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California's Amended CEQA Guidelines Mandate Analysis of GHG Emissions, While Preserving Lead Agencies' Discretion

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Background

On March 18, 2010, the amendments (the "Amendments") to the State's guidelines ("CEQA Guidelines") implementing the California Environmental Quality Act ("CEQA"), adopted by the California Natural Resources Agency (the "Resources Agency") on December 30, 2009, will become effective.[1] As required by SB 97, the Amendments primarily address the analysis of a project's greenhouse gas ("GHG") emission impacts[2] under CEQA.[3] Concurrent with its adoption of the Amendments, the Resources Agency issued its Final Statement of Reasons for Regulatory Action ("Statement of Reasons"), which explains in detail the intent of and the necessity for the Amendments, and why the Agency chose to adopt the approach to GHG analyses that is embodied in the Amendments.

CEQA requires public agencies to review the environmental impacts of projects and, if those impacts have the potential to be or are likely to be significant, to consider alternatives and mitigation measures to reduce significant adverse environmental impacts. The Amendments add GHG emissions to the list of the environmental impacts that must be analyzed under CEQA, and recommend an analytical approach similar to that for air quality emissions. Far from dictating either a precise analytic methodology or significance thresholds for GHG emission analyses as demanded by many environmental organizations, the Amendments, like the CEQA Guidelines generally, reserve significant discretion to lead agencies.[4] Additionally, the Amendments encourage and support lead agencies to consider not only the goals of AB 32,[5] but also those of SB 375[6] and State and local green building codes, when reaching their significance determinations.[7]

As the Statement of Reasons explains, the Amendments add no new substantive requirements, but simply assist lead agencies in complying with CEQA's existing requirements.[8] Notably, the Amendments do not restrict the analysis of a project's GHG emission impacts to a cumulative impacts analysis. Consequently, as for any other environmental effect, the significance of a project's GHG emission impacts and well as its cumulative effect on GHG emissions must be assessed. While the Resources Agency specifically rejected arguments for establishing a "zero emission" threshold, the Amendments do not prescribe or adopt specific thresholds for determining the significance of a project's GHG emission impacts.

Therefore, although some of the uncertainties surrounding the analysis of GHG emission impacts under CEQA have been resolved by the Amendments, the greatest uncertainty remains – what standards or thresholds should be used to determine the significance of a project's GHG emission impacts. Consequently, significance determinations on GHG emission impacts will continue to be uncertain, and the subject of comment and litigation.

Substantive Amendments to the CEQA Guidelines

Despite significant pressure from environmental organizations, the Resources Agency preserved in the Amendments its overall approach to the analysis of environmental impacts under CEQA. As expected, the Amendments require that lead agencies determine the significance of a project's GHG emission impacts. The Amendments continue to afford lead agencies broad discretion in doing so. Rejecting comments that the Amendments should require an analysis of climate change rather than "just" the effects of GHG emissions, the Resources Agency chose to follow the paradigm used for assessing air quality emissions, leaving the "precise 'effect' of GHG emissions from a project" to be determined by the lead agency "as a factual matter." (Statement of Reasons, p. 11.)

Environmental Setting. As with other environmental analyses under CEQA, the first step in the analysis of GHG emission impacts is a description of the existing environmental setting. The Amendments effect only minor changes to section 15125, Environmental Setting. A project's consistency with regional blueprint plans and plans for the reduction of greenhouse gas emissions must now be assessed along with its consistency with other applicable State, regional and local plans. (§ 15125(d).)

Environmental Impacts. The second step is determining the extent to which a project would change the existing environment. New section 15064.4(b)(1) directs that lead agencies determine whether the project would increase or decrease the existing GHG emissions.[9] The Amendments give lead agencies the discretion to choose whether to assess a project's GHG emission impacts quantitatively or qualitatively, and to choose the precise methodology for doing so.[10] At the same time, the Resources Agency encourages lead agencies to quantify GHG emissions where possible, "even where a lead agency finds that no numeric threshold of significance applies to a proposed project." (Statement of Reasons, pp. 20-24.)

The third step is determining the significance of a project's GHG emissions, both at a project level and cumulatively. (§§ 15064.4(b), 15064, 15130.) As before, the Amendments allow lead agencies to consider a project's new or net emissions when determining the significance of its GHG emission impacts, so long as the analysis is supported by substantial evidence. (Statement of Reasons, pp. 83-84.) Moreover, the Amendments give lead agencies the discretion to choose the particular factors on which they will rely when determining significance, including, among other considerations, an increase or decrease in GHG emissions, exceedance of an appropriate significance threshold and "[t]he extent to which the project complies with regulations or requirements adopted to implement a statewide, regional or local plan for the reduction or mitigation of greenhouse gas emissions." (§ 15064.4(b).) As the Resources Agency acknowledges, section 15064.4(b)(3) allows a lead agency to consider compliance with regulations or requirements implementing AB 32 in determining the significance of a project's GHG emissions. (Statement of Reasons, p. 100.)

Notably, the Amendments specifically reject the much-advocated "zero emission" threshold. As the Resources Agency explains, it rejected that threshold because "there is no 'one molecule rule' in CEQA." (Statement of Reasons, pp. 25, 85.) The Amendments "failure" to establish GHG emission thresholds, numerical or otherwise, is consistent with the overall approach taken in the CEQA Guidelines:

> "[t]he CEQA Guidelines do not establish thresholds of significance for other potential environmental impacts, and SB97 did not authorize the development of a statement threshold as part of this CEQA Guidelines update. Rather, the proposed amendments recognize a lead agency's existing authority to develop, adopt and apply their own thresholds of significance or those developed by other agencies or experts."

(Statement of Reasons, p. 84; see also § 15064.7(c).)

The Amendments also provide a means of streamlining GHG analyses. New section 15183.5 allows lead agencies to analyze and mitigate the significant effects of GHG emissions at a programmatic level, such as in a general plan, and either tier later project-specific CEQA documents on those analyses or incorporate those analyses by reference into later project-specific CEQA documents.

Effects of Climate Change on the Project. The Amendments implicitly acknowledge that a project may bring development and people to an area subject to hazards created by climate change such as a coastal area subject to future sea level rise. (§ 15126.2(a).) However, they limit the need to analyze these hazards in certain respects. (See generally Statement of Reasons, pp. 41-43, 102-104.) For example, only hazards reasonably likely to occur must be analyzed. Hazards that are not expected to occur until sometime after the projected life of the project need not be analyzed. Sea level rise and floodplain expansion should be analyzed only for projects in areas subject to those risks. Because the Agency believes that an individual project's causal effect on increasing temperatures, health risks posed by rising temperatures, habitat modification or changes in agriculture and forestry has not been established, the Agency does not believe those effects can or should be analyzed.

Cumulative Impacts. As before, the Amendments provide that a project's cumulative impacts may be assessed using either a "list of projects" approach or a "summary of projections" approach. (Section 15130(b)(1).) However, the Amendments have substantially expanded the list of adopted plans that may be used in the summary of projections approach. With more than a nod to AB 32 and SB 375, the list now includes regional transportation plans and plans for the reduction of GHG emissions. (Section 15130(b)(1)(B).) As before, a lead agency may conclude that a project's incremental contribution to a cumulative GHG effect is not cumulatively considerable where the project will comply with the requirements of a previously approved plan or mitigation program, now specifically including plans or regulations for the reduction of greenhouse gas emissions.[11] When a lead agency makes such a determination, however, the Amendments require that the lead agency explain how implementing the particular requirement in the plan, regulation or program would ensure that the project's incremental contribution to the cumulative effect would not be cumulatively considerable. (Id.)

Mitigation Measures. The Amendments address the mitigation of GHG emissions in section 15126.4(c), which follows existing CEQA law. Mitigation is required only where a project's GHG emissions impacts are determined to be significant. Rejecting arguments that compliance with requirements such as those imposed in green building codes and ordinances cannot be considered mitigation, the Amendments make clear that a lead agency can consider such compliance, along with

project design features and other mitigation measures, in determining whether a project's GHG emission impacts have been "mitigated" to a less than significant level. (Section 15126.4(c); Statement of Reasons, pp. 46-50.) A reasonable inference can be drawn from this position that a project's compliance with adopted codes, plans and programs that are intended, at least in part, to reduce GHG emissions may be considered by lead agencies when determining whether the project meets AB 32's goal of reducing GHG emissions to 1990 levels by 2020.

Finally, the Amendments approve the use of "off-site mitigation measures, including offsets that are not otherwise required" and "[m]easures that sequester greenhouse gases" as mitigation measures. (§ 15126.4(c); Statement of Reasons, pp. 85-90.) The Resources Agency has specifically found "that the offset concept is consistent with the existing CEQA Guidelines' definition of 'mitigation,' which includes '[r]ectifying the impact by repairing, rehabilitating, or restoring the impacted environment' and '[c]ompensating for the impact by replacing or providing substitute resources or environments.' (State CEQA Guidelines, §§ 15370(c), (e).)" (Statement of Reasons, p. 89.) At the same time, however, the Resources Agency acknowledges that the use of offsets as mitigation would not be appropriate in every instance, and that the appropriateness of such mitigation measures is a factual issue for the lead agency's determination. (Id.)

Statement of Overriding Considerations. As for other types of environmental impacts, where a lead agency determines that a project's GHG emissions are significant and unavoidable, it must adopt a Statement of Overriding Considerations. (§ 15093.) The Amendments have revised section 15093 to provide that lead agencies may include a project's "region-wide or statewide benefits," and not only purely local interests, in the evaluating the overall benefits of a project. (§ 15093(a).) For example, a city may choose to approve a project resulting in increased housing density in an area otherwise rich with jobs to reduce region-wide GHG emissions, even though the project may increase short-term or local GHG emissions. (Statement of Reasons, p. 36.)

Amendments to Appendix G Environmental Checklist Form

Finally, the Amendments include revisions to Appendix G to the CEQA Guidelines, which contains a sample environmental checklist providing suggested CEQA significance thresholds that may be modified as necessary to correspond to a specific project.

- **Forest Resources:** The Amendments add several checklist items addressing forest resources in the Agriculture sub-section pertaining to: (1) direct loss of forest land or conversion of forest land; (2) indirect loss of forest land or conversion of forest land; and (3) compliance with forestry state laws.

- **Greenhouse Gas Emissions**: The Amendments include two checklist items related to generation of GHG emissions resulting in direct or indirect impacts and conflict with any applicant, plan, policy or regulation adopted for the purpose of reducing GHG emissions.

- **Transportation**: The Amendments make four significant changes to the prior checklist items including: (1) changing the focus of the analysis from an increase in traffic at a specific location to the effect of the project on a larger circulation system; (2) clarifying the role of the congestion management plan in a CEQA analysis; (3) eliminating the existing item regarding parking capacity; and (4) addressing the performance and safety of various methods of alternative transportation.

Looking Ahead

The Amendments and the Statement of Reasons provide lead agencies with assurance that the CEQA law that has governed their environmental review of projects in the past will govern their review of GHG emission impacts. However, until thresholds for determining the significance of GHG emission impacts have been adopted – by the ARB or the air districts, or even by the lead agencies themselves - lead agencies will continue to face challenges to their significance determinations.

In the meantime, where numeric or other thresholds are not yet available, lead agencies and project proponents can increase the likelihood that their EIRs will withstand legal scrutiny by taking a multi-pronged approach using both a quantitative and a qualitative analysis. A project's GHG emissions can be quantified and compared to an identified numeric standard, such as AB 32's 28.5 percent reduction as compared to the ARB's "2020 No Action Taken" scenario (also referred to as the "Business as Usual" scenario). In addition, the project's GHG emissions can be assessed qualitatively by assessing its compliance or consistency with adopted State measures (e.g., AB 32, SB 375, Green Building Standards Code), and with regional and local trip reduction, air quality emission reduction and GHG emission reduction measures and plans (§§ 15164.4, 15126.4); as noted in Section 15126.4, the qualitative analysis can consider project design features and mitigation measures designed to comply with existing GHG emissions reduction measures. As is always the case under CEQA, the lead agency's evidence and reasoning supporting its significance determinations must be made clear, and provide the substantial evidence needed to prevail against a legal challenge. While this approach cannot provide legal certainty, it should at least increase the likelihood that an EIR's GHG analysis will survive in court while thresholds are being formulated.

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1 References to the CEQA Guidelines are to Title 14, Cal. Code of Regulations, §§ 15000 et seq.

2 The Amendments define GHGs as including, but not limited to, carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride. (See newly adopted § 15364.5.)

3 The Resources Agency received recommended amendments to the CEQA Guidelines for GHG emissions from the Governor's Office of Planning and Research on April 13, 2009. On July 3, 2009, the Natural Resources Agency commenced the rulemaking process for certifying and adopting the Amendments. After conducting a 55 day public comment period, two public hearings, and in response to comments, the Resources Agency proposed revisions to the text of CEQA Guidelines, which it then released for further public comment. After having adopted the Amendments on December 30, 2009, the Resources Agency transmitted them to the Office of Administrative Law ("OAL") on December 31, 2009. On February 16, 2010, OAL completed its review and filed the Amendments with the Secretary of State. The Amendments will become effective on March 18, 2010.

4 See, e.g., § 15064.4(a); Statement of Reasons pp. 80-83, 84-85.

5 AB 32 – The Global Warming Solutions Act of 2006 requires California to reduce its GHG emissions to 1990 levels by 2020 – a 30% decrease from projected emissions.

6 SB 375 connects land use and transportation policy to achieving the goals set forth in AB 32 by regulating GHG emissions from passenger vehicles.

7 See § 15064(h)(3); Statement of Reasons, pp. 97-101.

8 Statement of Reasons, p. 2.

9 § 15064.4(b)(1), Statement of Reasons pp. 24-25, 83-84.

10 § 15064.4(a)(1); Statement of Reasons, pp. 20-24, 80-83.

11 §§ 15064(h)(3), 15183(g)(8), 15183.5(b); see Statement of Reasons, pp. 14-17.