SANDAG RTP/SCS EIR Redux: Is Fourth District's Published Opinion on Remand Constructive CEQA Compliance Lesson or Moot Exercise?

By Arthur F. Coon on [Month day, year]

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When it comes to CEQA cases, some courts don't seem to know when to stop beating a dead horse. So it may be with the Fourth District Court of Appeal's 43-page, published, 2-1 majority decision, accompanied by a 4-page dissent, filed on November 16, 2017, after remand from the California Supreme Court in *Cleveland National Forest Foundation, et al. v. San Diego Association of Governments, et al.* (4th Dist., Div. 1, 2017) ____ Cal.App.5th ____. My previous blog post on the Supreme Court's disappointingly narrow opinion, which decided only the issue whether SANDAG's 2011 EIR for its Regional Transportation Plan/Sustainable Community Strategy (RTP/SCS) violated CEQA by not explicitly engaging in an analysis of consistency of projected 2050 GHG emissions with a 2005 executive order (holding it didn't), can be found *here*.

The Court of Appeal's previous published decision, of course, reached that narrow GHG analysis issue and a lot more – it held SANDAG's EIR was deficient in literally *all* respects argued by plaintiffs and intervenor/appellant the People, i.e., failure to analyze consistency with the 2005 Executive Order; failure to adequately address GHG mitigation; failure to analyze a reasonable range of project alternatives; failure to adequately analyze and mitigate air quality and particulate matter pollution impacts; and understating agricultural land impacts. In supplemental briefing following the Supreme Court's remand, Cleveland and the People requested the Court to issue a revised published opinion essentially the same as *Cleveland I*, albeit slightly revised to acknowledge the Supreme Court's partial reversal.

On the other hand, "SANDAG asserted the case is moot because the EIR and the transportation plan have been superseded by more recent versions, which Cleveland and the People have not challenged" and "will be superseded once more by another EIR and transportation plan currently being prepared." Indeed, I had noted in my prior post that "the strong flavor of mootness … permeates [this case]" and

questioned whether "the parties [will] still be fighting over the adequacy of the 2011 EIR years hence, when even the 2015 RTP is superseded by yet another regional plan[.]"

Apparently, they will be. Obviously eager to drive another judicial stake through the heart of the 2011 EIR, lest it rise again, vampire-like, to wreak future CEQA havoc, the Court of Appeal found the case was not moot on the record before it, reasoning:

> While there is evidence in the record suggesting SANDAG prepared different environmental review documents for the 2015 version of the transportation plan, there is no evidence indicating that the EIR at issue in this case has been decertified and can no longer be relied upon for the current version or future versions of the transportation plan, or for projects encompassed with[in] the transportation plan. Additionally, while there is evidence suggesting the environmental review documents associated with the 2015 version of the transportation plan may have addressed this court's concerns about the EIR's greenhouse gas emissions impacts analysis, there is no evidence indicating these environmental review documents addressed this court's concerns about any of the EIR's other analytical deficiencies. Consequently, on this record, it appears this case may still be able to provide Cleveland and the People with effective relief because correcting the defects in the EIR may result in modifications to the current version or future versions of the transportation plan, or to projects encompassed within the transportation plan.

(Slip Opn. at 6.)

But wait, you might object, doesn't the record reflect that *nobody challenged* SANDAG's 2015 EIR? And isn't that EIR thus *conclusively presumed valid* under CEQA absent a timely challenge? These would be good points, and they are not really satisfactorily answered by the Court's simple dropping of a footnote referencing Public Resources Code, § 21168.9(b) and the inherently retained jurisdiction of a court issuing a peremptory writ of mandate to enforce and ensure compliance with that writ.

In any event, the Court of Appeal buttressed its rationale for continuing to flog the "dead horse" – SANDAG's 2011 EIR – here by holding, in the alternative: "Even if this case were moot, it falls within the exception for cases "present[ing] important questions of continuing public interest that may evade review" because of the frequency with which SANDAG must update the transportation plan … as well as the nature of a program EIR and the associated limits on future environmental review[.]" It later added in its recitation of the law governing program EIRs: "Because of these ["within the scope" and subsequent review] limitations [on future review for later activities], a court generally cannot compel an agency to perform further environmental review for any known or knowable information about the project's impacts omitted from the EIR [citations]" and "also generally cannot compel an agency to perform further environmental review if new regulations or guidelines for evaluating the project's impacts are adopted in the future [citations]."

Having thus justified reaching what would appear to be moot issues regarding the 2011 EIR's adequacy under CEQA, the majority opinion proceeds to systematically shoot those "fish in a barrel." Thus, it found the 2011 EIR lacked "a discussion of mitigation alternatives that could both substantially lessen the transportation plan's significant [GHG] emissions impacts and [potentially] feasibly be implemented" and that substantial evidence did not "support SANDAG's determination [that] the EIR adequately addressed mitigation for the transportation plan's [GHG] emissions impacts."

Paying lip service to Public Resources Code § 21005(c)'s requirement that a court finding CEQA violations "shall specifically address each of the alleged grounds for noncompliance," the Court excused the People's and Cleveland's failures to obtain rulings below on many of the CEQA issues they challenged by their cross-appeals, holding "application of the forfeiture rule is not automatic" and that "the legal issues … are sufficiently important [that] we should exercise our discretion to excuse any forfeiture."

Proceeding from this rather dubious proposition, the Court then applied a "substantial evidence" standard of review to every remaining issue, all of which it characterized as "predominately factual," holding that: (1) the omission of an alternative that could significantly reduce vehicle miles travelled (VMT) violated the "rule of reason" and was unsupported by substantial evidence; (2) SANDAG's "determination it could not reasonably provide additional baseline information in the EIR about TACs [toxic air contaminants] exposures and the location of sensitive receptors" was unsupported by substantial evidence; (3) SANDAG's contention that it could not feasibly provide more definite information correlating air quality impacts to adverse human health effects was unsupported by substantial evidence; and (4) with one exception, the record showed SANDAG improperly deferred analysis of appropriate air quality mitigation measures and lacked substantial evidence supporting its contentions that such mitigation was adequately addressed. As to each of these issues, the Court found the CEQA violation "prejudicial because it precluded informed public participation and decision making." (Citing Pub. Resources Code, § 21005(a); *City of Maywood v. Los Angeles Unified School Dist.* (2012) 208 Cal.App.4th 362, 386.)

The Court of Appeal also held the record lacked substantial evidence showing the EIR's analysis accounted for the plan's "impacts to farmland of less than 10 acres put into production within the last 20 years," resulting in an understatement of impacts and prejudicial error "because 68 percent of the farmland in the County is between one and nine acres, with the average farm size being four acres." Per the Court: "By choosing a methodology with known data gaps, SANDAG produced unreliable estimates of the amount of existing farmland and, consequently, unreliable estimates of the transportation plan's impacts to existing farmland." The Court held this failed to comply with Government Code § 65080(b)(2)(B)(v)'s statutory requirement to "gather and consider the best practically available scientific information regarding resource areas and farmland in the region" as well as CEQA's information disclosure requirements.

It did, however, hold that Cleveland failed to show that it exhausted its administrative remedies as to two specific related issues – the EIR's asserted failure to discuss and analyze plan impacts to small farms, and its allegedly inaccurate assumption that land converted to a rural residential designation would remain farmland.

Once again dissenting from the majority opinion, Justice Benke cut to the heart of the matter and challenged its conclusion that the case was not moot, stating: "I conclude the superseded 2011 EIR is *most likely* moot as a result of the certification of the 2015 EIR accompanying the 2015 Plan[.]" In the accompanying footnote, Justice Benke noted that while moot questions need not be dismissed if they present important questions of law likely to recur but evade review, "courts of review also recognize that they should refrain from exercising their inherent discretion to resolve moot issues on appeal that are largely factual." She correctly observed that "it appears *none* of the remaining issues addressed by the majority … involve questions of law, much less "important" ones." She stated that whether the case was wholly or partially moot should be determined by the trial court on remand, because the appellate record was insufficient to make that determination without speculating. She further disagreed with the majority opinion's "award of costs to plaintiffs and [the] State because SANDAG prevailed on … the overarching issue in this case that was decided by the Supreme Court[,]" and she would also leave issues concerning prevailing party for the trial court to determine on remand.

For what it's worth, I once again concur with the common sense, practical and well-reasoned approach taken in Justice Benke's dissent, which appears to me to find more support in the law governing mootness than does the majority opinion. The Court of Appeal didn't have to flog this "dead horse" yet again.

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