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A BRIEF OVERVIEW OF THE RECENT AMENDMENTS TO CEQA GUIDELINES

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On December 29, 2009, the California Natural Resources Agency ("Resources Agency") adopted amendments to the guidelines implementing the California Environmental Quality Act ("CEQA"). The amendments were filed with the Secretary of State on February 16, 2010. The amendments assist lead agencies in complying with CEQA's existing requirements when analyzing and mitigating the impacts of greenhouse gas ("GHG") emissions^[1] associated with a proposed project.

The amendments implement Senate Bill 97 which required the Resources Agency to clarify how GHG emissions should be analyzed and mitigated during the CEQA process. Recent legislation and issuance of the California Air Resource Board's ("CARB's") Scoping Plan pursuant to Assembly Bill 32, the Global Warming Solutions Bill, created uncertainty regarding CEQA compliance. CARB approved the Scoping Plan a year ago. It presents strategies for achieving the statewide goal of reducing GHG emissions to 1990 levels by 2020. The Legislature passed SB 97 to give greater certainty to CEQA lead agencies as to whether CEQA requirements have been met. According to the Resource Agency's *Final Statement of Reasons for Regulatory Action* (dated Dec. 2009), they do not add substantive requirements.

The amendments provide guidance to lead agencies regarding how to determine whether GHG emissions are significant, how to analyze significant impacts, how to develop appropriate mitigation measures to address significant impacts, and how to address significant impacts that cannot be mitigated to below a level of significance. The changes affect 14 sections of the existing CEQA Guidelines, Appendix F regarding Energy Conservation, and Appendix G which presents the Environmental Checklist Form.

Are the Impacts Significant? Should an EIR Be Prepared?

Under CEQA, an EIR is required if a lead agency determines there is substantial evidence that a proposed project "either individually or cumulatively, may cause a significant impact on the environment." 14 C.C.R. § 15063. Lead agencies have struggled to determine when GHG emissions associated with a project may cause a significant impact. Under the new section 15064.4(b), the following are to be considered in determining the significance of impacts from GHG emissions: (1) the extent of change in GHGs compared to the existing environmental setting, (2) whether emissions exceed an applicable threshold of significance,

and (3) the extent of compliance with regulations or requirements to implement a plan for reduction or mitigation of GHGs. *Id.* at §§ 15064.4(b)(1)-(3); *see also* § 15183.5(b).

Change in GHG Emissions

The amendments focus on the project's potential incremental contribution of GHGs. They include the addition of section 15064.4(a) which states that the description, calculation or estimation of GHGs should be made "based to the extent possible on scientific and factual data." This subsection grants the lead agency the discretion either to use a model or methodology to quantify such emissions or to rely on qualitative analysis or performance-based standards. *Id.* at § 15064.4(a)(1)-(2). The amendments do not specify how GHG emissions are calculated. The lead agency must determine how it will calculate emissions.

Environmental Setting

The environmental setting is defined as the "physical environmental conditions in the vicinity of the project." *Id.* at 15125. An EIR is required to discuss inconsistencies between the proposed project and existing general and regional plans. *Id.* at 15125(d). Inconsistencies indicate that potentially significant impacts exist: they do not require a mandatory finding of significance. The amendments add specific plans to the list of plans to be considered for consistency. *Id.* In addition, regional blueprint plans and plans for reducing greenhouse gas emissions were added to the list of examples of regional plans that should be considered. *Id.* The lead agency must determine the significance of any inconsistencies with such plans.

Cumulative Analysis

The existing section 15130(b) requires that a lead agency determine the extent of cumulative problem and determine if the project's incremental contribution is cumulatively considerable. "Cumulatively considerable" is defined as:

the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects. *Id.* § 15064(h)(1).

Compliance with these types of plans establishes a rebuttable presumption that the effects are not cumulatively considerable. The lead agency must still document how plan implementation ensures project effects are not cumulatively considerable.

Amendments to section 15064(h)(3) focus on the types of plans and programs that may be considered during CEQA review of cumulative impacts. They do so in the context of cumulative effects. *Id.* The revisions added habitat conservation plans, natural community conservation plans, and plans or programs for regulation of GHG emissions. *Id.* Whatever the plan, it must provide requirements that "avoid or substantially lessen the cumulative problem" of GHG emissions. *Id.* Also, the plan must be "specified in law" or already be adopted by a public agency that has jurisdiction to implement the law. *Id.* If a project complies with such a plan, then the lead agency may determine the project's incremental contribution to a cumulative effect is not cumulatively considerable. *Id.*

Thresholds of Significance

Section 15064.7(c) was added to allow lead agencies to consider "thresholds of significance previously adopted or recommended by other public agencies or recommended by experts." The Resources Agency identifies local and regional air districts as likely sources for thresholds. Another potential resource for thresholds is the California Air Pollution Control Officers Association ("CAPCOA"). CAPCOA has issued a White Paper on the development of thresholds for GHG emissions. The purpose of this amendment is to assist lead agencies lacking expertise to develop thresholds for GHG emissions. A lead agency's decision to employ a particular threshold must be supported by substantial evidence.

The amendments add GHG emissions reduction requirements contained in adopted land use plans, policies or regulations as an example of "uniformly applied development policies or standards." *Id.* at § 15183(g)(8). The effects of a project are not peculiar to a project if such adopted policies or standards will substantially mitigate the effects. *Id.* at § 15183(f). The agency must make this finding based on substantial evidence and can decide not to prepare an EIR on this basis. *Id.*

Existing CEQA law remains unchanged. If there is a fair argument, based on substantial evidence, that a project will result in significant effects, then the lead agency must prepare an EIR. This is true for the impact of GHG emissions related to a project as well. These amendments clarify how other plans and programs might affect determinations of significance and whether an EIR is prepared.

What Should the EIR Contain?

When determining what to analyze in an EIR, lead agencies often focus on the environmental factors listed in Appendix G to the CEQA Guidelines. Appendix G contains a sample checklist of potential impacts that should be analyzed. The CEQA amendments add or modify sample questions regarding forest resources, GHG emissions, and transportation. However, a lead agency should not limit its review to the items listed in the checklist. In accordance with existing case law, a lead agency must consider all substantial evidence regarding potentially significant impacts.

Other amendments provide guidance regarding the impacts to be analyzed in the EIR. Amendment of section 15126.2(a) requires that an EIR analyze the significant effects of bringing development and people to the affected area. The EIR should evaluate impacts associated with locating development in areas susceptible to hazardous conditions such as floodplains, coastlines, and wildfire risk areas. The amendments clarify that areas susceptible to hazards include those affected by climate change, and the effects of GHG emissions might include flooding, sea-level rise and wildfires. These should be considered in the project EIR in a manner consistent with the probability of the potential hazard.

The Resources Agency stated in its Final Statement that this amendment regarding hazards was made in response to public comments. Recognizing the potential for overlap, the public requested "guidance addressing the analysis of climate change on a project" in response to the *2009 California Climate Adaptation Strategy Discussion Draft* (issued 2009) pursuant to Executive Order S-13-2008. The *Adaptation Strategy* is a programmatic document that prescribes State action for addressing the effects of climate change. CEQA is not the tool to implement the *Adaptation Strategy*.

Appendix F of the Guidelines was revised to ensure that lead agencies recognize that analysis and mitigation of energy impacts is not only a procedural requirement but also a substantive requirement of Public Resources Code 21100(b)(3). Analysis and mitigation is mandatory.

These amendments provide some clarification regarding what aspects of impacts of GHG emissions should be analyzed in the EIR.

How Is Mitigation of Significant Emissions Impacts Addressed?

The addition of section 15126.4(c) addresses mitigation measures related to GHG emissions. Lead agencies must consider feasible means of mitigating the significant effects of GHGs based on "substantial evidence and subject to monitoring or reporting." *Id.* Reductions in emissions not otherwise required may constitute mitigation pursuant to the CEQA Guidelines. Such mitigation measures may include: (1) mitigation measures in an adopted plan, (2) reductions resulting from project implementation including measures identified in Appendix F, (3) off-site measures including carbon offsets, community energy conservation projects, and forestry projects, (4) greenhouse gas sequestration, and (5) development of measures that can be implemented at the project level. *Id.*

The amendments also add section 15183.5 addressing GHG reduction plans in tiering and streamlining GHG emissions analyses. It recognizes that "GHG emissions may be best analyzed and mitigated at a programmatic level" consistent with state policy. Section 15183.5(a) states that existing CEQA Guidelines regarding tiering apply to GHG analysis. Section 15183.5(b) provides criteria for determining if an existing GHG reduction plan

is appropriate for tiering the cumulative impacts analysis. Requirements for an existing GHG reduction plan must be binding and enforceable on the project or must be incorporated into the project as mitigation measures.

CONCLUSION

The amendments become effective March 18th of this year. Only time will tell if the amendments achieve their goal of providing greater clarity to lead agencies on how to analyze the effects of project-related GHG emissions. On a parallel track, the CARB is developing new information and criteria pursuant to Assembly Bill 32, The Global Warming Solutions Bill. The CEQA Guidelines will be amended periodically to account for this new information.

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[1] The Amendments define GHGs as including "but not limited to: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride" consistent with section 38505(g) of the Health and Safety Code.