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Lack of Court Direction Requires Developers and Lenders to Estimate Their Own Significance Thresholds for GHG Emissions Past 2020

This June, the California Supreme Court heard the last set of oral arguments before breaking for the summer. Cleveland National Forest Foundation v. San Diego Association of Governments, 231 Cal.App.4th 1056 (2014) (“Cleveland National”) – a fully briefed (and closely watched) case related to an appropriate benchmark for greenhouse gas (“GHG”) emission reduction goals past 2020 – was not heard. This means September 2016 is the earliest Cleveland National will be scheduled for a hearing, and for now, the court will not decide whether an Environmental Impact Report (“EIR”) under the California Environmental Quality Act (“CEQA”) must consider gubernatorial executive orders seeking to further reduce GHG emissions beyond 2020. As discussed below, the lack of certainty in this area requires additional thought and planning by developers, as well as by lenders, on major projects with significant GHG emission impacts.

In *Cleveland National*, the court granted review to answer the following question:

Whether the [EIR] for a regional transportation plan must 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 [CEQA] (Pub. Resources § 21000 et seq.).

The court previously raised but did not address this issue in *Center for Biological Diversity v. California Department of Fish & Wildlife*, 62 Cal.4th 204, 223 (2015). *Center for Biological Diversity* concerned a land-use development project on 12,000 acres for approximately 58,000 residents. There, the court affirmed an EIR’s use of consistency with the California Global Warming Solutions Act of

2006's ("AB 32") GHG emissions reduction to 1990 levels by 2020 as a standard for a significance threshold under CEQA. However, the court also held that the lead agency did not conduct a sufficient project level analysis to determine if consistency with the AB 32 threshold should apply to the project. In dicta, the court raised issues that are now central to *Cleveland National*: (1) an appropriate benchmark for setting the significance threshold for GHG emission reduction goal past 2020, (2) the validity of gubernatorial executive orders such as S-3-05 in setting such a goal, and (3) a suitable long-term GHG emission reduction goal for California.

In *Cleveland National*, the EIR for the 2050 Regional Transportation Plan/Sustainable Communities Strategy used the AB 32 GHG emissions reduction goal as a significance threshold standard to assess the transportation and non-transportation sources of GHG emissions from the project. Using its discretion, the lead agency, the San Diego Association of Governments ("SANDAG"), did not use Executive Order S-3-05's long-term GHG emissions reduction goal of 80 percent below 1990 level by 2050. In certifying the EIR, SANDAG emphasized there is no legal authority requiring such analysis in the EIR, and thus, there was no abuse of discretion by omitting from the EIR a discussion of the transportation plan's consistency with Executive Order S-3-05. The trial court disagreed, and the Court of Appeal, Fourth District, affirmed, invalidating the EIR. The court concluded CEQA Guidelines section 15064.4 is not an exhaustive list of factors in determining the significance threshold, and the lead agency cannot select a significance threshold in a manner that causes the analysis to be misleading or without informational value. By not analyzing Executive Order S-3-05, according to the appellate court, the EIR was misleading.

CEQA Guidelines section 15064.4 does not require a lead agency to consider executive orders or legislation such as AB 32 in determining the significance threshold that applies to a specific project. Instead, it provides a lead agency discretion to choose a quantitative model or methodology, or to rely on a qualitative analysis. In relevant part, CEQA Guidelines section 15064.4 specifies three factors to consider, "among others," when assessing the significance of GHG emissions: (1) the extent to which the project may increase GHG emissions as compared with the existing environmental setting, (2) whether the project's emissions exceed the significance threshold, and (3) the extent to which the project complies with the regulations and requirements adopted to implement a statewide, regional or local plan for reduction or mitigation of GHG emissions. The appellate court in *Cleveland National* emphasized the qualifying language "among others" to hold that Executive Order S-3-05 should have been considered to comply with CEQA.

In applying CEQA Guidelines section 15064.4, lead agencies have generally based GHG significance thresholds on AB 32's GHG reduction goal or other

methodologies, such as comparisons with prior studies or projects. The California Legislative Counsel Bureau, a non-partisan public agency, stated earlier this year that gubernatorial executive orders *cannot* set state-wide policy on GHG emissions reduction goals past 2020 *unless* ratified by the state legislature. The state legislature has attempted to pass legislation to set GHG emission reduction goals beyond 2020 (Assembly Bill No. 2050 (2013-2014 Reg. Sess.) and Senate Bill No. 32 (2015-2016 Reg. Sess.)), but thus far, has not succeeded.

Despite the lack of legislative action, the California Air Resource Board (“CARB”) is moving forward with plans to adopt the interim target called for under Governor Jerry Brown’s Executive Order B-30-15 (April 29, 2015)—a reduction of GHG emissions by 40 percent below 1990 levels by 2030.

If the court upholds the Fourth Appellate District’s decision in *Cleveland National*, it will raise significant issues for lead agencies and EIRs. Lead agencies could lose some of the discretion that CEQA Guidelines section 15064.4 grants them to establish significance thresholds for GHG emissions. Instead, lead agencies could be required to consider consistency with Executive Order S-3-05 and other climate change executive orders, such as Executive Order B-30-15, which could be burdensome for lead agencies as well as project developers. This will set a precedent for courts requiring lead agencies to consider other factors, such as consistency with enacted legislation, including AB 32. At its core, such affirmation by the court could challenge the notion that the state legislature sets public policy on GHG emission reduction goals through legislation, rather than by a governor through executive orders.

To avoid these implications, the court may very well decide to postpone oral argument for *Cleveland National* until the state legislature acts on SB 32 or passes other legislation that sets GHG emission reduction goals beyond 2020.

The court’s inaction this term on *Cleveland National* means that no state law is currently setting GHG emission reduction goals beyond 2020. Without such goals in place, project developers, lenders and public agencies will need to estimate what they believe will be an appropriate GHG reduction goal beyond 2020, if the environmental review is going to rely on state policy in assessing the project’s impacts from GHG emissions under CEQA Guidelines section 15064.4(b)(3). For complex project planning purposes, the year 2020 is just around the corner, and preparation of an EIR for some projects could easily push just the project approval process itself into 2018 or 2019, especially for projects just now seeking permits. GHG emissions from those projects would of course continue beyond 2020. Given this reality, project developers and lead agencies would be prudent to consider applying Executive Order B-30-15’s GHG reduction target of 40 percent below 1990 levels by 2030, and/or Executive Order S-3-05’s target of 80 percent below 1990 levels by 2050, depending on the size and life of the project. Applying

such targets would minimize risk of challenges to the environmental review because these targets are the most aggressive. Moreover, the state legislature will likely approve some GHG reduction goals beyond 2020 that further reduce emissions below 1990 levels.

We will continue to monitor and provide updates on the status of *Cleveland National* and any legislation related to GHG emissions reduction goals past 2020.

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