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Global Warming, Close to Home: CEQA Climate Change Draft Regulations Move Forward

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Ever since Assembly Bill 32^[1] mandated reducing California's greenhouse gas ("GHG") emissions to 1990 levels by 2020, lead agencies reviewing development project proposals under the California Environmental Quality Act ("CEQA") have struggled to reconcile CEQA's requirements with AB 32's implications regarding the project's impact on climate change. The absence of existing regulations or published case law to guide climate change analysis under CEQA has left lead agencies and project proponents facing significant legal uncertainty and vulnerability, 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. 2009 promises significant evolution of the law on this issue, starting off with proposed amendments to the CEQA Guidelines recently released by the Office of Planning and Research ("OPR") ("Draft GHG Guidelines") which seek to provide clarity on how to analyze climate change impacts under CEQA.^[2]

While CEQA practitioners have long awaited guidance, the Draft GHG Guidelines do not ensure clarity, as much of the proposed language is vague and fails to address some of the most vexing issues. Final regulations will be approved by the Resources Agency by the end of this year, after a formal rulemaking process that will include another round of public comments. 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] OPR must transmit proposed guidelines for mitigating GHG emissions to the Resources Agency by July 1, 2009, and the Resources Agency, after a formal rulemaking process, must certify and adopt the amendments by January 1, 2010.^[5]

In a parallel process, OPR asked CARB to recommend a method for setting "thresholds of significance" within CEQA for GHG emissions. As project proponents know, 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. Early drafts of the proposed thresholds show them to be sector-specific, numbers-based, and stringent.^[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.* 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 the extent to which the project (i) “could help or hinder” the goals of AB 32, (ii) increase fossil fuel consumption, (iii) improve energy efficiency, or (iv) exceeds “any threshold of significance that applies to the project.”^[7]

- *Quantifying emissions.* The lead agency must make a “good-faith effort” to “describe, calculate or estimate” the amount of GHG emissions associated with the project. The Draft GHG Guidelines recognize that no established methodologies for quantifying climate change emissions exist, 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]
- *Conformity to SB 375 or a climate action plan can offer CEQA relief.* Lead agencies may determine that climate change impacts of a project conform to a Sustainable Communities Strategy, the new regional plan document mandated by SB 375 (see our legal update, [SB 375 Becomes Law, Pushing Greenhouse Gas Reduction to the Forefront of California Transportation, Economic and Land Use Planning](#), October, 2008). Armed with this finding, a project can be considered not to have a cumulatively considerable effect. Alternatively, projects that are consistent with a regional or local plan that adequately addresses GHG emissions may also be exempt from project-level emissions analysis or mitigation.
- *Wide-ranging mitigation measures.* The Draft GHG Guidelines suggest that lead agencies should consider “all feasible means” of mitigating GHG emissions. These measures include green building features and design, sequestering carbon, off-site mitigation, the purchase of offsets, or compliance with a previously approved plan that requires the project to avoid or offset emissions.^[9]
- *Forthcoming Thresholds of Significance.* The Draft GHG Guidelines add a new “Greenhouse Gas Emissions” section to CEQA Appendix G. This addition provides that a project would have a significant climate change impact “based on any applicable threshold of significance.” The word “any” suggests that thresholds other than CARB promulgated may be adopted. However, in most circumstances, it seems likely that the CARB-proposed thresholds could become a *de facto* statewide standard: most local agencies lack the resources to develop the substantial evidence required to establish their own threshold.
- *Cumulative impacts.* The Draft GHG Guidelines suggest that the traditional cumulative impacts analysis applies to climate change, although it is unclear how the standard can be achieved. The draft language states that an EIR “should” evaluate whether the GHG emissions of the project, when viewed in connection with the effects of past, current, and probable future projects, may result in a cumulatively considerable impact to the environment.^[10] The challenge is that this traditional cumulative impacts approach requires that the scope of the other 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.
- *Revisions to traffic impacts.* In a subtle move, OPR introduces revisions designed to move away from “level of service” analysis for traffic in favor of transit-oriented projects in urban areas.

Next Steps

The next few months will be critical for shaping CEQA’s treatment of climate change. OPR will hold two public workshops and within a “reasonable time” after the public workshops, OPR expects to transmit proposed guidelines to the Resources Agency for a formal rulemaking process, including additional opportunities for public participation.

Footnotes:

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

^[2] OPR, *Preliminary Draft CEQA Guideline Amendments for Greenhouse Gas Amendments*, January 8, 2009, at http://opr.ca.gov/ceqa/pdfs/Workshop_Announcement.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] ARB'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(a)(1)-(4).

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

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

[10] *Proposed* Calif. Code of Regs. section 15130(a).