Client Alert

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Is California Really Going to Mandate an 80% Reduction in Greenhouse Gases Below 1990 Levels by 2050?

By William Sloan, Miles Imwalle, and Jennifer Jeffers

The California Supreme Court has elevated the stakes even further on what has already developed into a critically important question for the future of greenhouse gas (GHG) regulation in the state. On March 11, 2015, the Supreme Court granted review of the Court of Appeal's opinion in *Cleveland National Forest Foundation et al. v. San Diego Association of Governments* to answer the following specific question:

> 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 the underlying decision now being reviewed, Division One of the Fourth Appellate District had affirmed that the San Diego Association of Governments (SANDAG) abused its discretion when it certified an Environmental Impact Report (EIR) for its Regional Transportation Plan and Sustainable Communities Strategy (RTP/SCS) because it failed to adequately analyze and mitigate GHG emission levels after year 2020. *See Cleveland National Forest Foundation v. San Diego Association of Governments* (2014) ___ Cal.App.4th ___, 2014 WL 6614394. In the environmental review for the RTP/SCS, the plan complied with CARB's GHG reduction targets through 2020, but the EIR found that emissions would substantially increase after this point and through 2050.

The majority of the *Cleveland National* court had found SANDAG's EIR deficient because, although it utilized three different significance thresholds authorized by CEQA Guidelines §15064.4 (b), it did not assess the Plan's consistency with the 2050 GHG emissions reduction goals outlined in Executive Order (EO) S-03-05, which the court had dubbed "state climate policy."[1]

The Executive Order in question dates back to June 1, 2005, when Governor Schwarzenegger was still in office. By virtue of that order, Governor Schwarzenegger established the following:

> NOW, THEREFORE, I, ARNOLD SCHWARZENEGGER, Governor of the State of California, by virtue of the power invested in me by the Constitution and statutes of the State of California, do hereby order effective immediately: 1. That the following greenhouse gas emission reduction targets are hereby established for California: by 2010, reduce GHG emissions to 2000 levels; by

[1] The Fourth Appellate District rendered a second decision last year, reaching a similar conclusion, when the court affirmed setting aside San Diego County's 2011 update to its General Plan and related program EIR due to, among other things, its failure to analyze and mitigate for anticipated GHG emissions after the year 2020, as contemplated by EO S-03-05. *See Sierra Club v. County of San Diego*, __ Cal. App. 4th __, 2014 WL 6657169 ("*Sierra Club* "). On March 11, 2015, the same day it granted review in the *Cleveland National* case, the Supreme Court denied review in the *Sierra Club* case.

> 2020, reduce GHG emissions to 1990 levels; by 2050, *reduce GHG emissions to 80 percent below 1990 levels* . . .

As many readers will know, subsequent to that Executive Order, California adopted in 2006 the California Global Warming Solutions Act (AB32), codifying the requirement that the state achieve 1990 levels by 2020. Cal. Health & Saf. Code §38550. However, AB 32 was silent on the question of what happens after 2020. In the absence of any legislative directive, the vast community of stakeholders involved with GHG regulation was left only with the older Executive Order that established a "target" of 80 percent below 1990 levels.

The Supreme Court now has before it the question of exactly what is the import of such a "target," adopted purely by gubernatorial decree. The answer to that question, oddly enough, may come not from the Supreme Court, but rather from the State Legislature, which has recently proposed a new bill to codify the Executive Order's 2050 target. Conveniently numbered SB 32, the bill is authored by Senator Fran Pavley (the same author of AB 32) and in its current form amends AB 32 to mandate that "the state board shall approve in a public hearing a statewide greenhouse gas emissions limit that is equivalent to 80 percent below the 1990 level . . . to be achieved by 2050." Should that bill be adopted, which would presumably occur long before the *Cleveland National* case is fully briefed, argued, and decided in the Supreme Court, then the pending decision in that case may end up being of little consequence. If the bill is not adopted, then the Supreme Court will be the arbiter of the future of state GHG regulation.

The importance of this case, as well as the potential legislation, should not be underestimated. If California mandates, through a Supreme Court decision or by adoption of a new law, that the state shall achieve 80% reductions in GHG below 1990 levels, that singular requirement may prove to be one of the most dominant factors in how development proceeds in California for the next 30 years.

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