

What Do California's Climate Change Policies Mean for Environmental Quality Act Review Process?

Background

The California Environmental Quality Act (CEQA), passed in 1970, is an extraordinarily complex and all-encompassing environmental law. CEQA and its multitude of substantive and procedural requirements are implicated for nearly every type of land use project in the State of California, including, but not limited to, housing and mixed-use developments, transit and transportation infrastructure, hazardous waste facilities, mining operations, renewable energy and school facilities, as well as quasi-legislative approvals such as zoning amendments, general plan updates and regional transportation plans.

Unlike its federal counterpart—the National Environmental Policy Act (NEPA)—CEQA contains a substantive mandate that prevents public agencies from approving projects with potentially significant environmental impacts if there are feasible mitigation measures that would eliminate or substantially reduce those impacts. In addition to its substantive mandate, CEQA contains comprehensive procedural requirements. The cornerstone of CEQA's procedural requirements is public participation. CEQA provides the public with ample opportunity to review and comment on the environmental document beginning from its draft stage, all the way through the day on which the final environmental document is certified.

Notwithstanding its good intentions, CEQA in recent years has imposed significant compliance and litigation challenges on both taxpayer-funded infrastructure and public works projects and private development of all types. This is particularly the case in the context of greenhouse gas emissions. Specifically, due to the lack of clear legal and regulatory guidance on the issue, one of the most complicated issues for project proponents—both public and private—is how to properly analyze and mitigate for a proposed project's greenhouse gas emission impacts under CEQA. Indeed, nothing in the law or in regulation establishes concrete guidance regarding how CEQA documents should properly analyze greenhouse gas emission impacts. Due to this uncertainty, greenhouse gas emissions analyses are emerging as one of the primary bases upon which CEQA petitioners are challenging projects, even those that are critical to meet California's greenhouse gas reduction mandates, such as transit and infill development.

In light of the California Legislature's continued focus on greenhouse gas reduction policies and the impact those policies have had historically and will continue to have on the CEQA process, this article focuses on these policies and the extraordinary challenges they impose on the CEQA process, and ultimately on the state's ability to meet the state's critical infrastructure and housing needs. Specifically, this article 1) explains how California's climate change policies are incorporated into the CEQA process; 2) summarizes three

recent cases involving CEQA challenges to the greenhouse gas emission analyses; and 3) discusses why current statutory, regulatory and legal frameworks governing greenhouse gas emission analyses in CEQA documents fail to provide any certainty for public and private development and could, in fact, hinder the state's ability to meet its greenhouse gas reduction mandates by making it more challenging to build environmentally friendly projects.

Applying California's Climate Change Policies to the CEQA Process

California has proposed to combat climate change through an array of mechanisms, including executive orders, legislation, regulations and plans. This section discusses each climate change policy in chronological order and, where relevant, discusses the policy's relation to the CEQA process. For a more detailed discussion regarding the history and current state of California's greenhouse gas reduction policies, see the Climate Change article.

Executive Order S-03-05

In 2005, then-Governor Arnold Schwarzenegger issued Executive Order (EO) S-03-05, which was the first significant state action California had taken to combat global climate change. EO S-03-05 established greenhouse gas reduction targets for California. Specifically, it required greenhouse gas emissions to be reduced to 2000 levels by 2010, to 1990 levels by 2020, and to 80% below 1990 levels by 2050. EO S-03-05 is particularly relevant in the context of CEQA because, shortly after Governor Schwarzenegger issued the executive order, the Cleveland National Forest Foundation and others sued the San Diego Association of Governments (SANDAG), challenging the environmental impact report (EIR) for SANDAG's 2050 Regional Transportation Plan/Sustainable Communities Strategy. The lawsuit asserted that the EIR failed to carry out its role as an informational document because it did not analyze the inconsistency between the state's greenhouse gas reduction targets reflected in EO S-03-05 and the transportation plan's greenhouse gas emission impacts after 2020.

Importantly, the post-2020 greenhouse gas reduction targets at issue in the case are ones that, at the time the EIR was certified and the case was filed, had not yet been codified in statute, but rather had been adopted solely by gubernatorial decree. It should be noted that executive orders historically are intended to outline policy views, but do not carry the full force and effect of the law when they implement policy directives that are not otherwise authorized by law. Accordingly, one of the primary questions in the context of CEQA and greenhouse gas emission reduction policies is what legal import those nonlegislatively authorized executive order targets have on the CEQA process. The SANDAG lawsuit, which presents this

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very question in a case pending before the California Supreme Court, is discussed in further detail below.

Global Warming Solutions Act of 2006 (AB 32)

In response to EO S-03-05, the California Legislature in 2006 passed and the Governor signed AB 32, also known as the Global Warming Solutions Act of 2006. More specifically, AB 32 requires that greenhouse gas emissions be reduced to 1990 levels by 2020 but, unlike EO S-03-05, AB 32 did not specify reduction targets beyond that time. The law designates the California Air Resources Board (ARB) as the state agency tasked with regulating greenhouse gas emissions, and calls for the ARB to coordinate with other state agencies to implement the state's reduction target.

Under AB 32, the ARB was required to determine as accurately as possible the statewide level of greenhouse gas emissions in 1990 and to approve on that basis a statewide emissions limit to be achieved by 2020. The ARB was required to prepare and approve by January 1, 2009, a "scoping plan" for achieving "maximum technologically feasible and cost-effective" reductions in greenhouse gas emissions by 2020.

SB 97 and the Implementing CEQA Regulations

By enacting SB 97 (Dutton; R-Rancho Cucamonga) in 2007, the California Legislature for the first time expressly recognized that CEQA documents must analyze greenhouse gas emissions. SB 97 required the Office of Planning and Research (OPR) to develop, and the Natural Resources Agency to adopt, amendments to the *CEQA Guidelines* addressing the analysis and mitigation of greenhouse gas emissions. Those *CEQA Guidelines* amendments clarified several points, including the following:

- Lead agencies must analyze the greenhouse gas emissions of proposed projects, and must reach a conclusion regarding the significance of those emissions (See *CEQA Guidelines*, Section 15064.4).
- When a project's greenhouse gas emissions may be significant, lead agencies must consider a range of potential mitigation measures to reduce those emissions (See *CEQA Guidelines*, Section 15126.4(c)).
- Lead agencies must analyze potentially significant impacts associated with placing projects in hazardous locations, including locations potentially affected by climate change. (See *CEQA Guidelines*, Section 15126.2(a)).
- Lead agencies may significantly streamline the analysis of greenhouse gases on a project level by using a programmatic greenhouse gas emissions reduction plan meeting certain criteria. (See *CEQA Guidelines*, Section 15183.5(b)).
- CEQA mandates analysis of a proposed project's potential energy use (including transportation-related energy), sources of energy supply, and ways to reduce energy demand, including through the use of efficient transportation alternatives. (See *CEQA Guidelines*, Appendix F).

The amendments to the *CEQA Guidelines* implementing SB 97 became effective on March 18, 2010.

2008 Scoping Plan and 'Business as Usual' Projection

In its 2008 Scoping Plan, ARB explained that "[r]educing greenhouse gas emissions to 1990 levels means cutting approximately 30 percent from business-as-usual emissions levels projected for 2020, or about 15 percent from today's levels." The Scoping Plan then sets out a "comprehensive array of emissions reduction approaches and tools" to meet the goal, including expanding energy efficiency programs, achieving a statewide renewable energy mix of 33%, developing without regional partners a cap-and-trade program for greenhouse gases, establishing targets and policies for emissions in transportation and implementing existing clean transportation programs, and creating targeted fees on certain activities affecting emissions.

The Scoping Plan's "business as usual" model is important to understand for purposes of CEQA because many environmental documents have and continue to rely on the model as a basis for determining whether a proposed project's greenhouse gas emissions would cause a significant impact on the environment.

The Scoping Plan's 2020 forecast is referred to as a "business-as-usual" projection because it assumes no conservation or regulatory efforts beyond what was in place when the forecast was made. According to the Scoping Plan, the model "represent[s] the emissions that would be expected to occur in the absence of any GHG reductions actions."

The "business as usual" projection is particularly relevant in the context of CEQA because, shortly after the Scoping Plan was adopted, the Center for Biological Diversity sued the California Department of Fish and Wildlife for its approval of a large land development in northwest Los Angeles County, arguing that the EIR prepared for the project unlawfully relied on the business-as-usual projection to evaluate the significance of the project's greenhouse gas emission impacts. This case, which recently was decided by the California Supreme Court, is discussed in further detail below.

California Sustainable Communities and Climate Protection Act of 2008 (SB 375)

In an attempt to achieve the state's ambitious greenhouse gas reduction policies through land use and transportation planning policies, the California Legislature passed and the Governor enacted SB 375 (Steinberg; D-Sacramento), also known as the California Sustainable Communities and Climate Protection Act of 2008. In enacting SB 375, the Legislature found automobiles and light trucks are responsible for 30% of the state's greenhouse gas emissions. Accordingly, SB 375 directed the ARB to develop regional greenhouse gas emission reduction targets for automobiles and light trucks for 2020 and 2035. In 2010, the ARB established these targets for 2020 and 2035 for each region covered by one of the state's metropolitan planning organizations (MPOs). The ARB must update these targets every eight years until 2050, and may update the targets every four years based on changing factors.

Based on the ARB's reduction targets, each California MPO must prepare a "sustainable communities strategy" (SCS) as an

integral part of its regional transportation plan (RTP). The SCS contains land use, housing and transportation strategies that, if implemented, would allow the region to meet its greenhouse gas emission reduction targets. Once adopted by the MPO, the RTP/SCS guides the transportation policies and investments for the region. The ARB must review the adopted SCS to confirm and accept the MPO's determination that the SCS, if implemented, would meet the regional greenhouse gas targets. If the combination of measures in the SCS would not meet the regional targets, the MPO must prepare a separate "alternative planning strategy" (APS) to meet the targets. The APS is not a part of the RTP.

SB 375 also establishes incentives to encourage local governments and developers to implement the SCS or the APS. Specifically, developers can get relief from certain environmental review requirements under CEQA if their new residential and mixed-use projects are consistent with a region's SCS (or APS) that meets the targets. Such projects are called "transit priority projects," but satisfying the plethora of requirements to be deemed a transit priority project can be difficult.

SB 375 is particularly relevant in the context of CEQA because, shortly after the enactment of SB 375, the Cleveland National Forest Foundation and others sued SANDAG, contending that the EIR for SANDAG's 2050 RTP/SCS prepared pursuant to SB 375 failed to carry out its role as an informational document because it did not analyze the inconsistency between the state's policy goals reflected in EO S-03-05 and the transportation plan's greenhouse gas emission impacts after 2020. This case, which is pending before the California Supreme Court, is discussed in further detail below.

Executive Order B-30-15

In April 2015, Governor Edmund G. Brown Jr. issued Executive Order B-30-15, which established a California greenhouse gas reduction target of 40% below 1990 levels by 2030. In response to EO B-30-15, the ARB began updating its Scoping Plan to meet these EO targets. Many in the business community criticized ARB for attempting to implement GHG reduction policies to achieve goals that, at the time, had not been statutorily authorized. In 2016, however, the California Legislature codified the EO B-30-15 reduction targets through the passage of SB 32.

SB 32

In 2015, Senator Fran Pavley (D-Agoura Hills) introduced SB 32, which proposed to codify EO B-30-15 in statute by requiring the ARB to approve greenhouse gas emission limits equivalent to 40% below 1990 levels by 2030. SB 32 failed in the final days of the 2015 legislative session on a 30-35 vote in the Assembly, forcing Senator Pavley to turn it into a two-year bill and revisit it in 2016.

In 2016, Senator Pavley renewed her effort, and in an attempt to garner additional support, stripped the provision requiring the ARB to approve greenhouse gas emission limits equivalent to 80% below 1990 levels by 2050. Additionally, SB 32 was joined with a companion bill, SB 197, which directed

the ARB to prioritize disadvantaged communities in its climate change regulations, and to evaluate the cost-effectiveness of the measures it considers. Those modifications helped earn the additional needed support, and the Legislature passed SB 32 at the end of the 2016 legislative session.

Discussion Draft 2030 Scoping Plan Update

On December 2, 2016, the ARB staff released its 2030 Scoping Plan Update Discussion Draft, which provides ARB staff's current thoughts regarding how to achieve the SB 32 greenhouse gas reduction targets. Importantly, ARB staff continues to use the "business-as-usual" projection to forecast greenhouse gas reduction by 2030.

Significant CEQA Cases Challenging Greenhouse Gas Analyses

With the above framework in mind, three recent cases demonstrate the challenges that lead agencies and developers face in properly analyzing and mitigating for greenhouse gas emissions under CEQA. The first case, *Center for Biological Diversity v. California Department of Fish and Wildlife*, was decided in November 2015 by the California Supreme Court. The second case, *Cleveland National Forest Foundation v. San Diego Association of Governments*, is pending before the California Supreme Court. The third case, *Mission Bay Alliance v. Office of Community Investment and Infrastructure et al.*, was recently decided by the California First District Court of Appeal, and is one of the first published cases to address greenhouse gas emissions in the CEQA context following the California Supreme Court's decision in *Center for Biological Diversity*.

Center for Biological Diversity v. California Department of Fish and Wildlife

Project Background: On November 30, 2015, the California Supreme Court issued its opinion in the long-awaited case involving the California Department of Fish and Wildlife (DFW) and the U.S. Army Corps of Engineers joint environmental impact statement and EIR for a proposed master-planned development called Newhall Ranch. Newhall Ranch would consist of up to 20,885 dwelling units housing nearly 58,000 residents, as well as commercial and business uses, schools, golf courses, parks and other community facilities. The project would be developed over about 20 years on almost 12,000 acres along the Santa Clara River west of the City of Santa Clarita. Importantly, Newhall Ranch is included in the Los Angeles region's approved (and not litigated) plan to achieve the regional greenhouse gas reduction goals established by SB 375.

EIR's Greenhouse Gas Significance Determination: DFW issued the draft EIR in April 2009 and a final EIR in June 2010. In December 2010, DFW certified the EIR, made the findings required by CEQA, and approved the project. Of relevance here, DFW found that Newhall Ranch's greenhouse gas emissions would have a less-than-significant impact on global climate change, taking into account the applicant's design commitments and existing regulatory standards.

Specifically, in analyzing the project’s potential greenhouse gas emission impacts, the EIR relied on the AB 32 Scoping Plan to set a threshold of significance, or the level at which the impact would be deemed “significant” under CEQA and thus require feasible mitigation. As noted above, the Scoping Plan determined that meeting the target of 1990 levels by 2020 would require a 29% reduction in statewide emissions from a business-as-usual approach—an approach that assumes no conservation or regulatory efforts beyond what was in place when the forecast was made. The Newhall Ranch project was designed so that it would reduce greenhouse gas emissions by 31% over a business-as-usual approach, 2% beyond that which the Scoping Plan sets out. Based on this determination, the EIR concluded that the project’s greenhouse gas emissions would result in a less-than-significant impact.

Lawsuit and Procedural History: The Center for Biological Diversity and other groups sued, making several claims that the EIR was flawed. The Los Angeles Superior Court ruled in October 2012 that DFW violated CEQA by comparing the project’s expected emissions to a hypothetical business as usual scenario rather than to a baseline of emissions in the existing physical environment.

In March 2014, the Court of Appeal reversed the trial court, holding that the EIR’s analysis of greenhouse gas emissions complied with CEQA. Specifically, the appeals court found that consistency with AB 32’s scoping plan is a proper threshold of significance under CEQA from which to evaluate a project’s greenhouse gas emissions.

On July 9, 2014, the California Supreme Court granted a petition for review of the Court of Appeal decision. While the state high court agreed to address three issues in the case, the court provided the following statement of issue for the case with respect to the EIR’s greenhouse gas emissions analysis: “May an agency deviate from the Act’s existing conditions baseline and instead determine the significance of a project’s greenhouse gas emissions by reference to a hypothetical higher ‘business as usual’ baseline?”

California Supreme Court Decision: On November 30, 2015, the California Supreme Court struck down the EIR’s analysis of greenhouse gas impacts in a 5-2 decision. First, the court examined whether the methodology the EIR used to evaluate the project’s greenhouse gas emission impacts was valid as a legal matter, and answered this question in the affirmative. Second, the court examined whether substantial evidence in the record supported the EIR’s conclusion that the project’s greenhouse gas emissions would result in a less-than-significant impact, and answered this question in the negative.

In its legal analysis, the court made three rather significant findings.

- First, it found that the EIR did not violate CEQA when it used—as a significance threshold—the standard of “consistency” with the ARB’s Scoping Plan and AB 32’s statewide goal for greenhouse gas reduction. The court stated that such an approach

was consistent with the *CEQA Guidelines* issued pursuant to SB 97, noting: “Given the reality of growth, some greenhouse gas emissions from new housing and commercial developments are inevitable. The critical CEQA question is the cumulative significance of a project’s greenhouse gas emissions, and from a climate change point of view it does not matter where in the state those emissions are produced. Under these circumstances, evaluating the significance of a residential or mixed use project’s greenhouse gas emissions by their effect on the state’s efforts to meet its long-term goals makes at least as much sense as measuring them against an absolute numerical threshold.”

- Second, the court found that the EIR, which was prepared in 2010, appropriately looked at the Scoping Plan’s goal for greenhouse gas reductions by the year 2020 and not beyond. The court did note, however, that later EIRs may have an obligation to look beyond the year 2020. The court stated: “Plaintiffs do not claim it was improper for this EIR, issued in 2010, to look forward only to 2020 for a guidepost on reductions in greenhouse gas emissions, and we therefore do not consider the question whether CEQA required the EIR to address the state’s goals beyond 2020. Nevertheless, over time consistency with year 2020 goals will become a less definitive guide, especially for long-term projects that will not begin operations for several years. An EIR taking a goal-consistency approach to CEQA significance may in the near future need to consider the project’s effects on meeting longer term emissions reduction targets.” Of course, with the subsequent enactment of SB 32, EIRs will surely be required to look beyond the year 2020.

- Third, the court rejected the Center for Biological Diversity contention that DFW violated CEQA by comparing the project’s expected emissions to a hypothetical business-as-usual scenario rather than to a baseline of emissions in the existing environment. In doing so, the court stated that the EIR used the business-as-usual scenario “merely as a means of comparing the project’s projected emissions to the statewide target set under the Scoping Plan. The business-as-usual emissions model is used here as a comparative tool for evaluating efficiency and conservation efforts, not as a significance baseline.”

In its factual analysis, the court found that DFW abused its discretion in concluding that the project’s greenhouse gas emissions would result in a less-than-significant impact. According to the court, the administrative record contained no evidence that Newhall Ranch’s *project-level* reduction of 31% in comparison to business as usual was consistent with achieving AB 32’s *statewide* goal of a 29% reduction from business as usual. According to the court, the Scoping Plan nowhere related the statewide level of reduction effort to the percentage of reduction that would or should be required from individual projects. In fact, the court implied that a greater degree of reduction may be needed from new land use projects to compensate for past and current sources of emissions, which are substantially less efficient and will continue to exist and emit.

The court also noted that, even if the statewide percentage reduction set out in the Scoping Plan were shown to be generally appropriate for use as a criterion of significance for individual projects, the EIR's conclusion still would be unsupported. According to the court, this is because the EIR's business-as-usual scenario assumes residential density equal to that currently found in the Santa Clarita Valley. Because Newhall Ranch as designed would have greater residential density than the existing average for the Santa Clarita Valley, the EIR "makes a downward adjustment from business as usual in projected vehicle miles traveled, and consequently in greenhouse gas emissions from mobile sources." But according to the court, the Scoping Plan's statewide business-as-usual model is not necessarily based on residential densities equal to the Santa Clarita Valley average.

The court concluded its analysis by noting that DFW and other lead agencies have several options for evaluating greenhouse gas emissions. Those options include:

- Examining the "data behind the Scoping Plan's methodology" to determine the level of expected project-level reductions from new land development at the proposed project's location.
- Analyzing the project's "compliance with regulatory programs designed to reduce greenhouse gas emissions from particular activities."
- Utilizing previously adopted local plans, such as general plans or climate action plans, or metropolitan regions' "sustainable communities strategies" that may analyze greenhouse gas emissions for the relevant area.
- Relying on "existing numerical thresholds of significance for greenhouse gas emissions" adopted, for example, by local air districts. The court noted that using numerical thresholds for a large project like Newhall Ranch would likely result in significant greenhouse gas emissions, which may not even be able to be mitigated to a less-than-significant impact. In such circumstances, DFW could adopt whatever feasible mitigation measures exist beyond the efficiency and conservation measures already incorporated into the project, and nonetheless approve the project after issuing a "statement of overriding" considerations explaining the countervailing benefits of the project.

Post-Decision Developments: Five Point LLC (formerly The Newhall Land and Farming Company) responded to the Supreme Court decision with a proposal to DFW to modify the previously approved project by committing to achieve zero net greenhouse gas emissions for the project by implementing 13 mitigation measures which, according to the draft additional environmental analysis (AEA), would reduce, mitigate, and offset 100% of the project's greenhouse gas emissions from both construction and operations. The ARB reviewed the new analysis and, in November 2016, concluded that the project "would not result in any net additional greenhouse gas emissions after the mitigation measures are fully implemented." The proposed mitigation measures include both

onsite reductions (designing homes to meet Zero Net Energy standards, constructing an electric vehicle charging station in every home, and more) and offsite reductions (conserving forestland, reducing methane emissions from California dairy farms, funding a clean cook stove program in sub-Saharan Africa, and more).

The original comment period for the AEA was set to expire on January 6, 2017, but DFW extended the comment period to February 13, 2017. DFW will be required to respond to any comments received and, based on those comments, will issue a final AEA and determine whether to approve the project as revised.

Cleveland National Forest Foundation v. San Diego Association of Governments

Project Background: This case involves the SANDAG certification of an EIR for its 2015 Regional Transportation Plan/Sustainable Communities Strategy (RTP), the first in the state to be prepared and adopted by a Metropolitan Planning Organization pursuant to SB 375. The RTP is intended to serve as the long-range plan designed to coordinate and manage future regional transportation improvements, services and programs among the various agencies operating within the San Diego region.

The RTP lays out a plan for investing an estimated \$214 billion in local, state, and federal transportation funds expected to come into the region over the next 40 years. The largest proportion of the funds will go toward transit, which will receive 36% of the funds in the first 10 years, with 34% going to highway improvements (largely for adding high occupancy vehicle lanes to existing freeway corridors), and 21% to local roads and streets. The percentage dedicated to transit will grow each decade, up to 44% from 2021 to 2030, 47% in the third decade, and 57% in the last decade of the plan. After two years of extensive public input, SANDAG adopted the RTP on October 28, 2011.

EIR's Greenhouse Gas Significance Determination: The EIR concluded that the RTP complied with the ARB's greenhouse gas reduction targets through 2020, but that emissions would substantially increase after this point and through 2020. Thus, the EIR concluded that the RTP's implementation would lead to an overall increase in greenhouse gas emission levels. The EIR did not analyze, however, whether this consequence conflicted with Executive Order S-03-05 with respect to post-2020 emission reduction targets, or would impair or impede the achievement of the EO's goals.

Although the EIR did not analyze the transportation plan's consistency with the state climate policy reflected in the EO, the EIR nevertheless analyzed the RTP's greenhouse gas emission impacts against three significance thresholds for each of the planning years 2020, 2035 and 2050. Under the first threshold, the EIR posited the transportation plan's impacts would be significant if the RTP implementation were to increase greenhouse gas emissions compared to existing, or 2010,

conditions. Under the second threshold, the EIR posited the RTP's impacts would be significant if the RTP's implementation conflicted with the ARB's regional automobile and light truck emissions reduction targets. Under the third threshold, the EIR stated the RTP's impacts would be significant if the RTP's implementation conflicted with either the ARB's Scoping Plan or SANDAG's own Climate Action Strategy.

The EIR concluded the RTP's greenhouse gas emission impacts would be significant under the first significance threshold for the 2035 and 2050 planning years because the emissions would be higher in those planning years than in 2010. The EIR concluded the greenhouse gas emission impacts would be less than significant in all other respects analyzed.

Lawsuit and Procedural History: After SANDAG certified the EIR for the RTP, Citizens for Responsible Equitable Environmental Development-21 and Affordable Housing Coalition of San Diego filed suit, challenging the EIR's adequacy under CEQA. Cleveland National Forest Foundation and the Center for Biological Diversity filed a similar lawsuit, which the Sierra Club later joined.

The superior court ruled in favor of the petitioners, finding that the EIR failed to carry out its role as an informational document because it did not analyze the inconsistency between the state's policy goals reflected in EO S-03-05 and the RTP's greenhouse gas emission impacts after 2020. The court also found the EIR failed to adequately address mitigation measures for the RTP's greenhouse gas emission impacts.

SANDAG appealed the ruling to the Court of Appeal, contending that the decision to omit an analysis of the transportation plan's consistency with the EO did not violate CEQA because CEQA does not require a consistency analysis of executive order targets that are not statutorily codified. Whether the EIR's analysis complies with CEQA depends on whether the analysis reflects a reasonable, good faith effort to disclose and evaluate the transportation plan's greenhouse gas emission impacts.

California Court of Appeal Decision: On November 24, 2014, the California Court of Appeal upheld the superior court's ruling. According to the appeals court, SANDAG's decision to omit an analysis of the RTP's consistency with the EO "did not reflect a reasonable, good faith effort at full disclosure and is not supported by substantial evidence because SANDAG's decision ignored the Executive Order's role in shaping state climate policy. The Executive Order underpins all of the state's current efforts to reduce greenhouse gas emissions."

The court noted that the EO led directly to the enactment of AB 32 and SB 375, and thus will "continue to underpin the state's efforts to reduce greenhouse gas emissions throughout the life of the [RTP]." The EIR's failure to analyze the RTP's consistency with the EO, or more particularly with the EO's overarching goal of ongoing greenhouse gas emission reductions, was therefore a failure to analyze the RTP's consistency with state climate policy.

In response to SANDAG's contention that the EIR cannot analyze the RTP's consistency with the EO because there is no statute or regulation translating the EO's goals into comparable scientifically based emission reduction targets, the court noted that the lack of such targets does not preclude the EIR from performing a meaningful consistency analysis. According to the court, although SANDAG may not know precisely what future emission reduction targets the RTP will be required to meet, it knows from the information in its own Climate Action Strategy the theoretical emission reduction targets necessary for the region to meet its share of the EO goals. With this knowledge, SANDAG could have reasonably analyzed whether the RTP was consistent with, or whether it would impair or impede, state climate policy.

On March 11, 2015, the California Supreme Court granted a petition for review of the Court of Appeal decision. The Supreme Court provided the following statement of issue for the case: "Must the environmental impact report for a regional transportation plan include an analysis of the plan's consistency with the greenhouse gas emission reduction goals reflected in Executive Order No. S-3-05 to comply with the California Environmental Quality Act (Pub. Resources §21000 et seq.)?"

SB 32 was enacted subsequent to the environmental review process and trial and appellate court opinions in this case; thus, it is unclear whether SB 32 will weigh into the California Supreme Court's decision. At the very least, this case ultimately may provide guidance regarding whether CEQA documents must, as a matter of law, look at greenhouse gas reduction targets set by nonlegislatively codified executive orders. This case is fully briefed and is awaiting oral argument.

Mission Bay Alliance v. Office of Community Investment and Infrastructure et al.

Project Background: In one of the first published cases addressing the sufficiency of a greenhouse gas impacts analysis under CEQA since the Supreme Court decision in the Newhall Ranch case, *Mission Bay Alliance v. Office of Investment and Infrastructure* involved a challenge to the San Francisco Office of Community Investment and Infrastructure (OCII) November 3, 2015 approval of the new Golden State Warriors arena, two office and retail structures, parking facilities and open space in San Francisco. Governor Brown had certified the project as an "environmental leadership development project" under AB 900 (Buchanan; D-Alamo; 2011), which provided expedited judicial review for projects under CEQA that meet certain criteria, including that the project does not result in any net greenhouse gas emissions. The ARB staff conducted a technical evaluation of the greenhouse gas estimates and voluntary mitigation contained in the AB 900 application, and concluded that the proposed project would not result in any net additional greenhouse gas emissions. Notwithstanding this determination, the parties agreed that the Governor's AB 900 certification did not constitute a substitute for a CEQA determination regarding the significance of greenhouse gas emissions; accordingly, the finding was

irrelevant for purposes of the case, which ultimately turned on the adequacy of the greenhouse gas analysis contained in the Final Supplemental Environmental Impact Report (FSEIR) relied upon by the San Francisco OCII in approving the project.

EIR’s Greenhouse Gas Significance Determination: At a basic level, the FSEIR concluded that the Warriors arena and associated structures would not result in significant greenhouse gas emissions because the project would comply with San Francisco’s Greenhouse Gas Reduction Strategy. In relying solely and exclusively on the consistency with the Greenhouse Gas Reduction Strategy, the FSEIR did not include an individual project-specific analysis of greenhouse gas emissions.

Lawsuit and Procedural History: The Mission Bay Alliance challenged the adequacy of the greenhouse gas analysis, arguing that the city’s exclusive reliance on performance-based standards such as consistency with the Greenhouse Gas Reduction Strategy is inadequate. Rather, the alliance asserted that the greenhouse gas analysis must include a quantification of the project’s greenhouse gas emissions and calculate the remaining greenhouse gas emissions after implementation of the identified mitigation measures. On July 18, 2016, the trial court ruled in favor of the OCII.

California Court of Appeal Decision: The Court of Appeal rejected the petitioner’s claims and upheld the OCII’s greenhouse gas analysis, holding that the *CEQA Guidelines* allow reliance on performance-based standards such as the Greenhouse Gas Reduction Strategy, the Newhall case allows Greenhouse Gas analysis using performance-based standards, and substantial evidence demonstrated that the Greenhouse Gas Reduction Strategy would achieve reductions consistent with state and local targets.

Citing the *CEQA Guidelines* governing greenhouse gas emissions analyses, the court noted that the *CEQA Guidelines* expressly grant lead agencies the discretion to use a model or methodology to quantify greenhouse gas emissions and which model to use, and/or rely on—a qualitative analysis or performance-based standards. The Natural Resources Agency, in adopting these guidelines, stated that “CEQA does not require quantification of emissions in every instance If the lead agency determines that quantification is not possible, would not yield information that would assist in analyzing the project’s impacts and determining the significance of [GHG] emissions, or is not appropriate in the context of the particular project, [the Guidelines] would allow the lead agency to consider qualitative factors or performance standards.”

With this basic framework in mind, the court turned to a different provision in the *CEQA Guidelines* that authorizes lead agencies to adopt an area-wide plan to reduce greenhouse gas emissions and determine that a project’s incremental contribution to climate change is not significant if the project complies with the requirements of the previously adopted plan. Indeed, that is precisely what the OCII did in this case.

Next, in response to the petitioner’s argument that the Newhall case requires a lead agency to first quantify a project’s

greenhouse gas emission before analyzing consistency with a reduction plan such as the Greenhouse Gas Reduction Strategy, the court noted that Newhall did not hold that quantifying greenhouse gas emissions was required in order to satisfy one’s CEQA obligations. Instead, the Newhall decision provided a menu of options for lead agencies in making their greenhouse gas significance determinations, including a performance-based methodology in which the lead agency evaluates the significance of a project’s greenhouse gas impacts by “looking to compliance with regulatory programs designed to reduce greenhouse gas emissions.” Accordingly, the court rejected petitioners’ reliance on the Newhall case.

Having concluded that the OCII appropriately relied on compliance with the Greenhouse Gas Reduction Strategy, the court then looked at the Greenhouse Gas Reduction Strategy itself to determine whether substantial evidence existed demonstrating a less-than-significant impact. The strategy includes quantifying baseline levels of greenhouse gas emissions and planned reductions from the baseline 1990 level of 25% less emissions by 2020, 40% less by 2025 and 80% less by 2050. The strategy also includes project-specific measures that achieve citywide emissions reductions. The project was shown to be consistent with those previously quantified thresholds, and the city demonstrated that the reductions would help San Francisco attain (and exceed) local and state greenhouse gas reduction targets. Accordingly, even though the FSEIR itself did not quantify reductions, the court nonetheless supported the FSEIR’s conclusion that the project complies with strategy.

Challenges for Current/Future Development

Notwithstanding the plethora of laws, regulations, plans, executive orders governing climate change, and the statutes, regulations and case law interpreting their applicability and relevance to the CEQA process, lead agencies and developers continue to have very little guidance about how to conduct a legally adequate greenhouse gas emissions analysis. The lack of guidance on this issue has resulted in even more uncertainty in the already-notoriously uncertain and complicated CEQA process. Consequently, environmental documents continue to remain vulnerable to challenge on inadequate greenhouse gas emissions analyses.

The *Mission Bay Alliance* case may provide some guidance for lead agencies that choose to rely solely and exclusively on existing greenhouse gas reduction plans to demonstrate a less-than-significant impact, but reliance on a plan in and of itself is not enough. Lead agencies must demonstrate, through substantial evidence in the record, that relying on the plan will, in fact, result in a less-than-significant greenhouse gas emissions impact. Unfortunately, CEQA is a fact-intensive law, and predicting with any certainty whether a greenhouse gas analysis will be deemed adequate by the courts will remain difficult, if not impossible.

In addition to the lack of guidance, analyzing the significance of a project’s greenhouse gas emissions is innately

difficult because unlike virtually every other resource area that must be examined under CEQA, climate change presents a global rather than a local issue. As the California Supreme Court explained in *Center for Biological Diversity v. Department of Fish and Wildlife*:

“[T]he global scope of climate change and the fact that carbon dioxide and other greenhouse gases, once released into the atmosphere, are not contained in the local area of their emission means that the impacts to be evaluated are also global rather than local. For many air pollutants, the significance of their environmental impact may depend greatly on where they are emitted; for greenhouse gases, it does not. For projects, like the present residential and commercial development, which are designed to accommodate long-term growth in California’s population and economic activity, this fact gives rise to an argument that a certain amount of greenhouse gas emissions is as inevitable as population growth. Under this view, a significance criterion framed in terms of efficiency is superior to a simple numerical threshold because CEQA is not intended as a population control measure.”

Understanding these basic challenges and the difficulty of achieving meaningful CEQA reform in the California Legislature, the judicial branch is the only branch of government that has had several opportunities to provide more detailed guidance regarding how to conduct an appropriate greenhouse gas emissions analysis under CEQA. As Loren Kaye, president of the California Foundation for Commerce and Education, aptly stated in a 2014 article, “[t]he best prospect for reform of [CEQA] is no longer with the Legislature or the Governor, but at the California Supreme Court.” Kaye also noted, however, that the Supreme Court’s motivations remain obscure: “Have the justices decided to finally step into a policy chasm vacated by the political branches? Or have they recognized that most of CEQA’s litigation land mines were created by the courts themselves—with vague and sometimes contradictory case law inviting litigation rather than clarifying the law?” (www.foxandhoundsdaily.com/2014/09/supreme-court-eyes-ceqa, September 3, 2014.)

Unfortunately, despite the recent Newhall Ranch, SANDAG and Golden State Warriors cases, it appears that, apropos to Kaye’s article, it will likely take many years before the courts develop a body of helpful jurisprudence on the issue of greenhouse gas emissions analyses under CEQA, and thus developers and lead agencies alike will continue to face compliance and litigation challenges in this complicated and undeveloped area of the law.

State of Law Regarding How to Conduct Adequate/Defensible Greenhouse Gas Reduction Analysis Remains Uncertain

The Supreme Court in *Center for Biological Diversity v. Department of Fish and Wildlife* appropriately upheld consistency with the ARB’s Scoping Plan and AB 32’s statewide

goal for greenhouse gas reduction as a legally permissible significance threshold under CEQA. In doing so, however, the court suggested that in order to avoid the “analytical gap” in the Newhall Ranch EIR, lead agencies must embark on a nearly impossible analysis to examine the data behind the Scoping Plan’s methodology to determine the level of expected project-level reductions from new land development at the proposed project’s location. This analysis, in turn, would provide lead agencies with the data to appropriately determine what level below business as usual a project would need to satisfy to be consistent with AB 32 and the Scoping Plan. While some lead agencies and developers may have the resources to embark on this type of complicated and highly technical analysis, most do not and, as such, the business-as-usual scenario for determining greenhouse gas emission impacts under CEQA will likely be used less frequently in the future.

As for some of the other alternatives the court outlined, analyzing a project’s compliance with regulatory programs designed to reduce greenhouse gas emissions from particular activities may be a good approach for lead agencies going forward where the emissions result from sources subject to the cap-and-trade program. For example, fuel producers and importers were subject to AB 32’s cap-and-trade program beginning in 2015 and accordingly are required to obtain allowances or offsets for the greenhouse gas emissions produced from the consumption of their fuel. Based on this, lead agencies from Southern California to the San Joaquin Valley have published CEQA documents finding that no significant impacts can result from the consumption of fuel given that these emissions are effectively mitigated at the refiner/importer level. Indeed, this alternative methodology now has been utilized successfully in the *Mission Bay Alliance* case, perhaps suggesting that lead agencies may elect to conduct their greenhouse gas analyses similar to that of San Francisco moving forward.

Next, relying on “existing numerical thresholds of significance for greenhouse gas emissions” adopted, for example, by local air districts, may be easier said than done. The Newhall Ranch court noted that using numerical thresholds for a large project like Newhall Ranch would likely result in significant greenhouse gas emissions, which may not even be able to be mitigated to a less-than-significant impact. In such circumstance, the lead agency could adopt what is called a “statement of overriding considerations.” Specifically, when an agency approves a project with significant environmental effects that will not be avoided or substantially lessened, it must adopt a statement that because of the project’s overriding benefits, it is approving the project despite its environmental harm.

Adopting a statement of overriding considerations, however, has both political and legal challenges. From a political perspective, some locally elected officials are hesitant to approve a project that an EIR determines will have a significant impact on the environment. From a legal perspective, a statement of overriding considerations must be treated like findings and

therefore must be supported by substantial evidence (*Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 357). Whether a determination under CEQA is supported by substantial evidence is an unpredictable fact-based inquiry, the outcome of which is impossible to predict. Accordingly, even if lead agencies proceeded with adopting a statement of overriding considerations, as the court suggests they may do, it is far from certain whether such an approach would be upheld against the inevitable legal challenge. Further, the court's suggested pathway is difficult to square with its previous statement in the decision that "a significance criterion framed in terms of efficiency is superior to a simple numerical threshold because CEQA is not intended as a population control measure."

SB 32's Ambitious Greenhouse Gas Reduction Targets Pose Additional Challenges for Development

Although courts are beginning to provide guidance on the appropriate methodology for analyzing greenhouse gas reductions under CEQA, one forthcoming challenge will be for developers and lead agencies to develop mitigation measures and demonstrate that those measures will reduce greenhouse gas emissions below the extraordinarily ambitious targets established in SB 32.

Indeed, in his EO B-30-15, Governor Brown recognized the importance of oversight, evaluation and the wisdom of pursuing an ambitious but achievable path when he included the 2030 timeframe, noting that 2030 is "the most aggressive benchmark enacted by any government in North America." These ambitious benchmarks, coupled with the lack of clear guidance on the appropriate methodology for conducting greenhouse gas emissions analyses under CEQA, will make CEQA compliance all the more challenging for projects of all types in the years to come.

CalChamber Position

The California Chamber of Commerce supports the underlying goals of California's greenhouse gas reduction policies. In implementing such policies, however, political leaders must be mindful regarding how such policies impact other statewide development priorities, such as smart growth, affordable and infill housing, school construction, transportation infrastructure, renewable energy, transit and water projects.

Unfortunately, all these projects, which are needed to achieve the state's greenhouse gas reduction targets, are currently required to undergo greenhouse gas emissions analyses without any concrete guidance or certainty. The lack of direction and certainty underlying the CEQA process in the context of greenhouse gas reduction breeds litigation, which in turn stifles the state's ability to accommodate population growth and expeditiously achieve its greenhouse gas reduction targets.

The CalChamber is mindful that achieving meaningful CEQA reform continues to be one of the most substantively and politically difficult issues in the Capitol. We are hopeful, however, that the issue of greenhouse gas reduction policies and the role they play in the CEQA process will spark a much-needed conversation about how the state can achieve its climate change goals while creating more legal certainty for the very projects that are needed to achieve these goals.

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