

Legal Updates & News

Legal Updates

A Step Closer to Regulatory Clarity? OPR Transmits Draft CEQA Guidelines to Resources Agency

April 2009

by [Mitchell S. Randall](#), [Miles H. Imwalle](#)

Lead agencies reviewing development project proposals under the California Environmental Quality Act ("CEQA") continue to struggle to reconcile the implications regarding the project's impact on climate change with Assembly Bill 32's^[1] mandate to reduce California's greenhouse gas ("GHG") emissions to 1990 levels by 2020. The absence of formal guidance has left lead agencies and project proponents facing significant risk and uncertainty, as they have attempted to analyze hard-to-quantify impacts, link the project causally to the global problem of climate change, and adopt defensible mitigation. This state of uncertainty recently moved a grade closer to regulatory clarity as the Office of Planning and Research ("OPR") released a new version of proposed amendments to the CEQA Guidelines that is aimed at providing guidance on addressing climate change impacts ("Draft GHG Guidelines").^[2] While the draft amendments to the Guidelines must still undergo a formal rulemaking procedure with the Resources Agency, the release of the Draft GHG Guidelines by OPR marks a significant advance.

Related Practices:

- › [Cleantech](#)
- › [Environmental Law](#)
- › [Land Use & Natural Resource Law](#)

Although an improvement on the prior draft released by OPR, the Draft GHG Guidelines still do not provide clarity, as the language is often vague and fails to address some of the most vexing issues. Lead agencies and project proponents need to be aware of these important developments and should consider taking part in the public comment opportunities during 2009.

Statutory Background

The key legislation behind the Draft GHG Guidelines is Senate Bill 97,^[3] passed in 2007, which identified climate change as an environmental effect and officially brought it within the purview of CEQA. SB 97 also tasked OPR with developing guidelines for mitigating the impacts of GHG emissions subject to CEQA review.^[4] Under the statute, OPR must transmit proposed guidelines for mitigating GHG emissions to the Resources Agency by July 1, 2009. It is this step that OPR recently accomplished. The Resources Agency in turn must certify and adopt the amendments by January 1, 2010.^[5] Over the following months, the Resources Agency will conduct a formal rulemaking, including additional

opportunities for public comment on the proposed Guidelines.

In a parallel process, OPR asked the California Air Resources Board (“CARB”) to recommend a method for setting “thresholds of significance” within CEQA for GHG emissions. One of CEQA’s linchpins is a determination of significance: the threshold below which the project’s activity is permissible and above which mitigation is generally required. CARB released an early draft of the proposed thresholds in late 2008, but after significant concerns were raised in comments, that process has been placed on hold indefinitely.^[6]

OPR’s Draft Amendments to the CEQA Guidelines

The Draft GHG Guidelines fit within the existing CEQA framework by amending existing Guidelines to reference climate change. Following are points of note about the Draft GHG Guidelines:

- *Significance determination.* Although the new language is an improvement compared to the prior version, anyone hoping for real clarity on how to assess whether a project’s climate change impact is “significant” will be disappointed. The Draft GHG Guidelines discuss vague qualitative standards for determining significance, such as (i) the extent to which the project may increase or reduce GHG emissions when compared to the existing setting, (ii) whether the emissions exceed a threshold of significance that the lead agency determines applies to the project, or (iii) the extent to which the project complies with adopted regulations or requirements adopted to implement a plan to mitigate or reduce GHG emissions.^[7] Current CEQA documents frequently utilize similar standards, but consistently applying them in practice has proved elusive.
- *Quantifying emissions.* The Draft GHG Guidelines clarify that the lead agency must make a “good-faith effort” to “describe, calculate or estimate” the amount of GHG emissions resulting from a project. The Draft GHG Guidelines recognize that no established methodologies for quantifying climate change emissions exist and, as a consequence, lead agencies have the discretion to choose among methodologies, including choosing between quantifying a project’s GHG emissions or taking a more qualitative approach.^[8] This language is an improvement to the prior version of the Draft GHG Guidelines, which, perhaps more broadly, required a lead agency to describe the GHG emissions “associated with” a project.
- *Wide-ranging mitigation measures.* The Draft GHG Guidelines suggest that lead agencies consider a range of feasible measures to mitigate GHG emissions, including measures that are within an existing plan or GHG mitigation program, green building features and design, sequestering carbon, off-site mitigation, or the purchase of offsets.^[9]
- *Cumulative impacts.* The Draft GHG Guidelines suggest that the traditional cumulative impacts analysis applies to climate change. Practitioners have struggled to fit global climate change within the traditional cumulative impacts analysis because this requires that the scope of the other “cumulative” projects encompass those contributing to the same problem (e.g., other local projects for traffic impacts, projects in the same air basin for air impacts). In the global climate change context, a cumulative impacts analysis could conceivably include every other project in the world. The Draft GHG Guidelines clarify that the climate change cumulative impacts analysis need only include a summary of projections of other projects contained in an adopted local, regional, or statewide plan, including a general plan, regional transportation plan, or greenhouse gas reduction plan.
- *Tiering and Greenhouse Gas Reduction Plans.* The Draft GHG Guidelines, as well as OPR’s letter to the Resources Agency transmitting the guidelines, clearly endorse the practice of tiering CEQA documents when analyzing GHG emissions.^[10] While they recognize that tiering off programmatic documents may generally be useful for the analysis of GHG emissions, the Draft GHG Guidelines specifically focus on tiering off an EIR prepared for an adopted “Greenhouse Gas Reduction Plan,” if the GHG Reduction Plan is binding on the project or the project incorporates mitigation.

Next Steps

OPR has passed the torch to the Resources Agency. Prior to January 1, 2010, it must conduct a formal rulemaking and certify the Guidelines. This process will offer additional occasions for public comment and the opportunity to shape the final Guidelines. Meanwhile, we expect that CARB will re-start its process for adopting thresholds of significance.

If you would like further information or have questions relating to CEQA and climate change, or California's other climate change regulations under AB 32, or evolving Green Building standards, please contact David Gold (dgold@mofo.com / 925-295-3310) or Mitch Randall (mrandall@mofo.com / 925-295-3377) in Walnut Creek, Zane Gresham (zgresham@mofo.com / 415-268-7145) or Miles Imwalle (mimwalle@mofo.com / 415-268-6523) in San Francisco, or Tom Ruby (truby@mofo.com / 650-813-5857) in Palo Alto.

Footnotes

[1] California Global Warming Solutions Act of 2006, codified at Calif. Health & Safety Code section 38500 *et seq.*

[2] OPR, *CEQA Guidelines: Sections Proposed to be Added or Amended*, April 13, 2009, available at http://www.opr.ca.gov/ceqa/pdfs/PA_CEQA_Guidelines.pdf.

[3] Calif. Public Resources Code section 21083.05.

[4] Public Res. Code section 21083.05(a).

[5] Calif. Public Resources Code section 21084.05.

[6] CARB's background paper on the thresholds, *Recommended Approaches for Setting Interim Significance Thresholds for Greenhouse Gases under the California Environmental Quality Act*, October 24, 2008, can be viewed at <http://www.arb.ca.gov/cc/localgov/ceqa/meetings/102708/prelimdraftproposal102408.pdf>. Slides presenting the draft thresholds as of December 9, 2008, can be viewed at <http://www.arb.ca.gov/cc/localgov/ceqa/meetings/120908/wkshpslides120908.pdf>.

[7] *Proposed* Calif. Code of Regulations section 15064.4(b).

[8] *Proposed* Calif. Code of Regulations section 15064.4(a).

[9] *Proposed* Calif. Code of Regulations section 15126.4(c)(1)-(5).

[10] *Proposed* Calif. Code of Regulations section 15183.5.