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## Environmentally Sound

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02-22-2010

Recent legal developments have provided some guidance on the difficult question of how to analyze the environmental impacts of greenhouse gases (GHGs) for land use projects under the California Environmental Quality Act. The issue first reached prominence in late 2006 after the adoption of AB 32 — The California Global Warming Solutions Act — and relates to state efforts to reduce GHGs to combat global warming. However, legal guidance has taken a while to develop. State regulations were adopted at the very end of last year. Some local air quality districts have recently adopted or are considering adoption of regulations and guidance. There have been no court of appeal decisions on the issue and trial court decisions are not uniform. In this evolving legal area, only one thing has become clear — the GHG impacts of land use projects should be analyzed under CEQA. The challenging issue is how this analysis should be done. The answer involves an assessment of options, legal risks and policy choices by public agencies. Since CEQA is commonly used as the basis for challenging land use projects, the GHG analysis will be a critical component of the legal defensibility of projects.

### STATE CEQA REGULATIONS

In 2007, the state Legislature directed the State Office of Planning & Research to develop regulations for the analysis and mitigation of GHGs under CEQA (Senate Bill 97). That process was completed on Dec. 30, 2009, when the Natural Resources Agency adopted revisions to the State CEQA Guidelines (Title 14, California Administrative Code §15000 et.seq.) — these amendments will become effective March 18. The main issue in the development of the regulations was whether the state would establish a statewide uniform standard for GHG analysis or leave discretion to local agencies. The State Air Resources Board (the agency implementing AB 32) initially proposed statewide standards for determining the significance of GHG impacts under CEQA, but that approach was not followed. The adopted regulations landed firmly on the side of leaving local agencies the discretion to determine the methodology and significance standard that would apply to GHG impacts.

The CEQA Guidelines allow agencies to perform either a quantified or qualitative analysis to determine if the impact from GHG emissions is significant. A quantified analysis

involves a significance standard based on a numeric threshold — emissions over a certain level are a significant impact. A qualitative analysis determines significance based on a project's compliance with performance standards for GHG reductions or its consistency with GHG reduction plans or regulations (such as a local Climate Action Plan (CAP)). However, the significance standard adopted by the agency must be supported by substantial evidence that shows that compliance with the standard would result in a less than significant impact. An agency also may conduct programmatic analysis of GHG emissions under a broader planning document (ex. General Plan) and use this analysis for the implementation of individual projects under the plan. So, the guidelines allow alternatives to performing GHG analysis on a project-by-project basis. The guidelines also give agencies discretion to choose types of mitigations for reducing GHG emissions, such as off-site mitigation, offsets and carbon sequestration (i.e., capture), in addition to project-specific or on-site mitigations.

## **AIR DISTRICT GUIDANCE**

Since the State CEQA Guidelines have left many of the issues for GHG analysis to be determined by agencies, local air quality management districts have stepped in to provide guidance. This is consistent with the past roles of air districts in providing CEQA guidance for analysis of air quality impacts of pollutants such as ozone, nitrogen oxides and particulate matter. Air districts have set the standards of significance for these pollutants which are routinely used by local agencies. Two air districts provide examples of the different approaches for GHG analysis — San Joaquin Valley Air Pollution Control District (SJVAPCD) and the Bay Area Air Quality Management District (BAAQMD). Each of these agencies describes their standards as "guidance" which local agencies are not required to adopt. However, their status as experts in air quality regulations means that their standards carry great weight under the CEQA substantial evidence test.

SJVAPCD adopted its CEQA guidance for analysis of GHGs in December 2009. Its approach focuses on compliance with performance standards to reduce GHGs rather than emissions quantification and mitigation for individual projects. SJVAPCD is developing Best Performance Standards (BPS) that will have a quantified GHG reduction percentage (e.g., Energy Star roof = x% reduction). Project GHG emissions will be less than significant under CEQA if the project incorporates BPS that equals a 29 percent reduction. So, the use of BPS provides a streamlined mechanism for finding GHG emissions less than significant under CEQA. However, if BPS is not incorporated, then quantification of Project GHG emissions is required and the impact is only less than significant if mitigations reduce project emissions by 29 percent from "business as usual" (BAU) emissions measured from a 2002-2004 baseline. BAU is determined by measuring the GHG emissions by the proposed project with GHG reduction measures in place in 2002-2004. SJVAPCD is also developing a program for Voluntary GHG Mitigation Agreements which would allow projects to reduce GHG emissions by paying a fee used to fund implementation of GHG reduction measures. Consistent with the state guidelines, SJVAPCD recognizes that CEQA GHG analysis may be based on a project's consistency with an adopted local GHG reduction plan or CAP.

In contrast, BAAQMD has proposed a quantified approach to determining the significance of GHG emissions. BAAQMD's CEQA Guidelines are anticipated to be adopted in April. For land use projects, the threshold of significance is either (1) 1,100 metric tons of CO<sub>2</sub> equivalent a year (MT CO<sub>2</sub> eq/yr) or (2) an efficiency standard of a certain amount of MT CO<sub>2</sub> eq (4.6) per residents and employees a year. The efficiency standard establishes a level of GHG emissions per residents and employees (service population) generated by the project. The 1,100 MT CO<sub>2</sub> eq/yr is not a high emissions level and equates to a supermarket of 8,000 square feet, office building of 53,000 square feet, or 56 single-family homes. The GHG emissions attributable to the project are broad and include indirect emissions such as energy generation for electricity consumption, water conveyance and wastewater treatment. Project emissions which exceed the quantified threshold would be significant and require an EIR. Since the threshold is quantified, any mitigations to reduce project emissions must be quantified. BAAQMD also recognizes an option for CEQA compliance based on consistency with an adopted GHG reduction plan or CAP. However, BAAQMD establishes strict criteria for CAPs that would qualify for use under CEQA, including adoption of a specified, quantified reduction goal for 2020, quantification of reduction measures and effectiveness (based on a specified methodology), and a certified CEQA document.

## **APPROACHES AND RISKS**

The quandary for agencies is how to exercise the discretion granted under the State Guidelines in a legally defensible manner. Air districts are adopting differing approaches. Some of the methodologies for performing the CEQA analysis (such as quantification of reductions from mitigations) are still evolving. Many agencies do not have the resources or expertise to develop their own methodology. However, state law now requires an analysis of GHG impacts.

The main issue for agencies to address is whether the CEQA GHG analysis is based on a quantified or qualitative approach. This decision affects the entire analysis, including the significance threshold and determination of reductions from mitigation measures. Factors in choosing a methodology include legal defensibility, supporting scientific evidence, and practicality. Agencies should consider whether the analysis rubric will result in a finding that the vast majority of land use projects may have a significant impact due to GHG emissions. This will require the preparation of EIRs which are costly and time-consuming. The methodology should allow a determination of a less than significant for certain land use projects which will allow adoption of a negative declaration or mitigated negative declaration.

A quantified approach is supported by BAAQMD and many environmental groups. The basis is that GHG emissions have to be reduced and stabilized at a certain numeric level to avoid a "tipping point" of atmospheric GHG concentration that will lead to adverse global warming impacts. The issue with any numeric threshold is the substantial evidence that supports the emissions level chosen. Many agencies do not have the expertise to establish substantial evidence to support a particular numeric threshold. BAAQMD has provided analysis and evidence to support its proposed quantified threshold, which an agency could adopt. It also could be used to challenge any different numeric threshold

adopted by an agency. A quantified approach requires that emission reductions be quantified. The methodologies for measuring reductions from certain types of mitigations are not well-established. So, the evidentiary basis for showing mitigations will reduce project emissions below a numeric threshold presents an area for challenges.

A qualitative approach could use either performance-based standards ("best practices" approach similar to SJVAPCD) or consistency with plans. Performance standards provide a basis for streamlined review and eliminate the need to quantify reductions on a project-by-project basis. The reductions are "pre-calculated." Examples of performance standards could be measures to address energy efficiency, water conservation, waste reduction and vehicle trip reductions. Use of performance standards is already recognized as a means for reducing other environmental impacts under CEQA. However, performance standards present evidentiary issues of effectiveness and enforceability. So, the reductions from performance standards must be supported by substantial evidence and the incorporation of performance standards during project implementation should be verified.

Another qualitative approach is use of a programmatic EIR analysis or compliance with GHG reduction plans or CAPs. Both state law and the air district regulations authorize this planning rather than project-by-project approach. This allows an agency to analyze GHG impacts as part of a broader planning document and rely on this prior review for later consistent projects. The adoption of a GHG Reduction Plan or CAP also could provide the analysis for projects consistent with the plan. The CEQA Guidelines require these plans to meet certain standards including quantifying GHG emissions from future planned development, establishing a reduction target, and specifying reduction measures to achieve the target. In approving the project based on consistency with the plan, the agency must identify the plan requirements that apply to the project and require those measures in the project approval.

The programmatic approach or compliance with plans seems to be the best long-term approach for CEQA GHG analysis. It allows streamlined review for individual projects and reduces uncertainty. GHGs are a quintessential cumulative impact and CEQA has long recognized the use of these approaches for cumulative impacts. These approaches also allow agencies to evaluate the policy decisions involved in developing an approach on a jurisdiction-wide planning level. The one downside is that these approaches do not present immediate solutions. Many agencies have not performed programmatic analysis of GHG in their planning documents and have not adopted GHG reduction plans or CAPs. In the interim, agencies may evaluate compliance with existing plans and regulations that reduce GHG emissions, such as vehicle trip, water, wastewater and energy use reduction measures. Many jurisdictions already have such measures in place which reduce GHG emissions. Alternatively, agencies could follow the guidance of air districts. However, no matter what approach is taken, in order to avoid a successful legal challenge, the agency must assure the analysis complies with the CEQA Guidelines, is supported by substantial evidence, and is a good faith attempt to address GHG impacts.

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