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High Court Upholds Long-Term GHG Emissions Analysis, But Warns Agencies to Keep Pace with Regulatory Advancements: Lessons from Cleveland National Forest Foundation v. SANDAG

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***Cleveland National Forest Foundation, et al. v. San Diego Association of Governments* (2017) __ Cal. 5th __, Supreme Court Case No., S223603**

Judicial deference to a lead agency's determination regarding the proper greenhouse gas ("GHG") threshold for a project California Environmental Quality Act ("CEQA") remains a swinging pendulum. The California Supreme Court recently upheld the San Diego Association of Government's ("SANDAG") determination that the year 2050 statewide GHG reduction goals set forth in Executive Order S-3-05 ("Executive Order") issued in 2005 did not create a CEQA threshold of significance an agency must follow. However, the court did so for reasons different than SANDAG stated in the response to comments on the Environmental Impact Report ("EIR") on proposed amendments to its Regional Transportation Plan ("RTP"). In *Cleveland National Forest Foundation, et al. v. San Diego Association of Governments* (2017) __ Cal. 5th __, Supreme Court Case No., S223603, the court found that "SANDAG did not abuse its discretion in declining to adopt the 2050 goal as a measure of significance because the Executive Order does not specify any plan or implementation measure to achieve its goal." The EIR's long-term GHG analysis adequately informed the public and agency, in part, because SANDAG summarized the Executive Order in the EIR's regulatory framework section and disclosed the increase in GHG emissions in 2050 compared to the 2010 baseline. An analysis of "Lessons Learned and Reaffirmed" by the case appears at the end of this post.

The California Attorney General joined Cleveland Nation Forest Foundation and several other environmental groups in opposing the EIR. The Attorney General hoped to send a message to cities, counties and regional planning agencies to be more aggressive in adopting GHG-reducing policies in their long-term planning documents. Indeed, the Attorney General actively opposed several General Plan approvals soon after California adopted its landmark California Global Warming Solutions Act of 2006 (AB 32.)

The Attorney General argued in this case that only through analysis of the Executive Order could the general public and agency decision-makers have "meaningful context" to adequately evaluate the

environmental impacts of SANDAG's RTP. The latter set forth SANDAG's 40-year regional plan for land use and transportation infrastructure investment. The Executive Order set forth a goal of reducing statewide GHG emissions levels to 80% below 1990 levels by the year 2050 based on scientific consensus that such levels would be necessary for California to stabilize GHG emissions at 450 parts per million. California has determined this to be its fair share to achieve climate stabilization, and therefore an appropriate state?wide goal against which project GHG emissions should be evaluated. The Attorney General was concerned that it was not enough for SANDAG to just declare a significant and unmitigable impact without also explaining the broader consequences of the impact remaining significant and unmitigated. Within that larger context, the Attorney General was also specifically concerned that SANDAG's RTP did not go far enough in promoting land use patterns near transit and investing in transit infrastructure (as opposed to road infrastructure) that would assist the state in meeting the 2050 goal by reducing GHG emissions related to San Diego's average vehicle miles traveled.

The Attorney General prevailed at the trial court and court of appeals. The Supreme Court accepted SANDAG's appeal on the limited issue of whether a lead agency is required to use the Executive Order as its CEQA GHG significance threshold.

SANDAG's response to the Attorney General comments on the EIR had stated there was no legal requirement to analyze the RTP's consistency with the Executive Order because (a) the Executive Order was not an adopted GHG reduction plan within the meaning of CEQA Guidelines 15064.4(b)(2); and (b) SANDAG's role in achieving the statewide 2050 target is uncertain and small.

The Supreme Court held that SANDAG's small role in achieving the Executive Order's 2050 target was not a valid reason because GHG is a cumulative impact so no one project has a significant direct impact. Nearly all projects have a small impact, and the solution to climate change requires the aggregation of many small reductions in greenhouse gas emissions by public and private actors at all levels.

The court also held that even though the Executive Order is not an adopted GHG reduction plan, a lead agency must still exercise its discretion about what significance threshold to use "based to the extent possible on scientific and factual data." (CEQA Guidelines 15064(b).) Accordingly, the court found that the scientific information in the Executive Order has important value to policymakers and citizens when considering the emission impacts of a project like the RTP because it expresses the pace and magnitude of reduction efforts that the scientific community believes is necessary to stabilize the climate.

Nevertheless, the court simply disagreed with the Attorney General that the RTP EIR ignored the Executive Order when the RTP EIR disclosed it would have a significant and unmitigated GHG impact in 2050 based on the different significance thresholds SANDAG utilized. The court noted the following:

- The Executive Order was explained in the GHG analysis as part of the regulatory framework for GHG;
- The 2050 goal was noted in the EIR in the course of SANDAG explaining why it chose not to use the target as a measure of significance;
- The EIR disclosed the total project emissions in 2050 (33.65 MMT CO2e) and compared them to the existing condition level in 2010 of 28.85 MMT CO2e and therefore concluded the

RTP would have a significant impact.

Given these facts, the court held that even if the EIR could have presented the information more clearly, the information was still presented "in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project." The court believed"[i]t was not difficult for the public reading the EIR to compare the upward trajectory of projected greenhouse gas emissions under the Plan for 2020 through 2050 with the Executive Order's goal of reducing emissions to 80 below 1990 levels by 2050." The court found that "SANDAG did not abuse its discretion in declining to adopt the 2050 goal as a measure of significance in light of the fact that the Executive Order does not specify any plan or implementation measure to achieve its goal. Neither the Attorney General nor the other plaintiffs point to any guidance as to how the 2050 goal translates into specific reduction targets broken down by region or sector of emissions-producing activity."

The court accepted SANDAG's claim that "there are presently no reliable means of forecasting how future technological developments or state legislative actions to reduce greenhouse gas emissions may affect future emissions in any one planning jurisdiction…Lead agencies can only guess how future technical development or state (or federal or international) actions may affect emissions from the myriad of sources beyond their control." Accordingly, based on the information available to SANDAG at the EIR's certification in 2011, the potential impacts in 2050 from future development were too speculative to evaluate. The court sympathized with SANDAG stating, "It is not clear what additional information SANDAG should have conveyed to the public beyond the general point that the upward trajectory of emissions under the Plan may conflict with the 2050 emissions reduction goal." Nevertheless, as CEQA practitioners are aware, the case for why an impact is too speculative to evaluate can be made only "after thorough investigation." (CEQA Guidelines 15145.) Accordingly, the court cautioned SANDAG and other lead agencies that its holding does not mean that this analysis can serve as a template for future EIRs because "as more and better data become available, analysis of the impact of regional transportation plans on greenhouse gas emissions will likely improve."

Indeed, five years after the 2010 RTP was adopted, SANDAG adopted its 2015 RTP. The court noted that the latter "reflected additional certainty regarding the regulatory environment, including future projections on renewable energy, building efficiency, water conservation, and solid waste diversion." The court further noted that the state's adoption of SB 32 setting a statewide interim threshold of reducing GHG emissions to 40% below 1990 levels by 2030 and the California Air Resources Board had been charged with crafting regulations to implement that goal. The court predicted this "regulatory clarification, together with improved methods of analysis, may very well change the manner in which CEQA analysis of long-term greenhouse gas emission impacts is conducted." The court affirmed that "planning agencies like SANDAG must ensure that CEQA analysis stays in step with evolving scientific knowledge and state regulatory schemes." The court's final conclusion thus cautions lead agencies that they cannot necessarily rely on the 2010 RTP EIR's significance thresholds to satisfy a future RTP EIR's long-term GHG analysis.

Lessons Learned and Reaffirmed:

In this author's opinion, the court's decision to issue a limited opinion is a bit ironic. SANDAG had already replaced the 2010 RTP with a 2015 RTP that discussed the Executive Order prior to the Supreme Court taking the case. However, the court agreed the controversy was not moot because the case presented "an important issue of law that is likely to recur yet evade review because of the

short period of time between adoption of a RTP and adoption of a successor plan." If the court anticipates the issue will recur, but the opinion is limited to the SANDAG 2010 RTP EIR, then what guidance does the case truly provide to CEQA practitioners and lead agencies on how to analyze long-term GHG emissions? Although less obvious than in other Supreme Court opinions, here are some practical lessons learned from the opinion, as well as some unanswered questions:

1) It is wise for lead agencies to express GHG analysis in terms of compliance with CEQA Guidelines section 15064.4. SANDAG's three significance thresholds essentially followed the three factors for assessing GHG significance found in CEQA Guidelines 15064.4(b), which state the following:

(a) The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting;

(b) Whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project; and

(c) The extent to which the project complies with regulations or requirements adopted to implement a statewide, regional or local plan for the reduction or mitigation of greenhouse gas emissions.

The court stressed that "Whether or not any one method, by itself, would have provided sufficient analysis, we conclude that these three methods together adequately informed readers of potential greenhouse gas emission impacts."

SANDAG appears to have benefitted from disclosing its project impacts in 2020, 2035, and 2050, compared to the existing baseline pursuant to 15064.4(b)(1). The Supreme Court was able to make the connection between this emissions level disclosure and information about how the Executive Order fits into the regulatory background in order to understand why SANDAG concluded its GHG impacts were significant and unmitigated in 2050 and what the environmental consequences were.

Additionally, SANDAG appears to have benefitted from focusing its analysis on the project's consistency with applicable GHG reduction plans pursuant to CEQA Guidelines 15064.4(b)(3). While the court held that the Executive Order was not a GHG reduction plan and therefore not grounds for ignoring the Executive Order, the court also affirmed that SANDAG exercised careful judgement when it selected consistency with GHG reduction plans as one of its three GHG thresholds of significance. Moreover, the court stated that the Executive Order did not contain any regional or sector specific targets to guide SANDAG so it was proper for SANDAG to simply disclose the 2050 emissions level. CEQA practitioners learned in the recent case *Center for Biological Diversity v. California Dept. of Fish and Wildlife* (2015) 62 Cal. 4th 204, 225-228, that the Supreme Court is wary of statewide targets and values regional and sector?specific targets, which are often features in a GHG reduction plan.

2) It is wise for lead agencies to at least discuss the Executive Order in an EIR's regulatory background section and the consequences experts believe will come from the State's failing to stabilize GHG emissions at 450 ppm by 2050.

3) It is wise for lead agencies to disclose whether a project subject to long-term GHG analysis has an upward trend in emissions from 2020 to 2050 or a downward trend in emissions. The RTP's upward trend in GHG emissions caused SANDAG to conclude impacts in 2035 and 2050 were significant and unmitigated, but most development projects have a downward trend because new GHG-reducing regulations go into effect after 2020, thus further reducing a project's GHG impacts. The Supreme

Court's opinion cautions lead agencies to continue to refine its GHG analysis as regulations and methods of analysis advance. It noted that SANDAG's new 2015 RTP EIR "was able to account for many factors in the GHG inventories that were not accounted for in 2011, reflecting "additional certainty regarding the regulatory environment, including future projects of renewable energy, building energy efficiency, water conservation programs, and solid waste diversion." One way to do so is to disclose how implementation of future regulations will affect the level of GHG emissions from a project, to the extent it can be measured by a methodology the agency believes is appropriate. The Supreme Court's opinion clearly does not require a lead agency to engage in speculation about a future regulation's impact, but does caution agencies to keep up with modeling devices that can measure such impacts. Most GHG consultants working in California are well-versed in identifying which regulatory measures can be quantified and which ones cannot by various GHG modeling programs.

4) It is wise for a lead agency to document why it believes an impact is too speculative to evaluate in the context of long?term GHG impacts. In this case, the Supreme Court acknowledged the seemingly obvious speculative nature of long-term GHG analysis based on information available to SANDAG in 2010. That is not always the case, however, even for other projects approved in this same time period.

Lead agencies influenced by the Attorney General's litigation against agencies who adopt long?term planning documents sometimes invite more litigation by over-promising. The trial court and court of appeals that decided this case also decided at the same time *Sierra Club v. County of San Diego* (2014) 231 Cal. App. 4th 1152. In that case, the County's General Plan committed to achieving long range GHG reduction targets found in Executive Order S-S-05, but its climate action plan failed to adequately document why it was too speculative to analyze mitigation measures beyond 2020 and failed to commit to mitigation measures despite commitment to its climate action plan. Our prior analysis of this decision can be found here.

Of note, while SANDAG successfully appealed the court of appeals decision and found the Supreme Court receptive to SANDAG's plea that a detailed long-term GHG analysis was too speculative, the County, on the other hand, opted to commence revision of its climate action plan in accordance with the court of appeals decision. Its reward for doing so was a second lawsuit from the Sierra Club, in which the trial court recently enjoined the County from adopting any interim GHG threshold that is not based on the climate action plan and chastised the County for not processing its new climate action plan quickly enough. For all the trouble the County General Plan's commitment to developing a climate action plan has caused the County, and since CEQA does not mandate a lead agency adopt a climate action plan, other jurisdictions may decide they are better off simply making GHG significance determinations on a project-by-project basis, rather than attempting to approve a climate action plan.

Unanswered Questions:

1) Is a long-term GHG analysis required for projects that do not have a planning horizon that spans 2050? A regional transportation plan need only be for 20 years. SANDAG chose a 40?year planning horizon spanning 2010 to 2050, causing SANDAG to disclose GHG impacts in 2050 compared to the existing baseline in 2010. Under guidance from some regional air quality boards, a project's GHG construction emissions are often amortized over the operational life of the project, which is typically 30 years. (South Coast Air Quality Management District, Greenhouse Gas Significance Thresholds, December 5, 2008.) Accordingly, unless an lead agency is analyzing a project with an explicit planning horizon that spans 2050, then do lead agencies have any obligation to evaluate GHG

emission impacts in 2050? Is a 2050 analysis something lead agencies should only start analyzing on common development projects in 2020?

2) The Supreme Court remanded the case to the court of appeals for proceedings consistent with its opinion, but also noted that it did not grant review or express an opinion on issues such as whether SANDAG greenhouse gas emission mitigation measures were inadequate. SANDAG's conclusion that its 2050 impacts were significant and unmitigated caused SANDAG to impose partial mitigation measures it believed were feasible, but was punished for doing so when the court of appeal found those measures inadequate. However, the Supreme Court affirmed that it was too speculative to further analyze the RTP's 2050 GHG impacts. CEQA Guidelines 15145 states, that "[i]f, after thorough investigation, a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact." If SANDAG was entitled to terminate the discussion of the impact, then does a lead agency need to draw any significance conclusion once it has made a "too?speculative" finding and does a lead agency need to impose any partial mitigation?

Conclusion

In the author's opinion, the Supreme Court missed an opportunity to grant review and provide guidance on key issues that will likely recur. However, the case still provides some guidance on addressing long-term GHG emissions. Many lead agencies and GHG consultants are already adept at analyzing GHG emissions in accordance with CEQA Guidelines 15164.4 by (a) disclosing GHG emission compared to the existing baseline, (b) substantiating the GHG threshold selected by the lead agency, and (c) analyzing consistency with applicable GHG reduction plans. Furthermore, they are skilled at updating the GHG modeling tools to reflect the impacts of new GHG-reducing regulations to the extent quantifiable. Additionally, lead agencies commonly disclose the Executive Order and the environmental impacts that experts believe will result if emissions levels are not stabilized.

It is clear that lead agencies struggle to analyze the significance of GHG impacts in their long-term planning documents and courts struggle to decide how much analysis is enough. Because general plans, climate action plans, and regional transportation plans have to be regularly updated and agencies are mindful of their duty to be stewards of the environment, successive versions of long-range planning documents will establish clearer and stricter GHG reduction measures on their own as local, state and federal regulations are implemented and the ability to measure the GHG reductions that follow are improved. The pursuit of the perfect GHG reduction plan via litigation has become the enemy of the good when it halts the implementation of GHG reduction plans with built-in mechanisms for continual improvement. CEQA Guidelines 15183.5 (b)(1)(E) states, "[a] plan for the reduction of greenhouse gas emissions should…[e]stablish a mechanism to monitor the plan's progress toward achieving the level and to require amendment if the plan is not achieving specified levels."

Finally, this decision comes approximately a year and a half after the decision in *Center for Biological Diversity v. California Dept. of Fish and Wildlife, supra*, where the Supreme Court chose not to defer to a public agency's judgment that the Business-As-Usual methodology was an appropriate significance threshold. Here, the Supreme Court deferred to the reasonable judgement of SANDAG in combining three factors into a significance threshold, but immediately limited the scope of its opinion and warns that use of the significance threshold may not be upheld in the future. Combined *Sierra Club v. County of San Diego, Center for Biological Diversity v. California Dept. of Fish and Wildlife,* and now *Cleveland National Forest Foundation, et al. v. San Diego Association of*

Governments assure that GHG analysis will remain subject to legal and regulatory uncertainty for years to come.

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