the effect complies with established regulatory standards. (Protect the Historic Amador Waterways, supra, at p.1109; see also Cal. Code Regs., tit. 14, § 15064(i)(3).)

The Court acknowledges the fair argument standard normally would be limited to the issue of whether an EIR must be prepared. But courts in California have held that the fair argument standard also is properly applied when an agency has assessed the significance of impacts by relying on established regulatory standards. (Protect the Historic Amador Waterways, supra, at p.1109; Communities for a Better Environment, supra, at pp.113-114.) Thus, if the record contains substantial evidence to support a

fair argument that the Project may have significant impacts on emissions of PM10, PM2.5, or O3, notwithstanding the Project's compliance with the federal Clean Air Act standards for those pollutants, case law holds that CEQA requires Caltrans to consider and discuss whether those possible significant environmental impacts will, in fact, be significant.

It is a question of law whether substantial evidence of a fair argument exists. (Pocket Protectors v. City of Sacramento (2004) 124 Cal.App.4th 903, 928.)

Substantial evidence to support a fair argument means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Cal. Code Regs., tit.14, § 15384; Pocket Protectors, supra, at p.927.) To raise a fair argument, it is not necessary to bring forth credentialed experts to offer scientifically irrefutable, site-specific information foretelling certain environmental harm. (Friends of the Old Trees v. Dep't of Forestry & Fire Prot. (1997) 52 Cal.App.4th 1383, 1402.) The evidence supporting a fair argument need not be overwhelming, overpowering, or even uncontradicted. (Id.)

Furthermore, because CEQA places the burden of investigation on the government rather than the public, an agency cannot hide behind its own failure to gather relevant data to defeat a fair argument. (Sundstrom v. County of Mendocino (1988) 202 Cal.App.3d 296, 311; Gentry v. City of Murrieta (1995) 36 Cal.App.4th 1359, 1379; City of Redlands v. County of San Bernardino (2002) 96 Cal.App.4th 398, 408.) The lack of study enlarges the scope of the fair argument by lending plausibility to a wider range of inferences. (Gentry, supra, at p.1379.)

The administrative record in this case contains substantial evidence to support a fair argument that the Project may cause a significant increase in traffic-based emissions notwithstanding the Project's compliance with the federal Clean Air Act conformity standards. Specifically, the administrative record contains substantial evidence of a fair argument that increasing the capacity of the highway may generate additional vehicle travel by inducing additional demand for vehicle travel (e.g., shifts from other transport modes, longer trips, new vehicle trips). (See, e.g., 23 AR 8586 [unintended effects of adding HOV lane may include induced trips]; 24 AR 8960, 8963 [noting statistically significant relationship between adding lane miles and VMT]; 2 AR 426, 428-430 [citing research discussing induced demand from expansion of roadway capacity]; 11 AR 3609 [discussing findings of model showing HOV lanes increase travel and emissions]; 11 AR 3683, 3692 [study discussing high occupancy vehicle lanes in the Sacramento region and noting that HOV lanes may increase VMT and emissions compared to no-build scenario].)

There also is substantial evidence of a fair argument that additional traffic generated by the Project may have a significant environmental impact on emissions of NOx, PM10, and PM2.5. There is substantial evidence, for example, that the Project may exceed SMAQMD's threshold of significance for NOx and cause non-attainment of the state standards for PM2.5 and PM10. (See 2 AR 463 [commenting that project may exceed SMAQMD's thresholds of significance for ROG and NOx]; 2 AR 398-399 [commenting that levels of PM10 measured at Branch Center Road station annually violate state ambient air quality standards and that the PM2.5 monitoring station closest to the Project regularly measures pollutant concentrations in excess of state standards]; 9 AR 3180-3181 [traffic report showing increase in freeway vehicle throughput relative to no build scenario].)

However, Caltrans did not consider or discuss the potential environmental impacts of induced demand in the EIR. The EIR discusses the Project's potential growth-inducing impacts on population and economic growth and land use patterns, and discusses the Project's potential to generate additional highway travel during peak periods by inducing shifts in routes or time of travel, but the EIR does not consider the potential for additional highway travel as a result of "induced demand." (2 AR 89-92, 475-477, 485-486, 490, 494, 498; 9 AR 3170.) The EIR expressly assumes, without support, that any additional highway traffic will consist of time of day or route shifts and will not increase overall VMT. (Id.) It is noteworthy that the administrative record includes an emissions study that accounts for induced demand, but the study was not analyzed in the EIR, was limited to a 5-year period, and expressly states that a "more expanded analysis is needed" to adequately compare the long-term emissions benefits/disadvantages of HOV lanes relative to a no-build scenario. (24 AR 8960; see Calif. Oak Found. v. City of Santa Clarita (2005) 133 Cal.App.4th 1219, 1239 [information scattered in EIR or buried in appendix is not substitute for good faith reasoned analysis].)

Caltrans argues that increases in VMT do not necessarily result in higher overall emissions, since emissions are a function of speed as well as VMT. (Opposition Brief, pp.9, 10.) However, there is substantial evidence in the record that emissions vary with VMT, and Caltrans did not perform a specific analysis of the Project's impacts on overall emissions. Thus, at best, Caltrans can argue that even if the Project increases overall VMT, it nevertheless might reduce overall emissions. But it is the failure to disclose and analyze these potentially significant impacts that renders the EIR inadequate from an informational standpoint.

Thus, the Court concludes that Caltrans applied the federal Clean Air Act conformity standards in a way that foreclosed the consideration of substantial evidence tending to show the Project may have significant air quality impacts notwithstanding its compliance with the federal conformity standards. Caltrans was not compelled to find that the Project will have a significant impact on emissions of NOx, PM10, and PM2.5, but Caltrans should have analyzed and discussed whether the Project may have a significant impact on such emissions notwithstanding the Project's compliance with the federal Clean Air Act conformity standards.

For all of these reasons, the Court concludes that the EIR is inadequate and incomplete as an informational document in respect to the Project's operational impacts on emissions of NOx, PM10, and PM2.5.

The Determination that the Project Will Not Increase Vehicle Miles Traveled

Petitioners argue that Caltrans' analysis regarding the Project's potentially significant environmental impacts relies upon a determination that the Project will not result in an increase in VMT (vehicle miles traveled). Petitioners allege that this conclusion is not supported by substantial evidence in the record. Rather, Petitioners claim, the administrative record shows that construction of HOV lanes induces additional demand, which will result in an increase in overall VMT. (See Petitioners' Reply Brief, p.13 [citing 2 AR 428; 9 AR 3154, 3180; 10 AR 3589-3607; 11 AR 3609, 3683, 3685, 3689, 3692; 24 AR 8960, 9194].)

Caltrans denies that its EIR was based on any analysis, or any determination, of the Project's impact on VMT. (See Opposition Brief, pp.18, 20.) This is correct. The record shows that Caltrans made no effort to disclose or analyze the impact that the Project may have on overall VMT in the Highway 50 corridor.

Since Caltrans never determined the Project's impact on overall VMT, it is unnecessary for the Court to decide whether that determination is supported by substantial evidence. However, to the extent Caltrans assumed for purposes of its EIR that the Project would have no impact on overall VMT, the Court finds that assumption is not supported by substantial evidence, for the reasons discussed above.

The Project's Potentially Significant Impacts on Local Roads and Parking

Petitioners allege the EIR fails to adequately disclose and analyze the Project's impacts on the volume, distribution, and flow of traffic on local roadways, and on the demand for parking in downtown Sacramento.

The EIR states that parallel routes and local street connections at freeway off-ramps were analyzed up to the first intersection, but Caltrans concedes that the EIR does not quantify these impacts. (See Respondent's Supplemental Brief, p. 7; see also 2 AR 497, 500.) Caltrans contends that the EIR nevertheless adequately discussed the Project's impacts on local roadways and parking since there is no reason to believe that the Project would have a potentially significant adverse impact on local roads or parking.

Although the EIR's failure to disclose the analysis of the Project's impacts on local street connections renders the EIR less than perfect, the Court is not persuaded that it precluded informed decision making and informed public participation. Even if the Project will increase the number of vehicles exiting the highway and entering local roads, the Final EIR adequately discusses this issue. (See 2 AR 485 [parallel routes were analyzed as were all local street connections at off-ramp termini up to first intersection], 490 [traffic study does not suggest commuters would be likely to divert to local streets as result of project], 491 [not practical for Caltrans to model the entire local street system], 496 [project would not alter traffic patterns in central Sacramento, and traffic signal connections would control the flow rate of traffic onto

city streets], 497 [induced parking demand is not anticipated], 502 [Caltrans lacks authority to impose or enforce parking requirements].)

The EIR's discussion of the Project's impacts on local roads and parking is adequate.

The Project's Growth Inducing Impacts

Petitioners allege the EIR fails to adequately analyze the Project's growth inducing impacts.

Under CEQA, a project has growth inducing impacts if it will (1) foster economic or population growth or additional housing; (2) remove obstacles to growth; or (3) facilitate other activities that cause significant environmental effects. (Cal. Code Regs., tit.14, § 15126.2(d); see also City of Antioch v. City Council (1986) 187 Cal.App.3d 1325, 1335-1338; Stanislaus Audobon Society, Inc. v. County of Stanislaus (1995) 33 Cal.App.4th 144, 152-160; Napa Citizens for Honest Gov't v. Board of Supervisors (2001) 91 Cal.App.4th 342, 367-371.)

In discussing the Project's growth inducing impacts, a distinction must be made between the concept of "induced demand" and Petitioners' use of the phrase "growth inducing impacts." "Induced demand" is the concept that the increase in the capacity of the highway may generate additional vehicle travel by inducing additional demand for vehicle travel (e.g., shifts from other transport modes, longer trips, new vehicle trips). In contrast, when Petitioners refer to the Project's "growth inducing impacts," Petitioners are referring to the ways in which the proposed Project could directly or indirectly foster economic, population, or housing growth in the surrounding environment, and the related effects this might have on traffic and the environment. (Cal. Code Regs., tit. 14, §§ 15126.2(d), 15358(a)(2).) "Induced demand" is broader than a project's "growth inducing impacts" in that a highway project's "growth inducing impacts" may contribute to "induced demand," but "induced demand" also may occur even if the project will not have any "growth inducing impacts." In this section, the Court is addressing only Petitioners' assertion that the EIR did not adequately disclose and analyze the Project's "growth inducing impacts."

In this context, Petitioners allege the EIR failed to adequately disclose and analyze the Project's growth inducing impacts because the EIR states that population and employment growth occurs independent of the Project and will accelerate in the future with or without the addition of HOV lanes on U.S. Highway 50. Petitioners contend that the EIR is trivializing the Project's growth inducing impacts. (See Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 711, 718 [project's impact may be significant even though project contributes only a small amount to an existing problem].) Petitioners allege there is substantial evidence in the record to show that increases to highway capacity facilitate and accommodate regional growth. Thus, Petitioners contend, the EIR's analysis must use separate growth projections for the build and no-build scenarios to adequately account for the growth-inducing impacts of the Project.

Petitioners claim lacks merit. The EIR did not, as Petitioners suggest, find that growth in the Sacramento region occurs independent of construction of new highway capacity. To the contrary, the EIR expressly finds that regional traffic projects may have an impact on regional growth or land use. However, given existing and projected development in the area, and given the data showing that the Project is not expected to eliminate peak period traffic congestion or significantly improve the highway's peak period level of service,
Caltrans determined that the proposed Project would not add sufficient additional highway capacity to significantly affect growth patterns in the U.S. 50 corridor. (1 AR 89-92, 201-202; 2 AR 475, 485, 492, 494, 498.) This determination is supported by substantial evidence in the record. (Id.; 9 AR 3167-3168.) Accordingly, the Court concludes that the EIR adequately analyzes the Project's growth inducing impacts.

The Project's Contribution to Global Warming

Petitioners argue that the EIR also violates CEQA because it fails to analyze the Project's contributions to global warming. In light of the Governor's Executive Order (S-3-05) on global warming, and the legislative requirement that greenhouse gas (GHG) emissions be reduced to 1990 levels by the year 2020, Petitioners contend CEQA requires agencies to analyze a project's impacts on global warming. In order to properly analyze a project's global warming impacts, Petitioners assert, an EIR should (i) provide a regulatory and scientific background on global warming; (ii) assess the project's contribution to

GHG emissions and the potential impact of those GHG emissions on global warming; (iii) assess the effect of climate change on the project and its impacts; and (iv) make a significance determination.

Caltrans argues that the field of global warming is still in its "infancy." Caltrans notes that the California Global Warming Solution Act of 2006, codified at Health & Safety Code § 38500 et seq., was the nation's first mandatory cap on GHG emissions. Caltrans also notes that evaluation of a project's impact on global warming traditionally has not been demanded under CEQA. Although the Legislature has directed the Office of Planning and Research to develop guidelines for addressing GHG emissions in CEQA, those guidelines do not yet exist and are not required to be finalized until January 1, 2010. Consequently, Caltrans argues there is no workable framework for presenting the GHG analysis that Petitioners demand. According to Caltrans, this means any analysis of the Project's impact on global warming is too speculative for evaluation under CEQA.

Caltrans also argues that this Project's failure to analyze the effects of GHG emissions is not subject to legal challenge pursuant to Public Resources Code § 21097.

The Court agrees with Petitioners that the exemption in Public Resources Code § 21097 does not apply to this Project.

Although § 21097 exempts certain transportation projects – including, potentially, this one -- from claims based on a failure to adequately analyze the effects of GHG emissions, that statute applies retroactively only to EIRs that have not become "final." The dispute in this case centers on the meaning of the term "final."

Caltrans contends – not unreasonably – that if the term "retroactively" is to have any meaning, then § 21097 must apply to EIRs certified before adoption of the legislation. If the intent merely was to make § 21097 retroactive to uncertified EIRs, Caltrans argues, then subdivision (c) was superfluous because § 21097 already would have applied to conduct occurring after the effective date of the statute, including certification of an EIR. (See Fairbank v. City of Mill Valley (1999) 75 Cal.App.4th 1243, 1257 [propriety of agency action under CEQA is determined on the date on which the document is presented for public review].) Because the general purpose of the statute was to insulate certain state transportation projects from causes of action based on a failure to adequately analyze the effects of GHG emissions, Caltrans claims the intent of subdivision (c) was to make the protections of § 21097 retroactive to all EIRs, *including* previously certified EIRs, provided the cause of action itself had not become "final."

In response, Petitioners argue that the statute plainly and unambiguously provides it "shall apply retroactively to an environmental impact report . . . that has not become final." Thus, Petitioners claim, retroactivity depends on the finality of the EIR, not the finality of the cause of action. Petitioners contend that the Legislature used the term "retroactively" to clarify that § 21097 would apply to steps in the CEQA process already undertaken on the effective date of the legislation, provided the EIR or other document had not yet become "final." (See Cal. Code Regs., tit. 14, § 15007(b).)

Although both arguments have some appeal, the Court is persuaded that Petitioners have the better argument. It is the Court's opinion that the Legislature used the word "final" in the same sense it is used in Code of Civil Procedure § 1094.5. (See Civ. Proc. Code § 1094.5 [providing for inquiry into the validity of any final administrative order or decision].) The Legislature did not intend § 21097(a) to apply to a Final EIR certified before the effective date of the legislation.

Section 21097 was signed into law on August 24, 2007, and became effective on January 1, 2008. Caltrans certified its Final EIR on June 21, 2007, months before the effective date of the legislation. Thus, this project does not qualify for the exemption in Public Resources Code § 21097.

The Court next considers whether the EIR provided adequate information about the Project's contributions to global warming, and concludes it did not.

The EIR recognizes the concern that GHG emissions raise for climate change, but concludes that because there is no accepted federal, state, or regional methodology for GHG emission and climate change impact analysis, analyzing the impacts associated with an increase in GHG emissions at the project level is not currently possible. (1 AR 159.)

However, as Petitioners point out, nothing in the administrative record supports Caltrans' conclusion that it is not possible to quantify the Project's GHG emissions, at which point, Caltrans could make its own evaluation of their significance. While CEQA does not require an agency to foresee the unforeseeable, CEQA does require an agency to use its best efforts to find out and disclose all that it reasonably can. (Cal. Code Regs., tit. 14, § 15144.) Only after thorough investigation may an agency find that a particular impact is too speculative for evaluation and terminate its discussion of the impact. (Cal. Code Regs., tit. 14, § 15145 [emphasis added]; see Berkeley Keep Jets Over the Bay Committee v. Board of Commissioners (2001) 91 Cal.App.4th 1344, 1370-1371 [fact that a single methodology does not currently exist does not excuse evaluation].) Here, there is no evidence in the record that Caltrans performed any investigation whatsoever. This fell short of Caltrans' duty to make a good faith effort to investigate and disclose all that it reasonably can.

Caltrans must meaningfully attempt to quantify the Project's potential impacts on GHG emissions and determine their significance, or at the very least explain what steps it has taken that show such impacts are too speculative for evaluation.

The Project's Construction-Related Impacts on Air Quality

Petitioners also allege that the EIR violates CEQA because it fails to quantify and adequately analyze the Project's construction-related impacts on air quality.

Caltrans concedes that construction equipment will generate emissions while the Project is being built. Nevertheless, Caltrans argues that the EIR is adequate in terms of informing the public about these environmental impacts. According to Caltrans, the EIR adequately advises the public that the Project may result in the generation of short-term construction-related emissions, and that such emissions will be controlled and rendered less than significant by requiring compliance with best management practices, Caltrans' Standard Specifications, and all pertinent rules, regulations, and ordinances of the SMAQMD. (See 1 AR 12, 157, 199; 2 AR 505.)

As described above, the sufficiency of the information contained in an EIR is reviewed in light of what is reasonably feasible. (Cal. Code Regs., tit. 14, § 15151; Rio Vista Farm Bureau Ctr. v. County of Solano (1992) 5 Cal.App.4th 351, 374-375.) "Feasible" means "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (Cal. Code Regs., tit. 14, §§ 15147, 15364; see also Citizens to Pres. the Ojai v. County of Ventura (1985)176 Cal.App.3d 421, 429-430 [noting courts favor specificity and use of detail in EIRs].)

In this case, an evaluation of the Project's short-term construction-related emissions reasonably was feasible using SMAQMD's established methodology and thresholds of significance. (See 2 AR 463; 13 AR 4536.) Yet Caltrans made no effort to quantify this Project's construction-related air quality impacts or to analyze whether and to what extent the Project is or is not consistent with SMAQMD's threshold of significance. Nor does the EIR explain why an analysis of the Project's construction-related air quality impacts would be infeasible. (See, e.g., 2 AR 505; see also Ojai, supra, at p.430 [EIR failed to explain reliance on earlier analysis]; Berkeley Keep Jets Over the Bay Committee v. Board of Commissioners (2001) 91 Cal.App.4th 1344, 1368-1370 [EIR failed to support decision not to evaluate health risks with any meaningful analysis].) Accordingly, Caltrans' EIR failed to adequately disclose and consider the Project's potentially significant construction-related emissions.

The Description and Analysis of the Project's Community Enhancements

Petitioners allege Caltrans' EIR is inadequate because it does not provide a stable and accurate project description.

An accurate, stable, and finite project description is the sine qua non of an informative and legally sufficient EIR. (County of Inyo v. City of Los Angeles (1977) 71 Cal.App.3d 185, 193.) An adequate project description is necessary to ensure that CEQA's goals of providing information about a project's environmental impacts will not be rendered useless. An overly narrow description of a project could result in an agency overlooking a project's cumulative impact by focusing on the isolated parts of the whole. (Rio Vista Farm Bureau Ctr. v. County of Solano (1992) 5 Cal.App.4th 351, 370.) Thus, to further the objectives of CEQA, the term "project" is defined broadly to include the "whole of an action, which

has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect change in the environment." (Cal. Code Regs., tit. 14, § 15378(a).)

The description of a project in an EIR should be sufficient to provide public agencies and the public with detailed information about the effects the proposed project is likely to have on the environment. (Dry Creek Citizens Coalition v. County of Tulare (1999) 70 Cal.App.4th 20, 26.)

On the other hand, the project description in an EIR is not required to supply extensive detail beyond that needed for evaluation and review of the environmental impact of the project actually being proposed. (Cal. Code Regs., tit. 14, § 15124.) CEQA requires consideration only of the potential environmental effects of the proposed project, not some hypothetical project. (Rio Vista Farm Bureau Ctr. v. County of Solano (1992) 5 Cal.App.4th 351, 372.) No purpose would be served by requiring an EIR to speculate as to the environmental consequences of future activities that are unspecified or uncertain when the project is proposed. (Id. at pp.372-373.) Accordingly, the project description in an EIR should not include future activities if it is not possible to provide meaningful information about those activities at the time the project is proposed. (Id.)

Petitioners allege Caltrans' EIR does not provide a stable and accurate project description because it fails to adequately identify and describe the proposed "community enhancements."

The Draft EIR states that Caltrans is committed to provide funding for "community enhancements" proposed by the Citizens Advisory Committee and/or requested by affected local governments. (2 AR 513, 524, 535-536.) Although the CAC and local governments identified numerous potential community enhancements – both within and without Caltrans' right-of-way – the Draft EIR never identifies what enhancements will be included in the Project. Similarly, the Final EIR states that the community enhancements will include certain sound walls and landscaping, but it does not state that the community enhancements will be limited to soundwalls and landscaping. (1 AR 32-33.)

Caltrans concedes that the EIR does not identify and describe all the "community enhancements" that actually will be included in the Project. However, Caltrans contends this was reasonable and necessary because it was not possible to identify all of the community enhancements at the time the Project was proposed. According to Caltrans, the final list of community enhancements could not be determined until after the close of the environmental review process because each affected local jurisdiction has the discretion to decide how to spend its share of the community enhancement funds, and such decisions do not have to be made until funding is actually allocated to the local jurisdictions.

Notwithstanding the obvious uncertainty as to what community enhancements will be constructed as part of the Project, (1 AR 6), the Court agrees with Caltrans that the uncertainty does not arise from any attempt by Caltrans to improperly constrain its environmental review by improper segmenting. Rather, it arises from a good faith effort to be inclusive -- or perhaps over-inclusive -- in describing the "whole of the action" being approved. (See, e.g., Cal. Code Regs., tit. 14, § 15378(b)(4) [a project does not include creation of government funding mechanisms or fiscal activities which do not include any commitment to any specific project].)

Caltrans has made clear that if a local jurisdiction chooses to commit funding to a community enhancement that was not evaluated in the EIR, then that enhancement will be subject to full CEQA review. Caltrans maintains that no community enhancement will be constructed without full CEQA review. Thus, while the EIR's description of the project was not perfect, the description did not preclude informed decision making and informed public participation. (See, e.g., Dusek v. Redev. Agency of City of Anaheim (1985) 173 Cal.App.3rd 1029, 1040-1041 [discrepancy between project description and project approved does not violate CEQA where agency approves a narrower project than that described in EIR]; see also Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal. (1988) 47 Cal.3d 376, 394 [upholding description that defined projects as "[moving] the School of Pharmacy basic science research units from the UCSF Parnassus campus to Laurel Heights"]; Nat'l Parks & Conservation Ass'n v. County of Riverside (1996) 42 Cal.App.4th 1505, 1520 [deferral of environmental assessment does not violate CEQA where an EIR cannot currently provide meaningful information about uncertain or unspecified future projects].)

In addition to challenging the description of the project, Petitioners allege that the EIR failed to adequately disclose and analyze the potential environmental impacts of the community enhancements.

For the reasons discussed above, the Court concludes that the EIR was not rendered inadequate for failing to discuss possible community enhancements that either were not reasonably foreseeable at the time the project was proposed or that will not have any significant effect on the project or its environmental impacts. (See Laurel Heights Improvement Assn., supra, at pp. 395-396.)

However, in respect to the prospective community enhancements that were identified by the CAC and affected local governments, the Court agrees with Petitioners. The Court could not locate any analysis or evaluation of the possible adverse environmental impacts of the identified community enhancements. (See Sacramento Old City Ass'n v. City Council (1991) 229 Cal.App.3d 1011, 1027 [if the inclusion of a mitigation measure would itself create new significant effects, these too, must be discussed].) This lack of analysis renders this portion of the EIR inadequate as an informational document.

The Geographic Scope of the EIR's Cumulative Impact Analysis

Petitioners allege the geographic scope of the EIR's cumulative impact analysis was unduly restricted to the Highway 50 corridor. Petitioners assert the geographic scope of the cumulative impact analysis should be regional (i.e., the area under the jurisdiction of the SMAQMD), rather than strictly limited to the Highway 50 corridor. (See Opening Brief, p. 19 [citing Citizens to Preserve the Ojai v. County of Ventura (1986) 176 Cal.App.3d 421, 431-432; Cal. Code Regs., tit.14, § 15130(b)(3)].)

When determining the geographic scope of the area affected by the cumulative impacts of a project, the court reviews whether the lead agency has provided a reasonable explanation for the geographic limitation used. (Cal. Code Regs. tit. 14, § 15130(b)(3).)

Caltrans maintains that the geographic scope of its cumulative impact analysis was reasonable under the circumstances. The Court agrees.

For analysis related to transportation impacts, the scope of Caltrans analysis encompassed the Highway 50 corridor, but also considered the impacts from development projects in a larger area encompassing Rancho Cordova, Folsom, downtown Sacramento, and the unincorporated areas of Sacramento County. (See 7 AR 2508-2532; 1AR 198; see also 1 AR 198-259.) For analysis related to air quality, the EIR's analysis was regional, encompassing the entire Sacramento Valley Air Basin. (1 AR 151, 199.) Caltrans has provided a reasonable explanation for the geographic scope of its cumulative impact analysis. Thus, the geographic scope of the EIR's cumulative impact analysis did not violate CEQA.

The EIR's Discussion of Project Alternatives

Petitioners allege that the EIR is inadequate because it fails to discuss a reasonable range of project alternatives.

CEQA does not require an EIR to consider every conceivable alternative to a project. CEQA only requires an EIR to describe a range of potentially feasible alternatives.

The range of alternatives required to be considered in an EIR is governed by a "rule of reason." (Cal. Code Regs., tit. 14, § 15126.6(f).) The EIR should include those alternatives that could feasibly accomplish most of the basic objectives of the project and could avoid or substantially lessen one or more significant effects. (Cal. Code Regs., tit. 14, § 15126.6(a), (c).)

There is no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR; each case must be evaluated on its facts. However, the range of alternatives considered in an EIR must represent enough variation to allow informed decisionmaking and informed public participation. (Cal. Code Regs., tit. 14, § 15126.6(a); Preservation Action Council v. City of San Jose (2006) 141 Cal.App.4th 1336, 1351.)

An EIR is required to include an in-depth discussion of those alternatives identified as at least potentially feasible. (Preservation Action Council, supra, at pp.1350-1351; Citizens of Goleta Valley v. Bd. of Supervisors (1990) 52 Cal.3d 553, 569.) On the other hand, an EIR is not required to consider alternatives which are infeasible. (Id.) Thus, the lead agency must make an initial determination as to which alternatives are potentially feasible and merit in-depth consideration, and which do not. (Citizens of Goleta Valley, supra, at p.569.)

The Legislature has defined "feasible" for purposes of CEQA to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Pub. Res. Code § 21061.1; see also Cal. Code Regs., tit. 14, § 15364.) Among the factors that may be taken into account when assessing feasibility of alternatives are site suitability, economic viability, availability of infrastructure, general plan consistency, other plans or regulatory limitations, jurisdictional boundaries, and whether the proponent reasonably can acquire, control, or otherwise have access to the alternative site. (Cal. Code Regs., tit. 14, § 15126.6(f)(1); Citizens of Goleta Valley, supra, at pp.574-575.)

The EIR should briefly describe the rationale for selecting the potentially feasible alternatives considered in-depth in the EIR. (Cal. Code Regs., tit. 14, § 15126.6(c).) The EIR also should identify the alternatives that were rejected during the scoping process, and briefly explain the reasons underlying the agency's determination. (Id.) Evidence of infeasibility need not be found within the EIR itself. However, a finding of infeasibility must be supported by substantial evidence in the record. (Citizens of Goleta Valley, supra, at p. 569.)

Here, Petitioners acknowledge that Caltrans considered and rejected many alternatives during the scoping process. (See 1 AR 24-32.) Nevertheless, Petitioners allege that the EIR fails to discuss a reasonable range of alternatives because the EIR considered only two "build" alternatives – with little variation between them – and failed to consider a transit-only alternative. (1 AR 24-32.) The Court agrees.

The EIR did not include an in-depth discussion of the transit-only alternative because SACOG's HOV-US 50 Corridor Study suggested that both light rail extensions and HOV lanes were necessary to alleviate congestion in the corridor. (1 AR 30.) But even if this statement is accurate, it is not a proper basis to reject the transit-only alternative as infeasible. (Cal. Code Regs., tit.14, § 15126.6(b) ["the discussion of alternatives shall focus on alternatives . . . which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly."])

The test is not whether the transit-only alternative is the best strategy to achieve the Project's objectives, but whether it is a reasonable alternative that could feasibly accomplish most of the basic objectives of the Project and avoid or substantially lessen one or more of the Project's significant effects. (Cal. Code Regs., tit.14, § 15126.6; Wildlife Alive v. Chickering (1976) 18 Cal.3d 190, 197 [one of EIR's major functions is to ensure that all reasonable alternatives are thoroughly assessed].)

In this case, the objectives of the Project are to improve mobility, provide an option for reliable peak period travel time, improve traffic operations by reducing congestion and travel time, use highway facilities as efficiently as possible, provide incentives for commuters to use carpools, vanpools, or buses during peak period travel, and identify projects and strategies to improve adjacent street system and thereby enhance neighborhood livability. (1 AR 20.) The transit-only alternative is a potentially feasible alternative that could accomplish most of the basic objectives of the Project, while potentially avoiding or substantially lessening one or more potentially significant effects. (2 AR 417, 432-433; 11 AR 3648.) Thus, the transit-only alternative is a reasonable alternative that merits discussion and comparison to the two build options discussed in the EIR.

Because the EIR included only two build alternatives, with little variation between them, Caltrans' failure to include an in-depth discussion of the transit-only alternative precluded informed decision-making and informed public participation and rendered the EIR's discussion of alternatives inadequate. (Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 403-404.)

Impermissible Segmentation of Environmental Review

Petitioners contend that Caltrans impermissibly segmented its environmental review because the EIR fails to analyze a foreseeable extension of HOV lanes on major highways throughout the Sacramento region.

Although Caltrans admits that SACOG has an HOV network in concept, Caltrans denies that this Project

is part of a larger enterprise to construct a comprehensive network of HOV lanes throughout the Sacramento region.

As described above, an EIR must consider all future phases of a project as the "whole of the action" so that "environmental considerations [do] not become submerged by chopping a large project into many little ones . . . ." (Burbank-Glendale-Pasadena Airport Auth. v. Hensler (1991) 233 Cal. App. 3d 577, 592.) On the other hand, CEQA does not require a detailed environmental analysis of every future activity that conceivably may occur. Where future activities are unknown or uncertain, no purpose would be served by requiring an EIR to speculate about their environmental consequences. (Laurel Heights Improvement Ass'n v. Regents of University of California (1988) 47 Cal.3d 376, 395, 398-399.) Generally speaking, an EIR should be prepared as early as feasible to enable environmental considerations to influence project design yet late enough to provide meaningful and reliable information for environmental review. (Id. at p. 395.)

In Laurel Heights, the California Supreme Court considered the difficult question of when an EIR is required to analyze the environmental effects of future activities that may become part of the project. The Court held that an EIR must analyze the environmental effects of a future activity if (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. (Id. at p. 396; see also Cal. Code Regs., tit. 14, § 15165.) Future activities not currently proposed for approval, and not reasonably foreseeable, need not be analyzed in the EIR. (Nat'l Parks & Conservation Ass'n v. County of Riverside (1996) 42 Cal.App.4th 1505, 1520.)

In Del Mar Terrace Conservancy, Inc. v. City Council (1992) 10 Cal.App.4th 712, the Fourth Appellate District Court of Appeal upheld a trial court's use of a federal standard for evaluating the specific issue of whether a particular highway project is an impermissible segmentation of a larger roadway project. (Del Mar Terrace Conservancy, Inc. v. City Council (1992) 10 Cal.App.4th 712, 732-735, disapproved on other grounds by Western States Petroleum Assn. v. Superior Court (1995) 9 Cal.4th 559.) The federal standard uses the following criteria to evaluate whether a proposed highway segment may be reviewed separately: (1) is the highway segment located between logical terminal points; (2) is the segment of sufficient length to assure adequate consideration of alternatives; (3) does the segment have "independent utility;" (3) and (4) does the segment seem to serve important state and local needs, such as relieving particular traffic congestion? (Id. at pp. 732-733.) The Court also considered whether approval of the segment would irretrievably commit the agency to a definite course of action in regard to other highway segments. (Id. at p. 734.)

Applying the criteria in Laurel Heights and, more specifically, Del Mar Terrace, the Court concludes that Caltrans did not impermissibly segment its environmental review of this Project. The evidence in the record supports the determination that this Project is of substantial length, is located between logical terminal points, serves important state and local needs, and has independent utility. Further, approval of the project would not irretrievably commit Caltrans to construct any other HOV-related projects. The eventual possible construction of a comprehensive network of HOV lanes throughout the Sacramento region was not, at the time the EIR was prepared, a reasonably anticipated future project. (2 AR 480.)

The CEQA Guidelines provide that where a project is one of several similar projects of a public agency, but is not deemed part of a larger project, the agency may prepare one EIR for all projects, or one for each project, but shall in either case comment, in at least general terms, upon the cumulative effect. (Cal. Code Regs., tit. 14, § 15165; see also Del Mar Terrace, supra, at p. 735, 736-737.) The Court's review of the record shows that Caltrans' EIR met this standard. (See, e.g., 1 AR 79, 83, 198, 205.)

The CEQA Findings

Petitioners finally allege Caltrans' Findings violate CEQA because (i) Caltrans failed to adopt a mitigation monitoring plan; (ii) the Findings fail to specify the location and custodian of the record of proceedings; and (iii) the Findings are not supported by substantial evidence.

Caltrans contends that nothing in CEQA requires an agency to adopt a mitigation monitoring program as part of its Findings.

However, even if CEQA does not state how a mitigation monitoring plan may be adopted, CEQA clearly

states when a mitigation monitoring plan must be adopted. Specifically, CEQA states that the lead agency is required to adopt its mitigation monitoring program "[w]hen making the findings required [for approval of the project under] Section 21081 . . . ." (Pub. Res. Code § 21081.6(a)(1); Cal. Code Regs., tit. 14, § 15091(d) ["When making the findings required in subdivision (a)(1), the agency shall also adopt a program for reporting on or monitoring the changes which it has either required in the project or made a condition of approval to avoid or substantially lessen significant environmental effects."]; Cal. Code Regs., tit. 14, § 15094(b)(6) [notice of determination, which is required to be filed within 5 five working days after approval, must state whether a mitigation monitoring plan/program was adopted]; see also Cal. Code Regs., tit. 14, § 15097(a) [requiring mitigation monitoring or reporting program in order to ensure that mitigation measures and project revisions identified in EIR are implemented].) Thus, while the agency is not required to include the mitigation monitoring program as part of the EIR or (arguably) the Findings, the agency is required to adopt the mitigation monitoring program when the Findings are made, and before the agency files its notice of determination. (Cal. Code. Regs., tit. 14, §§ 15091(d), 15094(b)(6).)

Nothing in the record before this Court establishes that Caltrans adopted a mitigation monitoring plan when the Findings were made. (1 AR 1.) Although Caltrans refers to a list of "Environmental Commitments" purportedly "developed" in June 2007, (see Opposition Brief, p. 36 fn.33), there is no evidence that Caltrans adopted this document as its mitigation monitoring plan. Nor is there any mention of a mitigation monitoring plan in the Notice of Determination. (4 AR 1419-1420.) Consequently, Caltrans should correct (or clarify) its Findings and/or Notice of Determination.

Caltrans' Findings also appear to violate CEQA because they do not specify the location and custodian of the documents which constitute the record of proceedings upon which its decision was based. (Cal. Code Regs., tit. 14, § 15091(e).) The Court is not persuaded that the omission of this information was prejudicial, since the information was included in Caltrans' Notice of Determination. (1 AR 1.) Nevertheless, on remand, Caltrans should modify its Findings to conform to the requirements of CEQA.

The Findings also violate CEQA because substantial evidence does not support Caltrans' finding that the EIR was adequate. (See Cal. Code Regs., tit. 14, § 15090.)

Conclusion

In conclusion, the petition is granted in respect to Petitioners' claims the EIR is inadequate in the *following respects:*
a) the EIR fails to adequately disclose and analyze the Project's operational and construction-related air quality impacts;
b) the EIR fails to adequately disclose and analyze the Project's potential impacts on GHG emissions and climate change;
c) the EIR fails to adequately disclose and analyze the possible effects of the identified community enhancements;
d) the EIR fails to consider a reasonable range of potentially feasible alternatives; and
e) the Findings are inadequate and not supported by substantial evidence.

To be sufficient, the EIR must: (a) disclose and analyze the Project's specific traffic-based emissions; (b) meaningfully attempt to quantity the Project's potential impact on GHG emissions and determine their significance (or explain what steps Caltrans has taken that show such impacts are too speculative for evaluation); (c) disclose and analyze the Project's potentially significant construction-related impacts; (d) disclose and analyze the possible significant environmental impacts of the identified community enhancements; and (e) identify and evaluate the transit-only alternative as a potentially feasible alternative to the Project.

The petition is denied in all other respects.

A peremptory writ of mandate shall issue from this Court commanding Caltrans to (i) set aside its *certification* of the portions of the environmental impact report that analyze the significance of the Project's operational and construction-related air quality impacts and that consider potentially feasible alternatives to the Project; (ii) prepare, circulate, and consider a new EIR for the Project that is consistent with the views expressed in this opinion before proceeding with the Project; *(iii) suspend all* activity that could result in any change or alteration to the physical environment until Caltrans has taken

such action as may be necessary to bring the Project into compliance with CEQA; and (iv) file a return in this Court within six months after the issuance of the writ specifying what Caltrans has done to comply with the writ.

Petitioners are directed to prepare a formal judgment incorporating this ruling by reference, and a peremptory writ of mandate; submit them to opposing counsel for approval as to form; and thereafter submit them to the Court for signature and entry of judgment in accordance with Rule of Court 3.1312. Petitioners shall be entitled to recover their costs upon appropriate application. The Court shall retain jurisdiction to determine compliance with the writ and any motion for an award of attorney fees.

Case No. 07CS00967
Name of Case: Environmental Council of Sacramento, et al. vs. CA Dept. of Transportation, et al.

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4)

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled RULING AFTER HEARING a notice envelopes addressed to each of the parties or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

Donald B. Mooney
Attorney at Law
129 C Street. Suite 2
Davis, CA 95616

Martin Keck
Attorney for Department of Transportation
1120 N Street (MS-57)
P.O. Box 1438
Sacramento, CA 95812-1438

I, the undersigned Deputy Clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: 7/15/08

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

By: L. YOUNG
Deputy Clerk