Last week I posted a preview of three key environmental law cases that were scheduled for argument over two days in the California Supreme Court. I attended the arguments in two of those cases, held in San Francisco last Thursday. Here's an account of what transpired, along with my predictions of the likely outcomes in both cases.

Lynch v. California Coastal Commission

This regulatory takings claim was brought by Encinitas oceanfront landowners, who sought and obtained from the California Coastal Commission a permit to rebuild a seawall that had been destroyed by a 2010 coastal storm. But the Commission granted the permit only for a term of 20 years. The Commission was concerned about the effects on the site of projected sea level rise and intensified coastal storms, as well as possible deleterious impacts of the new seawall on adjacent homeowners' properties and the beach area owned by the public. The landowners accepted the permit and built the approved seawall, but simultaneously filed suit to challenge the 20-year term as an unconstitutional taking of their property requiring compensation from the Commission.

The *Lynch* case raises two issues: 1) whether the Commission's imposition of the 20-year term indeed constitutes a regulatory taking; and 2) did the homeowners waived their legal right to challenge the permit condition due to their acceptance of the permit and construction of the seawall.

The arguments in *Lynch* were quite lively, with all of the seven Supreme Court justices firing questions at the attorney from the Pacific Legal Foundation, representing the homeowners, and the deputy attorney general arguing on behalf of the Commission.

The justices' questions focused almost exclusively on the threshold procedural issue of whether the landowners had waived their right to press their constitutional claim by accepting the benefits afforded under the permit. And those questions revealed considerable skepticism for the homeowners' legal position. Chief Justice Tani Cantil-Sakauye, for example, pointedly commented from the bench that "if you accept the benefits

of a permit, you also accept the burdens." Justices Mariano-Florentino Cuellar and Goodwin Liu also seemed particularly skeptical of the homeowners' contention that they should be allowed to have it both ways.

The Pacific Legal Foundation attorney didn't fare much better when it came to the few questions and comments from the justices concerning the constitutional merits of the case. Justice Kathryn Werdegar stated her view that the regulatory takings claim only becomes ripe if the Commission denies a permit to maintain the seawall 20 years from now: "The possibility that the Commission may deny this [permit] in 20 years does not constitute a taking today."

Prediction: It's always risky to predict the substantive outcome of a case based simply on the oral arguments and related questions and comments from the justices. Nonetheless, after last Thursday's hearing I'd be surprised if the Commission doesn't prevail in this case. The tougher question is whether the Court will resolve the case simply by finding that the homeowners waived their regulatory takings claim when they accepted the permit and proceeded to build the seawall protecting their property or, instead, decides to address the constitutional merits of the case as well. I hope for the latter outcome: the issue of the Commission's legal latitude to plan and regulate under the Coastal Act, given the profound and looming impacts of climate change, is a question of overarching significance for the Commission, affected property owners and the general public alike. The *Lynch* case provides the justices with their first opportunity to grapple with the important policy–and constitutional–questions underlying this case. I, for one, hope they don't let that opportunity pass.

Cleveland National Forest Foundation v. San Diego Assn. of Governments

As Justice Cuellar aptly noted at the outset of arguments in *Cleveland National Forest*, "there's a lot of complexity in this case."

The central issue is the legal adequacy of an environmental impact report prepared by the San Diego Association of Governments in connection with its adoption of a revised regional transportation plan for the San Diego region. Specifically, the environmental plaintiffs, joined by California's Attorney General, argue that the EIR is fatally flawed for failing to analyze the plan's consistency with the State of California's long-term greenhouse gas emission reduction goals. (The regional transportation plan and accompanying EIR were the first prepared by local governments in response to SB 375, landmark 2008 state legislation designed to link California's transportation and land use policies, thereby reducing California's aggregate GHG emissions; this is the first time the Supreme Court has

had the opportunity to address SB 375.)

Veteran CEQA attorney Mike Zischke, arguing for SanDAG, was quietly forceful in arguing for the validity of what he characterized as a "groundbreaking EIR." He asserted that while the EIR was not required to consider the state's long-term GHG reduction goals as binding on his client, SanDAG had nonetheless made good faith efforts to assess short-, medium- and long-term GHG reduction goals, and that those efforts had received praise from California's Air Resources Board. The justices' questions to Zischke were relatively few and friendly.

Counsel for the EIR challengers–Center for Biological Diversity attorney Kevin Bundy and California Deputy Solicitor General Janill Richards–received a considerably more active and hostile reception from the justices. Notably, Justices Liu and Cuellar–among the Court's most progressive members–dominated the *Cleveland National Forest* arguments and revealed considerable skepticism for Bundy's and Richards' arguments. Picking up on Zischke's theme, Justice Liu observed that the ARB has acknowledged the inherent uncertainty involved with GHG emission projections. Isn't the real issue of the EIR's adequacy under CEQA whether the document is sufficiently informative, he inquired. Just how clear does the EIR have to be, questioned Justice Cuellar. What *should* the EIR have said in order to satisfy plaintiffs, he asked. Both Cuellar and Liu seemed sympathetic to the difficulties SanDAG faced in drafting this complex EIR, and characterized CEQA's standard of judicial review as a deferential one. The justices, conversely, pressed Bundy and Richards to articulate a "limiting principle" underlying their theory of the EIR's inadequacy.

Prediction:

It was surprising–at least to this observer–that the other five justices left almost all of the questioning in the *Cleveland National Forest* case to Justices Liu and Cuellar. That suggests two things to me: first, that either Justice Liu or Cuellar will wind up writing the Court's opinion in the case. Second, if the EIR challengers were unable to convince Liu and Cuellar of the merits of their case, they stand little chance of capturing the votes of the Court's more moderate members. Bottom line (and subject to the same caveat noted above): I expect the Supreme Court to reverse the lower courts in this case and conclude that the San Diego Association of Government's EIR in this landmark CEQA and climate change case is legally adequate.

The Supreme Court will issue its decisions in both *Lynch* and *Cleveland National Forest* by early August. So stay tuned.