

# California Environmental Quality Act

## High Court Offers Little Guidance on How Emissions, Regional Plans Should Relate

### 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.

Unfortunately, 2017 did not yield any meaningful guidance on this issue; however, the California Supreme Court did publish its opinion in the much-anticipated *Cleveland National Forest Foundation v. San Diego Association of Governments* (SANDAG) case.

### Legal Backdrop

#### ***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. Historically, EOs 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. One of the primary questions in the SANDAG case was what legal import the nonlegislatively authorized EO targets have on the CEQA process.

#### ***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 Air Resources Board (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/

# Expanding Opportunity An Agenda for All Californians

## 2018 Business Issues and Legislative Guide

See the entire CalChamber 2018 Business Issues and Legislative Guide at  
[www.calchamber.com/businessissues](http://www.calchamber.com/businessissues)  
Free PDF or epub available to download.

Special Thanks to the Sponsors  
Of the 2018 Business Issues and Legislative Guide

Premier



Silver



Bronze



Iron



We're always with you.®

The manatt logo consists of the word "manatt" in a white, lowercase, sans-serif font, centered within a solid yellow rectangular background.

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.

### SANDAG Case

**Project Background:** The case involves the San Diego Association of Governments (SANDAG) certification of an environmental impact report (EIR) for its 2015 RTP, the first in the state to be prepared and adopted by an MPO 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 implementing the RTP 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 petitioners contended 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. The superior court ruled in favor of the petitioners and further found the EIR failed to adequately address mitigation measures for the RTP's greenhouse gas emission impacts.

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.

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.

SANDAG appealed the decision to the California Supreme Court.

**California Supreme Court Decision:** 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 issue statement 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.)?”

In July 2017, the Supreme Court reversed the Court of Appeal, finding SANDAG did not abuse its discretion by declining to engage in a detailed analysis of the consistency of project’s 2050 greenhouse gas emissions with the goals of the EO. The Supreme Court found the EIR was sufficiently informative about the greenhouse gas impacts of the plan and its potential inconsistency with state climate change goals, while expressing that the EIR could have been clearer in its discussion and presentation of the data relating to the 2035 and 2050 projected emissions. The Supreme Court further found that SANDAG did not obscure the existence or contextual significance of the EO’s 2050 emission reduction target.

Notably, however, the Court emphasized the narrowness of its holding and pointed out that SANDAG’s analysis in its 2011 RTP will not necessarily be sufficient in the future because CEQA requires public agencies to ensure their analysis stays in step with scientific knowledge and regulatory schemes. Accordingly, the case lacks significant practical or legal guidance for conducting CEQA-compliant greenhouse gas emission analysis for long-term regional plans.

### 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 of how such policies affect 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.

*Article written by Louinda V. Lacey while serving as CalChamber policy advocate. She now is appellate attorney at the California Court of Appeal, Third Appellate District.*

### Jennifer Barrera

Senior Vice President, Policy

[jennifer.barrera@calchamber.com](mailto:jennifer.barrera@calchamber.com)

January 2018