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Allen Matkins Climate Change Alert

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A Winter Storm of Climate Change Activity

Climate change and the regulation of greenhouse gas ("GHG") emissions continue to be hot topics among regulators and industry leaders, and in the courts in California. There have been three key developments in the past month on the climate change front, in addition to the Ninth Circuit's decision last month in *Center For Biological Diversity v. National Highway Traffic Safety Administration*. Click here to link to our recent article regarding this decision.

- CAPCOA Offers Air Agencies' Views on CEQA and Climate Change. Most relevant to developers in California was the issuance on January 2, 2008, of a 155-page white paper by the California Air Pollution Control Officers Association ("CAPCOA"), entitled "CEQA & Climate Change: Evaluating and Addressing Greenhouse Gas Emissions from Projects Subject to the California Environmental Quality Act."
- CARB Adopts Mandatory Greenhouse Gas Reporting Requirements. California Air Resources Board's December 6, 2007, adoption of mandatory greenhouse gas reporting requirements for the largest GHG-emitting facilities in the state.
- California Battles EPA for Right to Regulate Tailpipe Emissions. The California State Attorney General filed a lawsuit against EPA on January 2, 2008, because EPA refused to permit California to regulate tailpipe emissions.

CAPCOA Offers Air Agencies' Views on CEQA and Climate Change

In September 2006, the State Legislature adopted AB 32 (the Global Warming Solutions Act of 2006), to accomplish significant reductions in GHG emissions and the effects they are reported to have on global warming. Since then, there has been pressure put on public agencies and developers of projects in California to evaluate and mitigate a proposed project's GHG emissions and climate change-related impacts as part of the environmental review under the California Environmental Quality Act (CEQA). But there is no generally-accepted or established methodology to calculate project-specific GHG emissions, and there are no established thresholds or guidelines for determining the significance of project-related GHG impacts.

White papers have been published on behalf of land use professionals and at least one environmental organization, but there has been no comprehensive, collaborative resource published by state regulatory officials on how to address GHGs in the context of CEQA. Until now.

On January 4, 2008, CAPCOA (whose members include all of the county and regional air pollution control and air quality management districts in California), in coordination with the California Air Resources Board ("CARB"), the Governor's Office of Planning and Research, and two environmental consulting firms, released its "CEQA & Climate Change" white paper, for the stated purpose of providing a "common platform of information and tools" for public agencies to address climate change in CEQA analyses.

The white paper opens with a "Disclaimer," repeated elsewhere in the document, that it is "not a guidance document," but only a "resource" to enable local policy and decision makers to "make the best decisions they can in the face of incomplete information during a period of change." The authors further acknowledge that as the policies and regulations implementing AB 32 evolve, GHG thresholds and other

policies and procedures for CEQA may undergo significant revision, and uniform statewide thresholds and procedures may be established. The white paper is intended to serve as an interim resource that offers several possible approaches to evaluating the significance of project-related GHG emissions and possible mitigation measures to address them, It does not endorse any particular approach.

GHG Significance Thresholds

The three alternative approaches in the CAPCOA white paper are:

- not establishing a significance threshold for GHG emissions;
- setting the GHG emission threshold at zero; and
- setting the GHG emission threshold at a non-zero level.

Option 1: No Significance Threshold

With regard to the first option, CAPCOA cautions that "the lack of a threshold does *not* mean a lack of significance." It suggests that a lead agency could presume significance and then determine if a case-specific finding of no significance can be made.

The implication of this approach, CAPCOA notes, is that a large number of projects would proceed to preparation of an environmental impact report (EIR), rather than a Negative Declaration (ND) or Mitigated Negative Declaration (MND). By contrast, CAPCOA suggests that if the agency begins with a presumption of insignificance--on the ground, for example, that it would be too speculative to attempt to identify the significance of project-related GHG emissions relative to climate change on a global scale—then, it says, fewer projects would necessarily proceed to the EIR stage.

The white paper concludes that this approach may have greater success with smaller projects, but would likely be challenged by project opponents on larger projects. CAPCOA further suggests that a lack of any presumption "creates the greatest uncertainty for project proponents," and may be more vulnerable to challenge.

Option 2: Zero GHG Threshold

Under the "Zero GHG Threshold" option, "all projects subject to CEQA would be required to quantify and mitigate their GHG emissions, regardless of the size of the project or the availability of GHG reduction measures available to reduce the project's emissions.

Projects that could not meet the zero-emission threshold would be required to prepare [an EIR] to disclose the unmitigable significant impact, and develop the justification for a statement of overriding considerations to be adopted by the lead agency."

Importantly, the white paper notes that establishing a zero GHG threshold "is likely to preclude the use of a categorical exemption" because of the likely application of exceptions to categorical exemptions for unusual circumstances or for significant cumulative impacts of successive projects of the same type in the same place over time.

Option 3: Non-Zero GHG Threshold

The white paper focuses most on the third option--setting a GHG emissions threshold for CEQA purposes at a non-zero level using a "tiered approach" that "would maximize reduction predictability while minimizing administrative burden and costs." This would be accomplished by "prescribing feasible mitigation measures based on project size and type, and reserving the detailed review of an EIR for those projects of greater size and complexity."

The white paper proposes that the framework for a tiered threshold include: disclosure of GHG emissions for all projects; support for

city/county/regional GHG emissions reduction planning; creation and use of a "green list" to promote the construction of projects that have desirable GHG emission characteristics; a list of mitigation measures; a decision tree approach to tiering; and quantitative or qualitative thresholds. Under this approach, a finding of "less than significant" impact could be made if one of the following can be shown: that a General Plan or Regional Plan is in compliance with AB 32; that the project is exempt under SB 97 (the Highway Safety, Traffic Reduction, Air Quality and Port Security Bond Act); that the project is on the "Green List"; that the project complies with a General Plan's GHG Reduction Plan; or that an analysis using a tiered methodology for the type of development project (residential, commercial industrial) has been used and the mitigation measures specified in the tiered threshold table have been incorporated.

The tiered threshold approach is the most complex. CAPCOA offers several different threshold options under this approach. The objective underlying each option is to identify meaningful unit-based thresholds – such as square feet for new office or retail projects, or numbers of new units for residential projects – in order to define projects that do and do not have significant GHG emissions consequences.

In order to estimate GHG emissions from various kinds of projects, CAPCOA evaluated the availability of various analytical methods and modeling tools such as URBEMIS 2007 (direct emissions) and the California Climate Action Registry's CCAR GRP v. 2.2 (indirect emissions). Using such tools with statewide applicability allows for consistency in project treatment, consideration, and approval under CEQA.

Potential Mitigation Measures

The white paper concludes by evaluating currently available mitigation measures. It first notes that, "[w]hen designing a project subject to CEQA, the preferred practice is first to avoid, then to minimize, and finally to compensate for impacts. Where the impact cannot be mitigated on-site, off-site mitigation is often and effectively implemented in several resource areas, either in the form of offsetting the same impact or preserving the resource elsewhere in the region." Mitigation fee programs or funds may also be established.

Appendix B to the white paper lists mitigation measures and discusses each in terms of emissions reduction effectiveness, cost effectiveness, and technical and logistical feasibility. CAPCOA provides examples of mitigation measures that might be used for residential, commercial, specific plan and general plan projects. CAPCOA proposes that potential GHG emissions mitigation for a commercial project would include methods to mitigate mobile source emissions, such as providing short- and long-term bicycle parking and "end-of-trip" facilities, such as showers and lockers. Emissions associated with residential projects might include use of solar water heaters and energy-efficient appliances. Where on-site mitigation is not feasible to reach a level of insignificance, paying into a "GHG retrofit fund" is offered as a possible additional mitigation measure. According to CAPCOA, that fund could be used to provide incentives to upgrade older buildings and make them more energy efficient, which would lead to a reduction in stationary source emissions associated with the production of that energy.

CAPCOA recognizes that the programs, regulations, policies and procedures ultimately established by CARB and other agencies to reduce GHG emissions under CEQA may differ from the approaches outlined in its white paper, but CAPCOA believes that while those programs are still being developed, the white paper will provide public agencies with information to ensure that GHG emissions are

"appropriately considered and addressed under CEQA." The white paper is available on CAPCOA's website at http://www.capcoa.org/.

CARB Adopts Mandatory Greenhouse Gas Reporting Requirements

Taking another step in its implementation of AB 32, on December 6, 2007, CARB adopted mandatory greenhouse gas reporting regulations that will impact the largest facilities in California, i.e., those that account for 94% of greenhouse gas emissions from industrial and commercial stationary sources. The new regulations apply to certain cement plants, petroleum refineries, hydrogen plants, electric generating facilities, electricity retail providers and power marketers, cogeneration facilities and "operators of other facilities" that emit over 25,000 tons of carbon dioxide per year from stationary combustion sources.

Pursuant to these new regulations, covered facilities must begin tracking their greenhouse gas emissions beginning January 1, 2008 based on the "best available data." Beginning in 2010, emissions reports will have to meet rigorous requirements outlined in the regulations and will be subject to third-party verification. The regulations also require such facilities to maintain a greenhouse gas inventory program that "ensures that emissions calculations and electricity transaction information are transparent, accurate, and independently verifiable," as well as to "implement systems of internal audit, quality assurance, and quality control for the reporting program and the data reported."

California Battles EPA for Right to Regulate Tailpipe Emissions

On January 2, 2008, the California Attorney General filed suit against the U.S. Environmental Protection Agency to challenge EPA's refusal to grant California a waiver under the Clean Air Act to permit California to enforce tailpipe emission reduction standards stricter than those required by EPA.

EPA's December 19 refusal came just a week after a federal district court in Fresno upheld California's tailpipe emissions law (AB 1493)--which requires a 30 percent reduction in GHG emissions from new motor vehicles by 2016--against a challenge by automakers. The automakers contended that AB 1493 violates federal law because only the U.S. Department of Transportation can regulate fuel mileage. The federal district court disagreed, and held that "both EPA and California ... are equally empowered through the Clean Air Act to promulgate regulations that limit the emission of greenhouse gases, principally carbon dioxide, from motor vehicles." California then requested a waiver from EPA to implement AB 1493, which EPA denied. EPA reasoned that a nationwide approach to regulating vehicular GHG emissions was preferable to a state-by-state approach. While California's lawsuit to challenge EPA's decision is pending, CARB is reportedly reviewing other measures it could impose on automobile manufacturers if the lawsuit fails or delays AB 1493 from taking effect.

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