



County of Orange

California

Thomas G. Mauk
County Executive Officer

DRAFT
February 14, 2012

Hasan Ikhata, Executive Director
Southern California Association of Governments
818 West Seventh Street, 12th Floor
Los Angeles, CA 90017-3435

Re: Orange County Comments to the Draft 2012 Regional
Transportation Plan/Sustainability Communities
Strategy

Dear Mr. Ikhata,

The County of Orange (County) has reviewed the 2012 Draft Regional Transportation Plan/Sustainable Communities Strategy (RTP/SCS), and associated Program Environmental Impact Report (PEIR). SCAG staff should be commended for the effort put into these regionally significant documents that put forth goals, policies and strategies intended to meet the provisions of SB 375. The County appreciates the opportunity to provide comments and suggested revisions to these documents.

Upon review of these documents, the County has determined that there are a number of policies, strategies and measures within the draft RTP/SCS and PEIR that detrimentally affect the County's local land use control and future transportation funding, and that the documents are legally inadequate under CEQA, SB 375, and applicable law. The overarching issues are described below and specific technical details are provided in the attached matrices. The County requests that all of the following changes be made so that the RTP/SCS and PEIR conform to existing law and County land use policies, and that the RTP/SCS and PEIR be recirculated for public review and comment.¹

Orange County Sustainable Communities Strategy

In 2010, the Orange County Council of Governments (OCCOG) requested delegation to develop a subregional Sustainable Communities Strategy (SCS) for Orange County. OCCOG entered into a Memorandum of Understanding (MOU) with SCAG that has allowed OCCOG to develop the Orange County Sustainable Communities Strategy (OC SCS) which will be incorporated into SCAG's 2012 RTP/SCS. The OC SCS, approved by the OCCOG Board of Directors on June 23, 2011, describes the policies and programs that Orange County local jurisdictions will

¹ This letter is not intended as an exhaustive discussion of the PEIR's compliance with state law, particularly the California Environmental Quality Act (CEQA) and SB 375. The County further adopts and supports the comments of other local agencies, such as the Cities of Irvine and Anaheim, OCTA, and others, to the extent those comments are consistent with this letter.

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implement to reduce greenhouse gas (GHG) emissions to 2005 levels by the year 2035 and reflects current land uses, existing entitlements, proposed development (e.g., general plans, zoning maps, etc.) and forecasted population, housing and employment growth in Orange County (i.e., Orange County Projections [OCP] 2010 – Modified, January 2012).

Pursuant to the MOU between SCAG and OCCOG, the OC SCS is to be fully incorporated without change. Although there are several references to the OC SCS in both the RTP/SCS and PEIR, it remains unclear whether the data contained in the OC SCS has remained unchanged in each proposed alternative. Without the underlying data for each alternative available for review, this cannot be confirmed. It is requested that language, maps, tables, and charts be added to demonstrate that the underlying land use, socioeconomic, and transportation data for Orange County (OCP 2010 – Modified) has been incorporated into the regional RTP/SCS and each of its plan alternatives without alteration as agreed to in the MOU. It is also requested that the adoption of the growth forecast numbers by SCAG’s Regional Council and/or Joint Policy Committee be at the county level, consistent with past RTPs.

A review of the policies and strategies contained in the RTP/SCS has revealed the potential for inconsistency with land use policies and/or County operations in the unincorporated area. The County requests that the RTP/SCS include language that acknowledges and incorporates the fifteen “OC SCS Sustainability Strategies A through O,” contained in Chapter Three, and the “Sustainability Strategies,” contained in Appendix F, of the OC SCS as specifically appropriate for the Orange County Subregion.

Land Use/Local Control

Several policies in the RTP/SCS and dozens of mitigation measures in the PEIR, appear to go beyond the requirements of SB 375 and extend SCAG’s purview into local land use control, which under law is exclusively vested with the local jurisdiction in most cases. The police power vests a county or a city with local land use regulation and control to protect the public health, safety and welfare of its residents.² This is specifically set forth in the California Constitution Article XI, Section 7, which reads that “A county or a city may make and enforce within its limits all local police, sanitary and other ordinances and regulations not in conflict with general laws.” Under this power a county is entitled to tailor regulations to suit the ever changing needs and interests of its population, which will be done through local ordinances and applicable CEQA processes (which are addressed below). Certain measures set forth in the PEIR will in effect usurp this local control that is enshrined in the California Constitution and preserved in SB 375.

The PEIR also contains measures that will affect County operations which are federally or state regulated. There are at least 180 mitigation measures related to existing federal and state regulations with which local jurisdictions must comply (see attached matrix).³

² *Berman v. Parker*, (1954) 348 U.S. 26, 32-33.

³ The attached matrix contains the collective comments of all County agencies that are impacted by the RTP/SCS and PEIR. Although some comments recommend edits to the mitigation measures, it is the overriding contention of the County that certain mitigation measures be completely removed. Those measures include, but are not limited to, mitigation measures as to what other local agencies “can and

These mitigation measures contain the phrase “local jurisdictions can and should” which both assumes the local jurisdiction has the authority to implement the measure and is required to do so. Inconsistency between proposed mitigation measures and existing mandates is of great concern to the County. For example, there are five California Regional Water Quality Control Boards (RWQCB) in the SCAG region, including two in Orange County, that have issued individual and locally-specified water quality permits. Local jurisdictions, including the County, would be unable to implement several of the mitigation measures in PEIR section “3.13 Water Resources” due to their inconsistency with the requirements of their local water quality permit. The County requests that mitigation measures related to existing federal and state mandates be removed and language added to the beginning of each PEIR section that states that local jurisdictions must comply with existing applicable laws and regulations. Should SCAG not delete the measures that restate existing federal, state, and local laws and regulations, the County recommends a statement that the proposed mitigation measures would be superseded by such.

Several mitigation measures will impose both funding priorities and financial obligations upon local jurisdictions at a time when budgets are tight and some funding sources are no longer available. Other measures will shift the financial obligation to project sponsors and residents by proposing that new taxes and fees be levied to fund programs or projects that “support a shift from private passenger vehicles to transit and other modes of transportation.” New taxes will require voter approval and new fees are subject to Proposition 26. This analysis is outside the scope of SB 375 and SCAG is unable to make that determination. If a tax is defeated, the local jurisdiction cannot implement it as a mitigation measure which could only have been implemented with a new funding source. Finally, the assessment of impact fees upon new development to fund these measures will result in an increase in the cost of housing and create an even more difficult environment for the construction of affordable housing throughout the region.

CEQA Considerations

The PEIR fails to comply with the fundamental requirements of CEQA, which must be corrected by SCAG and recirculated for additional public review and comment.⁴ The timeframe for review of a document as large as the PEIR is inadequate considering that the SCS is one of the first documents of its kind and may be subject to considerable comment by impacted jurisdictions, legally necessitating another round of review.

should” do, project level mitigation measures, mitigation measures duplicating federal and state law, and those measures that are beyond SCAG’s authority to analyze under SB 375.

⁴ We acknowledge that some of the CEQA issues discussed herein are currently being litigated by SANDAG. The County believes that the SANDAG DEIR properly deferred many mitigation measures to local agencies and that it is reasonable and legally defensible to do so.

Project Description Is Inadequate

It is not possible from reading the Project Description section of the PEIR to determine what actions SCAG proposes to take that constitute the “project” as defined by CEQA.⁵ The PEIR for the RTP/SCS is unreasonably broad, addressing both program level and project level mitigation measures, as well as subject areas beyond the scope of SB 375. This causes confusion as to what the actual “project” is under CEQA. Program level environmental documents by their nature consider initial broad policies for later projects or are designed to address a series of project approvals that will occur over time. By and large, it appears that the “project” here is something akin to adopting a range of policies to be imposed on activities of other entities that will promote compliance with SB 375 and other GHG reduction legislation. In any event, the project description is so uncertain that it cannot be determined what actions SCAG might take, and therefore, it cannot be determined what potential impacts the RTP/SCS might have on the physical environment. When future project development is unspecified and uncertain, as is noted throughout the PEIR, the project description should not supply extensive detail or ambiguity beyond that needed for evaluation and review of the environmental impact.⁶

Project Level Mitigation Measures Are Improper

The PEIR states that certain projects have not been specifically analyzed or that projects and project impacts are better addressed at the lead agency or local agency level. The PEIR also states that mitigation measures are drafted in less detail than those that would be part of a project EIR. However, the PEIR contains 550 detailed mitigation measures; nearly double that from the previously approved 2008 RTP PEIR. Of foremost concern are a broad array of proposed project level mitigation measures that SCAG asserts lead agencies “can and should” adopt. There are a number of legal and policy reasons in favor of deleting these mitigation measures from the PEIR, and instead, including them as an appendix of suggested project level considerations for a local agency in determining SCS consistency.

The use of the words “can and should” in the PEIR and SCS are being interpreted by many local agencies as mandates to be implemented at the local project approval level in order be consistent with the SCS. The PEIR is not clear about what “can and should” means. CEQA Guidelines section 15005 defines “must,” “should” and “may” to indicate whether a particular subject in the CEQA Guidelines is mandatory, advisory or permissive, respectively. Section 15005(b) states that “should” identifies policy considerations under the Guidelines, legislative history of the statute and court decisions that public agencies are advised to follow in the absence of compelling, countervailing considerations. Common use of the word “can” is used to express ability or opportunity, although this term is not defined under CEQA or any case law. It is not clear what SCAG’s intent is in using “can and should,” and whether usage is intended to be mandatory, advisory or permissive. Based on a definitional interpretation of “can and should,” the phrase appears in this context to mean that the lead agency is able to and recommended that the mitigation measures be imposed. Should this be SCAG’s intent, the County notes that SCAG has no authority under any applicable law to prescribe or

⁵ All references to “project” in parentheses mean SCAG’s RTP/SCS program as it is a “project” defined by CEQA pursuant to Pub. Res. Code § 21065 and CEQA Guidelines § 15378.

⁶ *County of Inyo v. City of Los Angeles* (1977) 71 Cal. App. 3d 185, 199; CEQA Guidelines § 15124.

enforce such mitigation measures. Furthermore, under CEQA, local agencies are not bound by the PEIR's mitigation measures as project level mitigation will be addressed by a lead agency at the time of project approval to the extent the mitigation is determined by that lead agency through the CEQA process to be feasible, effective and enforceable.

SCAG has stated at public meetings and workshops on the RTP/SCS that the mitigation measures are intended as a "toolbox" or "menu" of policy considerations from which lead agencies could choose in approving a project.⁷ Even with this clarification in the PEIR, "can and should" is used inconsistently throughout the documents. On page 1-5 of the Introduction, the PEIR expressly states that mitigation measures can be implemented at the project level and that local lead agencies "shall be responsible for ensuring adherence to the mitigation measures . . ." The Introduction goes on to state that "it is reasonable to expect that other agencies will actually implement the mitigation measures assigned to them."

SCAG should not attempt to further define what "can and should" is intended to mean or even what it means in every instance, as the current meaning under CEQA and common use of the words indicate a mandate where there is not one under CEQA or SB 375. The applicable mitigation measures should be removed from the PEIR and added to an appendix to the SCS or other policy related document, making clear that they are permissive policy considerations that lead agencies could examine at the project level. The County's recommended reworking of the mitigation measures will avoid misinterpretation and be consistent with CEQA and SB 375's preservation of local control. Again, permissive or advisory policy considerations are not proper mitigation measures for an EIR where mitigation measures must be feasible, effective and enforceable. This would also remove those mitigation measures that are not specific and do not articulate the impacts that will be mitigated.⁸

SCAG states that it is required to find that other jurisdictions can and should implement mitigation measures since many changes and alterations to SCAG's "project" are within the responsibility and jurisdiction of other public agencies.⁹ This argument is flawed. If SCAG is to clarify these mitigation measures are advisory or permissive policy considerations to be implemented by the local agency on a "toolbox" or "menu" basis, then the finding under section 15092(a)(2) has not been demonstrated because the measures will not in fact mitigate or avoid significant effects on the environment caused by SCAG's "project" since they are policy tools to be evaluated by local agencies. That is, SCAG should defer all mitigation measures associated with what local agencies "can and should" do to individual project level CEQA processes and only deal with program

⁷ While the County generally supports SCAG's intent to clarify in the PEIR that mitigation measures associated with what a local agency "can and should" do are a "toolbox" of policy considerations to consider at the project level, we believe that under CEQA, the mitigation measures should be removed for the reasons stated herein.

⁸ *Endangered Habitats League v. Orange County* (2005) 131 Cal.App.4th 777.

⁹ Introduction, page I-6, citing Pub. Res. Code § 21081(a)(2) and CEQA Guidelines § 15092(a)(2) as the basis of its use of "can and should."

level issues that are within SCAG's authority. This approach is consistent with SB 375's preservation of local control.

Mitigation Measures Have Not Been Demonstrated to be Feasible, Effective & Enforceable

As discussed above, the PEIR does not analyze specific projects and specific project impacts, yet attempts to implement a variety of project specific mitigation measures. The mitigation measures primarily consist of measures that SCAG thinks should be applied to future projects to be carried out by other entities. Such mitigation measures, of course, have no bearing on whatever "project" it is that SCAG is evaluating, and cannot be evaluated either for feasibility, effectiveness or enforceability since they would apply to as yet unidentified and indescribable future projects by other entities.

An EIR must describe and demonstrate the feasibility of mitigation measures that can minimize the project's significant environmental effects.¹⁰ The PEIR has made a preliminary determination that these mitigation measures are feasible and effective, and therefore, it is reasonable to expect that local governments will actually implement them. The County believes, however, that it has not been demonstrated that each and every project specific measure is feasible, practical and effective, or even that local agencies "can and should" approve such measures. If this was the case, then the mitigation measures would not now be characterized as a "toolbox" or "menu." And despite recognition that the PEIR cannot analyze every future project and impact, the document contains an exhaustive list of mandated or suggested, as the case may be, project level mitigation measures that local agencies "can and should" implement. CEQA, though, does not require analysis of every imaginable mitigation measure unless such measures are feasible and effective.¹¹ By its own admission, the PEIR has not analyzed and cannot analyze every potential project or impact for which it is attempting to mitigate. Thus, the measures are larger than the program itself and cannot therefore be characterized as feasible and effective.

The County agrees that mitigation measures must be adopted for significant impacts recommended in an EIR unless a lead agency finds that the measure is infeasible. We believe, though, that it can be demonstrated that project level measures as to what local agencies "can and should" do are infeasible as it is outside SCAG's authority to mandate since most SCS determinations will actually be made at the project level. Mitigation measures that are adopted must be enforceable through conditions of approval, contracts or other means that are legally binding.¹² A lead agency is not required to adopt a mitigation measure when it has no ability to enforce the measure.¹³ SB 375 is clear that a metropolitan planning organization (MPO) does not have authority to require compliance

¹⁰ CEQA Guidelines §§ 15121(a), 15126.4(a).

¹¹ *Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 CA4th 911, 935; *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1989) 209 CA3d 1502, 1519.

¹² Pub. Res. Code § 21081.6(b); CEQA Guidelines § 15126.4(a)(2).

¹³ *Tracy First v. City of Tracy* (2008) 177 CA4th 912.

with the SCS, and the legislation suggests that MPOs may have some ability to make determinations as to SCS consistency for purposes of prioritizing state transportation funding allocations. The County recognizes that CEQA allows program level mitigation measures to be incorporated into a policy or plan,¹⁴ but it is beyond SCAG's authority, as it has done here, to approve project level mitigation measures that can only be considered by a lead agency at the project level as such measures are not enforceable by SCAG pursuant to SB 375.

All proposed mitigation measures are subject to the same standard of feasibility under CEQA whether the measure is proposed to be carried out by SCAG or another local agency. The standard does not change for measures outside of SCAG's control. Thus, SCAG's preliminary determination of feasibility as to those mitigation measures that another local agency "can and should" could raise the feasibility thresholds for future lead agencies that actually make those determinations.

Significant Impacts to the Environment Are Speculative

Since it cannot be determined from the Project Description exactly what the "project" is, it cannot be discerned what impacts the "project" might have, and therefore, it is impossible to determine whether project level mitigation measures will avoid or otherwise reduce the impacts of the RTP/SCS. Certainly, SCAG relies on the data submitted by all local agencies in its region, and it must take the data at face value and rely upon it as accurate. The PEIR, though, correctly notes that it cannot specifically identify all future projects and it cannot specifically analyze those projects that will later be approved by other lead agencies. Future development in many respects is unspecified and uncertain, and the PEIR is not required to include speculation about future environmental consequences of such development and how it should be mitigated.¹⁵ "No purpose can be served by requiring an EIR to engage in sheer speculation as to future environmental consequences."¹⁶ Project level mitigation measures as to what a local agency "can and should" do are inadequate as sheer speculation because there is no evidence that they will avoid or reduce the impacts of SCAG's program and do not relate to known, identifiable projects.

¹⁴ CEQA Guidelines § 15126.4(a)(2).

¹⁵ *Laurel Heights Improvement Assoc. v. Regents of the Univ. of Calif.* (1988) 47 Cal.3d 376, 395.

¹⁶ *Christward Ministry v. Superior Court* (1986) 184 Cal. App. 3d 180, 193.

Mitigation Measures That Are Already Required by Law

Another reason to exclude project level mitigation measures is that many of them are already required by law. Although environmental documents often cite existing laws as mitigation measures for significant environmental impacts, this is often done at the project level where specific laws and regulations can be analyzed to determine whether the regulation or practice will actually mitigate the impact. SCAG's region lies across six large counties that have varying land use circumstances. For instance, the SCAG region encompasses five regional water boards with differing NPDES permit requirements, such as low impact development requirements that are implemented differently depending on geotechnical issues. The PEIR mitigation measures should not overly generalize or speculate as to which laws and regulations should be followed, which can only be determined by the actual regulating body on a specific basis.

SB 375 Considerations

The County is deeply concerned with the broadness of the PEIR and RTP/SCS. At a presentation held at the CEHD meeting on January 8, 2009, SCAG then interpreted SB 375 to only include VMT associated with vehicles and light trucks, and went on record that green buildings, energy efficiency, municipal operations, waste management, water and technology programs and measures were not within the purview of the SCS. The draft RTP/SCS and PEIR, however address all of these subject areas. We believe that SCAG's original 2009 interpretation is the legally correct one under SB 375 and that SCAG should amend the document to delete all references and measures to items outside of SB 375 that does not directly relate to VMT from vehicles and light trucks. The RTP/SCS and PEIR should not be used as an umbrella document for all things SCAG considers sustainable.

The legislative text of SB 375 states that state transportation funding will be prioritized and allocated to those local agencies that are consistent with an approved SCS. The actual SB 375 statutes do not specifically state how this will be done and what exact funding will be subject to SCS prioritization. There has been no follow-up legislation or other policy of which the County is aware that clarifies this issue. Due to this, SB 375 enforcement is unclear.

We believe that SCAG should clarify and elaborate on its understanding of this issue. Much more information is needed as to the process, if any, that SCAG will employ to make SCS consistency findings. Will SCAG make SCS consistency findings for individual programs and projects? Will a subregional delegate who has prepared its own SCS, like OCCOG has with the OC SCS, have the authority to make such findings? Will the local programs and projects within Orange County boundaries also be subject to consistency findings by SCAG under its approved SCS? What types of local programs and projects will be subject to a SCS consistency review? These questions and many other must be answered prior to effective implementation of the policies set forth in SB 375.

The PEIR states in one sentence that "Lead agencies shall provide SCAG with documentation of compliance with mitigation measures through SCAG's monitoring

efforts, including SCAG's Intergovernmental Review (IGR) process.”¹⁷ However, SCAG's approved 2008 PEIR devotes several pages to what a RTP consistency process entails. SCAG also devotes a portion of its website to an overview of the IGR process, but this does not appear to incorporate SCS issues and has not been recently updated. The County encourages SCAG to revise the SCS/PEIR to specifically define such a process in enough detail and with sufficient public comment to ensure that any such oversight is consistent with SB 375 and is not arbitrary or capricious under state law. On this issue, the County recommends that there be consideration for a consistency process by the subregional delegate who has prepared its own SCS, like OCCOG.

In short, many of the mitigation measures appear to go beyond SB 375's focus on transportation and housing, and could potentially be outside the scope of SCAG's authority. Again, the SCS and its mitigation measures should not be a “kitchen sink” approach to sustainability, but should endeavor to examine actual programmatic ways to reduce GHG within SCAG's control. The County is very concerned with mitigation measures that state local agencies “can and should” pass new taxes and fees. Such measures are beyond the scope of SCAG's authority to examine under SB 375 and are infeasible mitigation measures under CEQA.

The County respectfully requests that Southern California Association of Governments review and incorporate our comments/responses into the final 2012 RTP/SCS and PEIR. Further, as a member of the OCCOG the County actively participated in the development of and supports the comments submitted on by the OCCOG Executive Director. If you have any questions regarding this matter please call Rick Lefevre at 714-955-0124.

Sincerely,

Thomas G. Mauk
County Executive Officer

Attachment

cc: Orange County Board of Supervisors
Alisa Drakodaidis, Deputy CEO, OC Infrastructure
Jess A. Carbajal, Director OC Public Works
Rick Lefevre, Director of Planning

¹⁷ Introduction, page I-5.