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### EIR For SANDAG's Regional Transportation Plan Rejected By Court Of Appeal

In a long-awaited 2-1 decision, a court of appeal overturned the environmental impact report for the San Diego Association of Governments' 2050 Regional Transportation Plan and Sustainable Communities Strategy. [Cleveland National Forest Foundation v. San Diego Association of Governments \(4th Dist., Div. 1, No. D063288, Nov. 24, 2014\)](#). The most remarkable ruling, in what is likely to be viewed as a highly controversial decision, is the majority's finding that the EIR was deficient because it did not assess the plan's consistency with the 2050 greenhouse gas emissions reduction goal contained in an executive order issued by the Governor in 2005.

### **Background of the Plan and SB 375**

The decision concerns SANDAG's Regional Transportation Plan which contains the Sustainable Communities Strategy required by SB 375. When it enacted SB 375, the Legislature recognized that cars and light duty trucks emit 30% of the state's greenhouse gases. Accordingly, SB 375 required the Air Resources Board to establish greenhouse gas emissions reduction targets applicable to cars and light duty trucks for each of the state's metropolitan planning regions. The initial targets set goals for the years 2020 and 2035. SB 375 requires the Air Resources Board to consider new targets every eight years. The targets set for the San Diego area required a 7 percent CO2 reduction by 2020 and a 13 percent reduction by 2035.

In addition, the Legislature recognized that to achieve these targets, changes would need to be made to land use patterns and policies. For this reason, SB 375 also required Regional Transportation Plans to include land use-related strategies for achieving the targets, called Sustainable Communities Strategies. The SANDAG Regional Transportation Plan was the first in the state to be adopted with a Sustainable Communities Strategy.

The plan, however, drew fire. While it showed greenhouse gas emissions reductions through 2020, it also showed increases in greenhouse gas emissions after that date. Project opponents argued this was inconsistent with SB 375's goals, the policy in AB 32 requiring that emissions reductions achieved by 2020 be maintained past that date, and an executive order targeting larger scale emissions reductions by 2050.

### **EIR's Analysis of Greenhouse Gas Emissions**

In 2005, Governor Schwarzenegger issued an executive order establishing statewide targets for greenhouse gas emissions reductions that included reducing emissions to 1990 levels by 2020 and to 80 percent below 1990 levels by 2050. The EIR found that SANDAG's plan would reduce greenhouse gas emissions until 2020, but would increase them in later years. While it discussed the 2050 emissions reduction target in the executive order, it did not treat the order's 2050 emissions reduction target as a standard for assessing the significance of the plan's greenhouse gas impacts. The court's majority agreed with the plan opponents held that the EIR's greenhouse gas impacts analysis was inadequate for failing to analyze the plan's consistency with the executive order. While the executive order was not a legislative enactment, and established only statewide rather than regional emissions reduction targets, the majority reasoned that the executive order led to later legislation that "validated and ratified the executive order's overarching goal of ongoing emissions reductions," and therefore the executive order continues to "underpin the state's efforts to reduce greenhouse gas emissions throughout the life of the transportation plan." According to the majority, the absence of an analysis comparing the plan with the executive order's 2050 emissions reduction target amounted to "a failure to analyze the Plan's consistency with state climate policy."

In a footnote, the majority stated that it was not suggesting that the plan must achieve the Executive Order's 2050 goal or any other specific numeric goal. Rather, the court's concern was that the EIR failed to recognize the conflict between the increase in greenhouse gas emissions under the plan and the decrease required by the Executive Order.

The majority rejected SANDAG's argument that the EIR's use of three different significance thresholds authorized by CEQA Guidelines section 15064.4(b) was sufficient, stating: "the use of the Guideline's thresholds does not necessarily equate to compliance with CEQA, particularly where . . . the failure to consider the [plan's] consistency with the state climate policy of ongoing emissions reductions reflected in the Executive Order frustrates the state climate policy and renders the EIR fundamentally misleading."

## **Mitigation of Greenhouse Gas Emissions Impacts**

The majority also held that the EIR did not consider a sufficient range of mitigation measures for greenhouse gas emissions, and should have discussed additional mitigation options that could "both substantially lessen the transportation plan's significant greenhouse gas emissions impacts and feasibly be implemented." The EIR was deficient, according to the court, because it did not include measures that would encourage development of what the court referred to as "smart growth areas" -- support for planning and development through transportation investments and other funding decisions, incentives for transit-oriented developments, coordinating funding of low carbon transportation, and encouraging parking management that promote walking and transit use.

## **Alternatives Analysis**

Although the EIR analyzed *seven* alternatives to the proposed plan, the majority nonetheless concluded that the EIR failed to analyze a reasonable range of alternatives. The majority found the EIR deficient because it had not discussed an alternative which could significantly reduce total vehicle miles traveled and instead emphasized congestion relief. Given the drawbacks of congestion relief as a strategy for reducing greenhouse gas emissions in the long term, the court concluded the EIR was fatally flawed because it did not include an alternative that would focus public transit projects.

## **Air Quality Impacts**

The majority also found the plan's air quality impacts analysis deficient. The arguments centered on the required level of detail in a program-level EIR. The court noted that the fact that more precise information may be available during the next tier of environmental review, did not excuse SANDAG from providing in the EIR the information that is reasonably available now. It found the EIR deficient because SANDAG had not identified sufficient evidence in the record showing it was not feasible to provide more definitive information on a number of issues:

- **Description of Existing Conditions.** The EIR recognized regional growth and land use changes associated with the transportation plan had the potential to expose sensitive receptors to substantial localized pollutant concentrations, but asserted the level of exposure could not be determined until the next tier of environmental review when designs of individual projects became available. The majority nevertheless concluded that SANDAG's failure to provide additional baseline information in the EIR's description of existing toxic air contaminant exposure and the location of sensitive receptors violated CEQA.
- **Correlation to Adverse Health Impacts.** The EIR generally identified the adverse health impacts that might result from the transportation plan's air quality impacts. The court held, however, that the EIR must either correlate the additional transportation plan-related emissions to anticipated adverse health impacts or

demonstrate why it could not do so.

- **Inadequate Mitigation.** The court also found the EIR's mitigation of significant air quality impacts to be insufficient finding it improperly deferred analysis of appropriate mitigation measures and failed to set performance standards. SANDAG contended that no other mitigation was feasible at the program level of environmental review, but the court found that SANDAG failed to point to any evidence in the record supporting that contention.

## **Agricultural Resource Impacts**

Finally, the court found fault with the EIR's agricultural impacts analysis. SANDAG used data from the state's Farmland Mapping and Monitoring Program to analyze the agricultural impacts of the project, as permitted by Appendix G of the Guidelines, augmented by SANDAG's own geographic information system. The court found that the EIR's analysis understated the impacts to agricultural resources because the FMMP data do not capture information for farmland under 10 acres and SANDAG's own geographic information system may not have included agricultural lands that went into production after the mid-1990s. On this basis, the court concluded that the EIR's analysis of impacts to agricultural resources violated CEQA.

## **The Dissenting Opinion**

The dissent vehemently disagreed with the majority's rulings on greenhouse gas issues. The dissent expressed serious concern over the majority's analysis of the executive order characterizing its ruling as an improper determination by the court of what significance standards SANDAG should have used. This decision, according to the dissenting opinion, "strips lead agencies of the discretion vested in them by the Legislature and reposes that discretion in the courts." Stating the point even more bluntly, the dissent stated: "This insinuation of judicial power into the environmental planning process and usurping of legislative prerogative is breathtaking."

## **Review by Supreme Court?**

Not surprisingly, on December 5, 2014 the SANDAG board voted to file a petition with the California Supreme Court requesting that it review of the court of appeal's decision. SANDAG's petition should be filed in early January. .

## **Authors**