

Climate Mitigation, State Policy and Science “Stayed” in San Diego Court Ruling

On Sept. 14, 2018, the San Diego County Superior Court issued a [stay/preliminary injunction](#) preventing any San Diego County (“County”) project requiring an amendment to the County’s General Plan from relying on greenhouse gas (“GHG”) offset credits generated outside of the County.¹ A GHG offset credit is a promise to reduce emissions by one ton of carbon dioxide per year, or remove one ton from the atmosphere, which can take the form of forest management, methane capture, manure management, and other projects.² Ruling at the request of petitioners, the Sierra Club and Golden Door Properties, the court found that because the County’s General Plan requires GHG emission reductions from “County operations” and “community activities,” GHG offset credits for reductions that occur *outside of the County* may not be used to reduce emissions from projects *within the County*.

While the stay is in place only until the court can hear the merits of the Sierra Club’s claims (which challenge the County’s approval of its 2018 Climate Action Plan (“CAP”)), the court’s ruling leaves project proponents and the County guessing as to how to appropriately address GHG emissions and satisfy the state’s and the County’s aggressive GHG emission reduction goals.

On one hand, the petitioners’ position and the court’s stay are mystifying because they directly contradict science and state law. There is little scientific basis for requiring GHG emission reductions to occur in a particular place—the climate impacts of GHG emissions can be felt beyond a country’s (or county’s) borders as GHGs spread across the Earth’s atmosphere.³ Reducing GHG emissions inside or outside the County *has the same effect* in combating global climate change.

Furthermore, California acknowledges this fact by permitting entities covered by cap-and-trade to use GHG offset credits generated outside of the state to meet cap-and-trade requirements.⁴ Environmental groups challenged the state’s carbon offset program in court but that challenge was rebuffed.⁵ The California Environmental Quality Act (“CEQA”) also allows the use of GHG offsets to mitigate climate change impacts. “Environmental leadership” projects rely on GHG offset credits under the Jobs and Economic Improvement Through Environmental Leadership Act to be net neutral GHG projects, and the CEQA Guidelines specifically state that feasible means of mitigating GHG emissions include “Off-site measures,” such as “offsets,” and “[m]easures that sequester greenhouse gases.”⁶

On the other hand, the petitioners’ position is completely transparent—the Sierra Club’s goal is to prevent widespread development in the County, and Golden Door wants to prevent the Newland Sierra project (a 2,135-unit housing development with office and retail uses) from being constructed at its doorstep. Never mind that the San Diego region is in the midst of a housing affordability crisis, or that the court’s ruling introduces yet more uncertainty into the process that much needed housing projects in the County must traverse.⁷

So, *what comes next?* Perhaps the most straightforward action the County could take would be to amend the portions of its General Plan found objectionable by the stay to make clear that GHG offsets generated *outside the County* are entirely permissible to help projects meet GHG emission reduction goals. But the County is limited as

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to how many General Plan amendments it can make per year, and it is not clear whether an amendment of this type could be made before the end of the year.⁸ The County may also be able to appeal the stay, although the case is set for a merits hearing in December 2018, and any appellate relief may not be timely.

Despite the stay, on Sept. 26, 2018, the County Board of Supervisors approved the Newland Sierra housing project, which relies on GHG emission offset credits from outside the County to mitigate GHG emissions. Litigation is likely, and Golden Door is circulating a referendum for signatures to rescind the County's approval.

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¹ The Court issued the stay pursuant to Cal. Code Civ. Pro. sec. 1094.5(g), and, in the alternative, as a preliminary injunction. For ease of reference, we refer to the Court's grant of relief as a "stay" in this piece. The underlying case is *Sierra Club v. County of San Diego*, Case No. 37:2012-101054-CUU-TT-CTL, pending before Judge Timothy Taylor. Initially filed in 2012, the case is a long-standing challenge to the County's adoption of its Climate Action Plan ("CAP"). (See also *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152 [disapproving the County's 2012 CAP and requiring preparation of an Environmental Impact Report].)

² See California's carbon offset program at <https://www.arb.ca.gov/cc/capandtrade/offsets/offsets.htm>. GHG offsets can be purchased from several exchanges, and currently sell for about \$10 per ton. See, e.g., Climate Action Registry at <http://www.climateactionreserve.org/>.

³ See the article *Global mismatch between greenhouse gas emissions and the burden of climate change* at <https://www.nature.com/articles/srep20281>.

⁴ For California's cap-and-trade GHG offset program, see <https://www.arb.ca.gov/cc/capandtrade/offsets/offsets.htm>.

⁵ See *Our Children's Earth Found. v. Cal. Air Resources Bd.* (2015) 234 Cal.App.4th 870.

⁶ For environmental leadership projects, see Cal. Pub. Res. Code §§ 21178 *et seq.*, and <http://opr.ca.gov/ceqa/california-jobs.html> (numerous "environmental leadership" projects relying on GHG offset credits to reach neutral GHG emissions, as certified by the Air Resources Board). Cal. Code Regs., tit. 14, ("CEQA Guidelines") § 15126.4(c)(3)-(4).

⁷ One recent article estimated that San Diego needs to build 16,500 houses per year for the next decade just to catch up with housing demand. See

<http://www.sandiegouniontribune.com/business/growth-development/sd-no-development-bundle-20180504-story.html>.

⁸ See the following article for a discussing of general plan amendments and “batching.”
<http://www.sandiegouniontribune.com/business/growth-development/sd-no-development-bundle-20180504-story.html>.

This document is intended to provide you with general information about a recent San Diego County Superior Court stay regarding greenhouse gas emissions. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.