Client Alert.

January 26, 2012

Greenhouse Gas and Environmental Justice Issues Collide as California Attorney General's Office Weighs In on Sustainable Communities Plan

By Peter Hsiao, David Gold, Miles Imwalle and Jennifer Jeffers

On January 25, 2012, California Attorney General Kamala D. Harris filed a motion to intervene in a lawsuit challenging the "sustainable communities strategy," or "SCS," the first such strategy adopted in the state for the San Diego region. By seeking to intervene in *Cleveland National Forest Foundation, et al. v. San Diego Association of Governments, et al.*, the Attorney General sends a message that her office is closely scrutinizing the SCS process mandated by Senate Bill 375 ("SB 375") and will seek to ensure that every region across the state makes a strong commitment to reducing greenhouse gas ("GHG") emissions. In addition, the Attorney General's motion to intervene takes an aggressive—if not unprecedented—position that the California Environmental Quality Act ("CEQA") requires environmental review documents to analyze environmental justice impacts. In seeking intervenor status, the Attorney General weighs in and joins a growing effort to apply environmental justice principles, such as equitable distribution of environmental burdens, to the implementation of California's already complex suite of environmental and climate change laws. Those involved with either the SCS process or any project with potential environmental justice implications should take note.

In 2008, California enacted SB 375, which requires the state's metropolitan planning agencies to prepare a "sustainable communities strategy," now commonly referred to as an SCS, as part of their regional land use and transportation plans. The development of an SCS is intended to connect land use, transportation, and housing decisions in order to meet SB 375's mandate to reduce per-capita GHG emissions by 2020, and even further by 2035. The San Diego Association of Governments ("SANDAG") was the first region to adopt an SCS as part of a larger regional transportation plan.

SANDAG adopted its SCS in October 2011 after subjecting it to a lengthy public review process and preparing an environmental impact report ("EIR") pursuant to CEQA. On November 28, 2011, four environmental and environmental justice groups filed CEQA suits challenging the San Diego SCS under CEQA.[1] The environmental petitioners challenge the adequacy of the EIR prepared for the San Diego SCS, in part on environmental justice grounds. Petitioners assert that SANDAG's actions in certifying the EIR violate provisions of CEQA because the EIR failed to adequately address public health impacts to communities already overburdened with pollution.

The California Attorney General became involved in September 2011 by sending a comment letter on the draft EIR. The Attorney General suggested that the draft EIR was inadequate because CEQA requires environmental-justice-specific analysis of the impact of increases in pollution on overburdened communities and yet SANDAG "failed to analyze . . . significant effects of the [SCS] on communities currently experiencing environmental *in*justice" (emphasis in original). The

[1] Two of the petitioners, Cleveland National Forest Foundation and Center for Biological Diversity, filed the instant suit, *Cleveland National Forest Foundation, et al. v. San Diego Association of Governments, et al.*, in which the Attorney General seeks intervention. Two other groups, the Counsel for CREED-21 and Affordable Housing Coalition of San Diego County, filed a related complaint on the same day. The lawsuits challenge the adequacy of the EIR that was developed for San Diego's SCS and the 2050 Regional Transportation Plan, which provides a blueprint for the San Diego region's transportation network over the next 40 years.

© 2012 Morrison & Foerster LLP | mofo.com | Attorney Advertising

Attorney General faulted the project's EIR for its failure to identify "whether the area affected by the [SCS] includes particularly sensitive communities that will be affected disproportionately by the acknowledged increase in pollution." In addition, the Attorney General strongly criticized the SCS for insufficiently focusing on transit solutions and for allowing an increase in per-capita vehicle miles traveled, and hence GHG emissions, after 2020.

In the motion to intervene, the Attorney General has reasserted her position not only that the SCS is inadequate, but also that CEQA requires a thorough consideration of environmental justice impacts. The Attorney General's petition focuses on project impacts to air quality and GHG emissions and cites three reasons for the state's CEQA challenge, including the SCS's: (1) adverse effects on public transit and air quality due to its emphasis on highway expansion and extension; (2) adverse environmental effects of the project on "communities that already are overburdened by pollution"; and (3) failure to reduce GHG levels to a sustainable level in the long term. The Attorney General highlights the fact that the San Diego region suffers from serious air pollution, much of it due to traffic emissions, and that the final EIR inadequately determines "how the health of the most vulnerable people in the region will be affected" by the SCS's freeway and highway projects. Although the CEQA statute and case law has never explicitly required that environmental justice be addressed, and very few documents ever reach that subject in practice, the Attorney General presents novel arguments that existing law requires a discussion of environmental justice impacts and that SANDAG's EIR is deficient as a result.

The Attorney General's motion to intervene is significant for at least two reasons. First, all metropolitan planning organizations currently undergoing the SCS planning process are formally on notice that both the SCS itself, as well as the EIR supporting the SCS, will be closely scrutinized by the Attorney General's office to ensure that it achieves significant GHG reductions. Second, by pursuing the litigation, the Attorney General's office is staking an aggressive position on environmental justice under CEQA and putting lead agencies on notice that a failure to address the issue may receive unwanted attention from the state. In that way, the Attorney General Harris's decision to intervene in this litigation is akin to former Attorney General Jerry Brown's lawsuit against San Bernardino County in 2007, which effectively put lead agencies across the state on notice that GHG emissions must be analyzed under CEQA. As with the San Bernardino case, *Cleveland National Forest* will be closely watched by lead agencies across the state.

For further information relating to sustainable communities strategies, GHG regulations, or other important land use developments, please contact:

Peter Hsiao
(213) 892-5731
phsiao@mofo.com

David Gold
(415) 268-7205
dgold@mofo.com

Miles Imwalle
(415) 268-6523
mimwalle@mofo.com

Jennifer Jeffers
(415) 268-6113
jjeffers@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer*'s A-List for eight straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

© 2012 Morrison & Foerster LLP | mofo.com | Attorney Advertising