The California Supreme Court on the Significance of Emissions under CEQA: Read Between the Lines

INTRODUCTION

For California to meet its climate goals, there must be swift, bold infrastructure changes that facilitate decarbonization of the transportation sector.[1] The California Supreme Court's decision in *Cleveland National Forest Foundation v. San Diego Association of Governments* (*Cleveland*) is a mixed bag for those who would use the California Environmental Quality Act (CEQA) to achieve such infrastructure changes.[2] The case originated in 2011 after the San Diego Association of Governments (SANDAG) prepared its 2050 Regional Transportation Plan (RTP) and, pursuant to CEQA, accompanying draft Environmental Impact Report (EIR),[3] prompting Cleveland National Forest Foundation and others to broadly challenge the EIR's sufficiency. In 2017, the California Supreme Court took up and decided one, narrow issue in *Cleveland*: whether the EIR adequately discussed how the RTP's projected emissions departed from California Executive Order S-03-05 (the Order) and its 2050 goal of reducing total state greenhouse gas emissions 80 percent below 1990 levels.[4] While the court left open the possibility for future state-supported projects to skimp on climate emission reductions, it also indicated that future EIRs will be held to a standard consistent with the legislative and technological context at the time of their drafting—an evolving and increasingly stringent standard.[5] This In Brief first discusses the uncertainties the court left open by issuing such a narrow holding; then it analyzes the court's dicta, indicating what the court will consider

DOI: https://doi.org/10.15779/Z38VQ2SB4N

1. *See* S. 375(1), 2007-08 Leg., Reg. Sess. (Cal. 2008).

2. Cleveland Nat'l Forest Found. v. San Diego Assn. of Gov'ts, 397 P.3d 989 (2017).

3. A basic purpose of CEQA (fulfilled by the EIR) is to "inform governmental decision makers and the public about the potential, significant environmental effects of proposed activities." CAL. CODE REGS. tit. 14, § 15002(a)(1).

4. *Cleveland*, 397 P.3d at 997.

5. *See* Sean Hecht, *California Supreme Court Upholds Regional Planning Agency's Greenhouse Gas CEQA Analysis, and Sets Out Principles to Ensure Better Analysis in the Future*, LEGAL PLANET (July 17, 2017), https://legal-planet.org/2017/07/17/california-supreme-court-upholds-regional-planning-agencys-greenhouse-gas-ceqa-analysis-and-sets-out-principles-to-ensure-robust-analysis-in-the-future/.

important in future decisions; and finishes with a review of guidance issued since this decision that matches the kinds of resources the court mentioned.

I. OVERVIEW OF *CLEVELAND*

A. Legal Background

Cleveland involves two pieces of legislation and one executive order spanning four decades: CEQA, Executive Order S-3-05, and Senate Bill (SB) 375.[6] CEQA requires that any project undertaken or funded by, or requiring discretionary approval from, a public agency be reviewed for its environmental impacts.[7] Projects with potential impacts require the lead agency[8] to draft an EIR[9] detailing any significant environmental effects of the project and steps taken to mitigate those effects.[10] The lead agency must establish a baseline, or threshold of significance, against which to compare the measured environmental effect.[11] An EIR can only be approved if the lead agency determines that the project will not have any significant environmental impacts or, alternatively, mitigates all feasibly avoidable impacts and determines that all unavoidable impacts are acceptable due to overriding considerations.[12]

The Order was motivated by California's unique vulnerabilities to climate change, including to drought, worsening air quality, and sea level rise, as well as an understanding of the efforts needed to mitigate these vulnerabilities.[13] To achieve this necessary mitigation, the Order set three benchmark goals for greenhouse gas emissions reductions in California, including an 80 percent reduction in total greenhouse gas emissions from 1990 levels by 2050.[14] Though subsequent legislation has given legal effect to intermediate goals,[15] the Order's 2050 goal remains the most ambitious state goal from a total emissions reduction perspective.

In 2009, the legislature enacted SB 375, which directed the California Air Resources Board (CARB) to develop regional emissions reductions goals for

6. S. 375, 2007-08 Leg., Reg. Sess. (Cal. 2008).

7. CAL. CODE REGS. tit. 14, § 15002(b) (2020).

8. "Lead agency" means the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment. CAL. PUB. RES. CODE § 21067 (West 1972).

9. "An EIR is an informational document which will inform public agency decision makers and the public generally of the significant environmental effect of a project, identify possible ways to minimize the significant effects, and describe reasonable alternatives to the project." CAL. CODE REGS. tit. 14, § 15121(a).

10. CAL. CODE REGS. tit. 14, § 15089(a) (2020).

11. *Id.* § 15064.7.

12. *Id.* § 15092(b).

13. Cal. Exec. Order No. S-3-05 (June 1, 2005).

14. *Id.* The first two goals were reducing emissions (1) to 2000 levels by 2010 and (2) to 1990 levels by 2020. *Id.*

15. In 2006, Schwarzenegger signed Assembly Bill 32, codifying the second goal but, notably, not the third goal. CAL. HEALTH & SAFETY CODE § 38550 (West 2007).

automobiles and light trucks for 2020 and 2035.[16] Pursuant to SB 375, CARB set emissions reduction targets for the San Diego region of 7 percent per capita by 2020 and 13 percent per capita by 2035, against a 2005 baseline.[17] SB 375 further required Municipal Planning Organizations such as SANDAG, which must adopt RTPs with twenty-year-minimum planning horizons every four to five years, to develop a "Sustainable Communities Strategy" (SCS) as a part of their RTPs.[18] The SCSs are meant to "reduce the greenhouse gas emissions from automobiles and light trucks to achieve" CARB's regional targets.[19] These three authorities—CEQA, the Order, and SB 375—provided the framework for emissions mitigation and reporting for SANDAG's RTP.

B. Case Background

SANDAG is a regional organization of local governments within San Diego County, home to 8.5 percent of the state's population.[20] In 2011, pursuant to SB 375, SANDAG issued its first RTP/SCS and accompanying draft EIR.[21] The draft EIR used three different measures of significance for emissions impacts, entitled GHG-1, GHG-2, and GHG-3, to determine whether emission impacts would be significant in 2020, 2035, and—the subject of this litigation—2050.[22] GHG-1 measured total land-use and transportation-related emissions compared to a 2010 baseline.[23] The EIR determined emissions from 2010 to 2050 would increase under the RTP, constituting a significant environmental impact based on GHG-1.[24] GHG-2 compared CARB's regional emissions reduction targets to emissions projected under the RTP.[25] According to the EIR, emissions would meet CARB's goals, and thus GHG-2 did not demonstrate any significant impacts.[26] GHG-3 compared projected emissions with applicable emissions reduction plans—CARB's Scoping Plan and SANDAG's Climate Action Strategy.[27] SANDAG concluded that the RTP's focus on transit and compact development near transit centers aligned with the Climate Action Strategy's

16. CAL. GOV'T CODE § 65080(b)(2) (West 2020).

17. Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts, 397 P.3d 989, 994 (Cal. 2017).

18. 23 C.F.R. § 450.324(c) (2017); CAL. GOV'T CODE § 65080(b)(2) (West 2007).

19. CAL. GOV'T CODE § 65080(b)(2)(B) (West 2007).

20. U.S. CENSUS BUREAU, QUICKFACTS SAN DIEGO COUNTY, CALIFORNIA (July 1, 2019), https://www.census.gov/quickfacts/fact/table/sandiegocountycalifornia,CA/PST045219.

21. *Cleveland*, 397 P.3d at 995.

22. *Id.*

23. *Id.*

24. Projected 2050 emissions in the draft EIR were 33.65 million metric tons (MMT) carbon dioxide equivalent (CO2e) compared to 28.845 in 2010. "GHG-1 addressed whether the 2050 RTP/SCS would cause a net increase in GHG emission, and concluded this impact was significant and unavoidable for 2035 and 2050." SAN DIEGO ASS'N OF GOV'TS, 2050 REGIONAL TRANSPORTATION PLAN/SUSTAINABLE COMMUNITIES STRATEGY FINAL ENVIRONMENTAL IMPACT REPORT APPENDIX G, 681 (2011), https://www.sandag.org/uploads/2050RTP/F2050RTPEIRG.pdf.

25. *Cleveland*, 397 P.3d at 995.

26. *Id.*

27. *Id.* at 996.

goals and declined to analyze the Scoping Plan, which did not have targets beyond 2020, for significance in 2050. Thus, SANDAG found no significant impact for 2050 within the meaning of GHG-3.[28]

SANDAG received thousands of public comments and letters following the EIR's release.[29] The California Attorney General objected to the EIR and argued the emissions projections must be compared to the Order's 2050 goal because the Order "is designed to meet the environmental objective that is relevant under CEQA (climate stabilization)."[30] SANDAG rejected these comments and stated that the Order's target is not an appropriate CEQA threshold of significance.[31] SANDAG subsequently certified the EIR.

In response, Cleveland National Forest Foundation and others filed a petition for writ of mandate contesting the certification under CEQA in 2011.[32] The superior court directed SANDAG to fix the EIR's deficiencies and required that SANDAG analyze the RTP's emissions impacts against the Order's 2050 goal.[33] The court of appeal subsequently affirmed.[34] The California Supreme Court granted certiorari solely on the question of whether CEQA required SANDAG to analyze the consistency of the RTP's emissions with the Order, focusing on the 2050 goal.[35]

The court reversed and sided with SANDAG, presenting two central holdings. First, SANDAG's EIR did not need to explicitly discuss the RTP's inconsistency with California's 2050 greenhouse gas emissions reduction goal embodied in the Order.[36] Second, the report's three-part method for explaining

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28. *Id.*

29. 2050 Regional Transportation Plan Overview, SAN DIEGO ASS'N OF GOV'TS, https://www.sandag.org/index.asp?projectid=349&fuseaction=projects.detail (last visited Sept. 28, 2020).

30. *See Cleveland*, 397 P. 3d at 996. The attorney general also indicated that while SB 375 may not be legally binding on SANDAG's ability to allow car and light-duty truck emissions to rise after 2020, to allow such an increase in emissions would be contrary to the "underlying purpose" of SB 375. SAN DIEGO ASS'N OF GOV'TS, 2050 REGIONAL TRANSPORTATION PLAN/SUSTAINABLE COMMUNITIES STRATEGY FINAL ENVIRONMENTAL IMPACT REPORT APPENDIX G, 681 (2011), https://www.sandag.org/uploads/2050RTP/F2050RTPEIRG.pdf. Though the question of SB 375's legal authority to require emissions reductions past 2020 for cars and light-duty trucks was not an issue decided in *Cleveland*, the court nevertheless suggested that any RTP/SCS that runs counter to SB 375's underlying purpose must have demonstrated support from the latest scientific and policy guidance in its EIR. *Cleveland*, 397 P.3d at 1003.

31. *Cleveland*, 397 P.3d at 1003.

32. Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts, No. 2011-00101593 (Cal. Super. Ct. Dec. 3, 2012).

33. *See Cleveland*, 397 P. 3d at 997.

34. *Id.* at 996–97.

35. *Id.* at 1003. The superior court also found SANDAG failed to adequately address mitigation measures, which the court of appeal affirmed. Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts, 180 Cal. Rptr. 3d 548, 556 (Cal. Ct. App. 2014), *rev'd in part*, 3 Cal. 5th 497 (Cal. 2017). The California Supreme Court did not review the question of mitigation adequacy, and on remand, the court of appeal reaffirmed the superior court's decision on the matter, concluding the EIR lacked what CEQA required: "a discussion of mitigation alternatives that could both substantially lessen the transportation plan's significant greenhouse gas emissions impacts and feasibly be implemented." Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts, 17 Cal. App. 5th 413, 433, 447 (Cal. Ct. App. 2017).

36. *See Cleveland*, 397 P. 3d at 993.

the RTP's emissions impacts was sufficient under CEQA at the time of the EIR's drafting.[37] In dicta, however, the court indicated that future EIRs would be subject to increased scrutiny consistent with recently enacted climate policy.[38]

First, the court held that even though the EIR lacked an explicit comparison between the Order's 2050 goal and the project's forecasted emissions, the report did not "obscure the existence or contextual significance" of the goal.[39] The court noted three features of the EIR that accomplished this implicit comparison: SANDAG mentioned the 2050 target as part of the plan's legal backdrop; it discussed emissions in 2050, implicitly invoking the goal; and SANDAG explicitly mentioned why it did not include the 2050 goal.[40] Together, these features allowed the EIR to satisfy CEQA's requirement of adequately informing the public and decision makers, thus enabling informed public participation and reasoned decision making in light of environmental factors.[41]

Next, the court ruled that SANDAG properly exercised discretion in omitting the Order as a measure of significance.[42] The court agreed with SANDAG that there are no "reliable means of forecasting how future developments or state legislative actions to reduce greenhouse gas emissions may affect future emissions in any one planning jurisdiction."[43] Because of this, analyzing emissions against the 2050 goal would be "too speculative to evaluate" and thus unnecessary under CEQA, the court reasoned.[44] Rather, the court found the EIR's suggestion that the positive trajectory of emissions could potentially conflict with the Order's 2050 goal sufficiently informative.[45]

Finally, the court, without much further explanation, concluded that for this particular case, the three measures of significance SANDAG chose were sufficient in concert (though not necessarily individually) to satisfy CEQA.[46]

The court also offered some reassurance to environmentalists. First, in dicta, the court provided some forward-looking guidance. The court stressed that its decision was not a blanket blessing for future plans to adopt these measures of significance and that future measures of significance must be in accordance with the statutory and scientific backdrop present at the time of drafting.[47] The court also stated that an individual project, such as SANDAG's, is not necessarily insignificant in achieving a statewide goal and that solving climate change will

37. *Id.* at 1002.
38. *Id.* at 1003.
39. *Id.* at 1000.
40. *Id.* at 1000–01.
41. *Id.* at 1001; *see* Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 40 Cal. 4th 412, 442 (2007).
42. *Cleveland*, 397 P.3d at 1001.
43. *Id.*
44. *Id.* at 1001–02; *see also* Marine Mun. Water Dist. v. KG Land Cal. Corp., 235 Cal. App. 3d 1652, 1663 (1991).
45. *Cleveland*, 397 P.3d at 1002.
46. *Id.*
47. *Id.*

require a multitude of small reductions.[48] Finally, the court noted that the Order's importance in representing the policy conclusions reached through the best available scientific data made its discussion in the EIR necessary.[49]

II. ANALYSIS

In *Cleveland*, the California Supreme Court missed an opportunity to harmonize CEQA with modern climate change legislation. Instead, this admittedly narrow decision failed to please either climate advocates seeking stronger standards or lead agencies tasked with CEQA compliance seeking legal certainty.[50] While this decision may provide an opportunity for public agencies to deviate from considering California's 2050 emissions targets in future EIRs, the court cautioned against such deviations. Further, the court provided several guiding principles for lead agencies, which align with executive and legislative guidance issued in the wake of the decision.

A. Uncertainties left by Cleveland

This decision leaves projects that predict mildly decreasing or flat emissions through 2050, though clearly flouting the state's 2050 goal, in CEQA no man's land. The California Supreme Court decided that SANDAG did not need to explicitly compare its RTP's projected emissions to the Order's 2050 goal. But SANDAG's 2050 plan predicted a 17 percent increase in emissions from 2010,[51] an obviously sizeable contribution to climate change, requiring no express comparison for context. Mildly decreasing or flat emissions through 2050—subtler emissions than SANDAG's—would be clearly significant if contrasted with the Order's aggressive goal.[52] But using SANDAG's three metrics, such emissions would be insignificant under CEQA.[53] Yet the court explicitly refused to extend its approval of SANDAG's metrics for use in future EIRs.[54] Hence, CEQA no man's land.

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48. *Id.*

49. *Id.* at 1003.

50. *See* Arthur F. Coons, *Supreme Disappointment: High Court's Narrow Opinion in SANDAG RTP/SCS EIR Case Offers Little Guidance on CEQA GHG Analysis*, CEQA DEVS. (July 17, 2017), https://www.ceqadevelopments.com/2017/07/17/supreme-disappointment-high-courts-narrow-opinion-in-sandag-rtpscs-eir-case-offers-little-guidance-on-ceqa-ghg-analysis/.

51. The draft EIR reported 2010 emissions of 28.85 MMT CO2e and predicted 33.65 MMT CO2e in 2050, accounting for state measures. *Cleveland*, 397 P.3d at 995.

52. *See id.* at 1010 (Cueller, J., dissenting) (warning that "the majority heightens the risk that other regional planners will shirk their responsibilities").

53. *See id.* at 995. SANDAG found that emissions were significant under only one of the three measures of significance: GHG-1, which compared projected emissions in 2050 to 2010 emissions. *Id.* at 995–96. SANDAG determined emissions constituted a significant impact under GHG-1 because they represented an "overall increase . . . compared to 2010 levels." *Id.* at 995. In contrast, SANDAG found 2020 emissions to be "insignificant" because they were "expected to be lower than in 2010." *Id.* Thus, a project for which estimated emissions in 2050 would be net neutral or a slight decrease compared to 2010, by this logic, would be insignificant.

54. *Id.* at 1002.

The court's decision also implicitly encourages lead agencies to make plans with shorter analytical timelines to avoid potential conflict with the 2050 goal. Some courts have already interpreted the holding as a grant of discretion to lead agencies to shorten project timelines for CEQA compliance. Citing *Cleveland*, California's Court of Appeal for the Fifth District found that Kern County's decision to decline to compare its 2011 Specific Plan's projected emissions to the state's 2050 goal fell properly within the county's discretion.[55] The *Sierra Club v. County of Kern* court further looked to *Cleveland*'s holding in deciding that Kern County's decision to use 2020 as the target year for emissions cuts "was appropriate."[56] Consequently, the court ruled that Kern County adequately analyzed the significance of planned emissions.[57]

State agencies continue to take a different approach. For example, CARB has repeatedly emphasized the need to develop and implement policies to meet both mid- and long-term goals.[58] Executive branch guidance issued after *Cleveland* charts possible pathways for compliance with this potential requirement.[59] This tension between the California Supreme Court's holding and state agency advice puts lead agencies in an unenviable situation. The court will likely need to revisit this issue and resolve these uncertainties in the years to come.

The decision in *Cleveland* also implicitly expresses a view on other aspects of the EIR, despite the court's claim that it only addressed the issue at hand.[60] The court found that "it was not difficult for the public, reading the EIR, to compare" GHG-1, which captures the plan's projected emissions through 2050, to the state's 2050 goal.[61] The reasoning follows that the appropriate mitigation measures flowing from GHG-1 and the other measures of significance would sufficiently account for the plan's deviation from the 2050 goal. But this is incorrect. The actual mitigation measures CEQA requires are dependent on which emissions are significant—that is, what an EIR officially determines, not on what the public may understand, to be significant. Thus, regardless of whether the document succeeded or failed to inform the public about the significance of the emissions, by refusing to explicitly tie the significance of emissions to the 2050 goal, SANDAG distorted the necessary mitigation measures.[62] All six of

55. Sierra Club v. County of Kern, No. F071133, 2018 WL 3360567, at *13 (Cal. Ct. App. July 10, 2018).

56. *Id.*

57. *Id.*

58. CAL. AIR RES. BD., CALIFORNIA'S 2017 CLIMATE CHANGE SCOPING PLAN 17–18 (2017), https://ww3.arb.ca.gov/cc/scopingplan/scoping_plan_2017.pdf.

59. *See generally* GOVERNOR'S OFF. OF PLAN. & RES., TECHNICAL ADVISORY ON EVALUATING TRANSPORTATION IMPACTS IN CEQA (2018), http://opr.ca.gov/docs/20190122-743_Technical_Advisory.pdf; GOVERNOR'S OFFICE OF PLAN. AND RES., FINAL ADOPTED TEXT FOR REVISIONS TO THE CEQA GUIDELINES (2018), https://resources.ca.gov/CNRALegacyFiles/ceqa/docs/2018_CEQA_FINAL_TEXT_122818.pdf.

60. Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts, 397 P.3d 989, 1002 (Cal. 2017).

61. *Id.* at 1001.

62. *See id.* at 1009 (Cuellar, J. dissenting).

the alternative plans SANDAG considered would have produced the same or more emissions than the plan SANDAG ultimately adopted.[63] Had SANDAG considered the state's 2050 goal as a measure of significance, it would have been clear that its survey of alternative plans did not constitute a sufficient effort to mitigate emissions.[64]

B. Between the Lines: Guidance from Cleveland

Although the court neither endorsed nor clearly disapproved of any particular methods or rationales employed by SANDAG, it did make clear that CEQA requires a good-faith effort to reduce emissions according to the state's aggressive mitigation policies.[65] Some lead agencies have successfully walked the post-*Cleveland* line by avoiding explicit comparisons to the Order's 2050 goal.[66] However, several guiding principles drawn from the court's decision indicate that a safer route to EIR certification requires substantial treatment of emissions.[67]

First, lead agencies must take into account emissions that are marginal in a state-wide or global context. The court rejected SANDAG's claim that there was no need to make the Order's goal a measure of significance because the emissions associated with the RTP would be relatively small compared to the state's cumulative emissions.[68]

Next, local agencies must draw upon evolving scientific knowledge of climate change and the implications of such knowledge. The court cited its own precedent that invoked the United Nations Framework Convention on Climate Change Paris Agreement, reinforcing the California judiciary's deference to the international scientific consensus that numerous actions at varying levels of government are necessary to avert global climate catastrophe.[69] This suggests the adequacy of mitigation measures may shift as scientific understanding of what must be achieved, as reflected in legislation and regulations, advances.[70]

California's Court of Appeal for the Fourth District recently illustrated this principle. The court found the County of San Diego's greenhouse gas emissions analysis in its CEQA review-supporting 2016 Guidance Document failed to "stay

63. *See id.* at 1010.

64. *See id.*

65. *See id.* at 1003.

66. *See* Sierra Club v. County of Kern, No. F071133, 2018 WL 3360567, at *13 (Cal. Ct. App. July 10, 2018).

67. *See* Hecht, *supra* note 5.

68. *Cleveland*, 397 P.3d at 1000.

69. *See* Ctr. for Biological Diversity v. Cal. Dep't of Fish & Game, 62 Cal. 4th 204, 219 (2015); United Nations Framework Convention on Climate Change, Paris Agreement, Dec. 12, 2015, 52 U.N.T.S. 21("[*r*]*ecognizing* the importance of the engagements of all levels of government and various actors, in accordance with respective national legislations of Parties, in addressing climate change").

70. *See* Hecht, *supra* note 5.

in step with evolving scientific knowledge and state regulatory schemes."[71] The Fourth District court read *Cleveland* to require project-specific significance thresholds, as opposed to thresholds of "general applicability," such as the static efficiency metric San Diego County used in its Guidance Document.[72] This decision appears to demonstrate lower court support for the California Supreme Court's request to interpret *Cleveland*'s holding narrowly and to closely track state climate policy in evaluating emissions analysis adequacy under CEQA.

Finally, the court indicated that lead agencies must ensure their plans are responsive to current and future state policies that address the climate crisis.[73] For example, the court explained that the Order is crucial to the EIR process because it embodies the scientific community's belief about what state action is necessary.[74] This implies that lead agencies must address such goals embodied in executive orders.[75] Additionally, the court pointed to the passage of SB 32,[76] which occurred after briefing was submitted for *Cleveland*, suggesting future EIRs ought to reference this new legislation and any clarification it provides for how lead agencies should act to mitigate climate change.[77] Going forward, lead agencies should be aware of relevant legislative and executive authorities and include them in EIR preparation.

C. Executive and Legislative Materials Will Provide Guidance Post-Cleveland

In order to embody the most current mitigation practices and ensure future compliance with CEQA, lead agencies should not look to the specifics of *Cleveland*'s holding, but rather new and future administrative guidance, executive orders, and legislation on emissions mitigation.

The 2018 amendments to the CEQA Guidelines, which synthesize the holdings of *Cleveland* and other recent cases, clarify lead agencies' obligations to avert emissions.[78] The amendments eliminate old discretionary language, stating that lead agencies "shall," rather than "should," make a good faith effort to formulate a project's forecasted emissions, as well as "determine" rather than "assess" the significance of those emissions.[79] The amendments also direct lead

71. Golden Door Props., LLC v. County of San Diego, 27 Cal. App. 5th 892, 906–07 (2018) (citing *Cleveland*, 397 P.3d at 989).

72. *Id.* at 906.

73. *See Cleveland*, 397 P.3d at 1003.

74. *See id.* at 1000.

75. *See* Hecht, *supra* note 5.

76. SB 32 commits California to reducing its emissions by 40 percent below 1990 levels by 2030, establishing an aggressive interim target intended to ensure the state stays on track towards the Order's 2050 goal. CAL. HEALTH & SAFETY CODE § 38566 (West 2017).

77. *See Cleveland*, 397 P.3d at 1003.

78. *See* Ctr. for Biological Diversity v. Cal. Dept. of Fish & Game, 62 Cal. 4th 204, 240 (2015); *see also* Friends of Oroville v. City of Oroville, 219 Cal. App. 4th 832, 844 (2013).

79. Jessica Wentz, *California Adopts CEQA Guidelines Aimed at Improving Consideration of GHG Emissions and Climate Change Impacts in Environmental Reviews*, CLIMATE LAW BLOG (Jan. 10, 2019),

agencies to focus their findings of significance on their project's incremental contribution to climate change, rather than the (likely) small proportion of statewide emissions any given project represents.[80]

The amendments also increase the evidentiary standards for lead agency decisions on emissions analysis and reporting. Any determination that emissions are not significant based on state goals must be backed by "substantial evidence" that the emissions are "not cumulatively considerable."[81] Additionally, while lead agencies have discretion in choosing the best model or methodology for estimating emissions, they must support the decision with "substantial evidence" and explain any limitations.[82]

Following *Cleveland*, the Governor's Office of Planning and Research (OPR) released a technical advisory on transportation planning and CEQA.[83] In this advisory, OPR and CARB recognized that a gap exists between the level of reductions SB 375 alone can attain and the level of reductions necessary to achieve the state's 2030 and 2050 goals.[84] To close this gap, OPR urged lead agencies to adopt CARB's recommended goal of reducing vehicle miles traveled by 15 percent as compared to "existing development" on new projects.[85] To demonstrate an active stance on CEQA's emissions mitigation requirement, lead agencies preparing project-level EIRs can explicitly plan to achieve this vehicle-miles-traveled reduction goal. Those responsible for creating program-level EIRs,[86] such as RTP/SCSs, can facilitate the achievement of the vehicle miles

http://blogs.law.columbia.edu/climatechange/2019/01/10/california-adopts-ceqa-guidelines-aimed-at-improving-consideration-of-ghg-emissions-and-climate-change-impacts-in-environmental-reviews/.

80. *Id.*; CAL. CODE REGS. tit. 14, § 15064.4(b) (2020) ("In determining the significance of a project's greenhouse gas emissions, the lead agency should focus its analysis on the reasonably foreseeable incremental contribution of the project's emissions to the effects of climate change. A project's incremental contribution may be cumulatively considerable even if it appears relatively small compared to statewide, national or global emissions").

81. CAL. CODE REGS. tit. 14, § 15064.4(b)(3) (2020) ("In determining the significance of impacts, the lead agency may consider a project's consistency with the State's long-term climate goals or strategies, provided that substantial evidence supports the agency's analysis of how those goals or strategies address the project's incremental contribution to climate change and its conclusion that the project's incremental contribution is not cumulatively considerable").

82. CAL. CODE REGS. tit. 14, § 15064.4(c) (2020) (A lead agency may use a model or methodology to estimate greenhouse gas emissions resulting from a project. The lead agency has discretion to select the model or methodology it considers most appropriate to enable decision makers to intelligently take into account the project's incremental contribution to climate change. The lead agency must support its selection of a model or methodology with substantial evidence. The lead agency should explain the limitations of the particular model or methodology selected for use").

83. GOVERNOR'S OFF. OF PLAN. & RES., TECHNICAL ADVISORY ON EVALUATING TRANSPORTATION IMPACTS IN CEQA (2018), http://opr.ca.gov/docs/20190122-743_Technical_Advisory.pdf.

84. *Id.*

85. *Id.*

86. A "program EIR is an EIR which may be prepared on a series of actions that can be characterized as one large project." CAL. CODE REGS. tit. 14, § 15168(a).

traveled reduction goal through transit-oriented planning and utilizing infill opportunities.[87]

In 2018, Governor Jerry Brown enacted Executive Order B-55-18, pushing the state to "achieve carbon neutrality by 2045 and maintain negative emissions thereafter."[88] Depending on how successfully the state is able to encourage the generation of carbon offsets, some believe this goal may prove even more stringent than the 2050 target.[89] Given the California Supreme Court's careful admonishment that lead agencies keep up to date with scientific understanding via reference to climate policy, as well as the amount of litigation produced by the supposedly legally toothless Executive Order S-3-05, lead agencies should specifically address this newer Executive Order in future EIRs.

Finally, the increasing relative importance of vehicle emissions may stimulate further legislation. Approximately 40 million metric tons (MMT) of California's total 45 MMT carbon dioxide equivalent (CO2e) per-year drop in emissions from 2000 to 2017 was due to cleaner electricity.[90] As the low-hanging reductions associated with cleaning California's energy supply are picked, what will remain is the much more difficult task of reducing vehicle emissions, which currently account for 40 percent of state emissions.[91] This reality may prompt future legislation that lead agencies will need to incorporate. Explicit reference to each of these forms of guidance is the clearest path to certification of future EIRs.

CONCLUSION

The California Supreme Court's holding in *Cleveland* leaves open the possibility of future EIRs that do not fully consider climate mitigation efforts. However, agencies can avoid inevitable ligation risks by heeding the court's suggestion to closely consider the latest climate policy. Lead agencies should thoroughly review the effects of their plans as they pertain to statutory requirements, executively mandated goals, and regulations rooted in current understandings of climate science. This decision provides neither an invitation for lead agencies to "shirk their responsibilities" nor a "template for future EIRs," but rather calls for lead agencies to take seriously their role in actualizing California's trailblazing climate goals.[92]

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87. WHAT ARE SUSTAINABLE COMMUNITIES STRATEGIES?, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/sustainable-communities-program/what-are-sustainable-communities-strategies (last visited Sept. 28, 2020).

88. Kevin Poloncarz & Jake Levin, *Governor Jerry Brown signs SB 100 and Executive Order to Achieve Carbon Neutrality by 2045*, INSIDE ENERGY & ENV'T (Sept. 10, 2018), https://www.insideenergyandenvironment.com/2018/09/governor-jerry-brown-signs-sb-100-and-executive-order-to-achieve-carbon-neutrality-by-2045/.

89. *See id.*

90. *See* CAL. AIR RES. BD., CALIFORNIA GREENHOUSE GAS EMISSION FOR 2000 TO 2017, 5 (2019), https://ww3.arb.ca.gov/cc/inventory/pubs/reports/2000_2017/ghg_inventory_trends_00-17.pdf.

91. *Id.*

92. Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts, 397 P.3d 989, 1003 (Cal. 2017).

Regional plans such as SANDAG's RTP have the power to dramatically shape transportation trends. Justice Cuellar's vociferous dissent spoke to the importance of such plans in reducing emissions and achieving the state's climate goals.[93] With the future of California's low-carbon fuel efficiency standards hanging in the balance of larger political and legal battles,[94] such plans may become even more crucial in reducing notoriously pesky auto-related emissions.

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93. *See id.* at 1006 (Cueller, J., dissenting).

94. On April 30, 2020, EPA and the National Highway Transportation Safety Administration issued final rules establishing new fuel efficiency standards for cars and light trucks and revoking California's waiver under the Clean Air Act to establish its own standards. The Safer Affordable Fuel-Efficient Vehicle Rule for Model Year 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020). When the rules were proposed in September 2019, California, along with twenty-two other states, the District of Columbia, and the cities of Los Angeles and New York, sued in the district court for the District of Columbia challenging the rules. *California v. Chao*, CLIMATE CASE CHART, http://climatecasechart.com/case/california-v-chao/ (last visited Sept. 28, 2020). The results of that case now hinge on another suit brought by a coalition of nonprofits in the Court of Appeals for the District of Columbia. *Union of Concerned Scientists v. National Highway Traffic Safety Administration*, CLIMATE CASE CHART, http://climatecasechart.com/case/union-of-concerned-scientists-v-national-highway-traffic-safety-administration/ (last visited Sept. 28, 2020).