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Court Rules "Business as Usual" Method of Evaluating GHG Impacts Under CEQA Was Unlawful Where Baseline Reflected Hypothetical Worst Case Scenario

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Introduction

On May 31, 2012, the Superior Court for the County of Riverside's ruling became final on the much anticipated case addressing the "business as usual" (BAU) method for evaluating the threshold of significance for greenhouse gas (GHG) emissions under the California Environmental Quality Act (CEQA). In *Friends of the Northern San Jacinto Valley et al. v. County of Riverside*, the court found that the challenged environmental impact report (EIR) did not properly evaluate a proposed development project under the BAU method, but instead improperly used a "worst case" scenario to evaluate the impacts from GHG emissions attributable to the project. While the court did not conclude that the BAU method—based on compliance with the California Air Resources Board's (CARB's) Scoping Plan adopted under AB 32—was *per se* unlawful, the decision warrants caution in how project proponents establish what constitutes a proper baseline for evaluating the significance of a project's GHG emissions impacts on the environment.

Background

In March 2010, amendments to the CEQA Guidelines[1] took effect, which require lead agencies, among other things, to consider the extent to which a proposed project may increase or reduce GHG emissions whenever the project's emissions exceed a threshold of significance.[2] As a result, projects that exceed the significance threshold for GHG emissions impacts must identify feasible mitigation measures to reduce the impacts below a level of significance. If a project is deemed to have significant environmental impacts after the identification of all feasible mitigation measures, the lead agency must adopt a Statement of Overriding Considerations to explain why further mitigation measures are not feasible and why approval of a project with significant, but unavoidable, impacts is warranted. The March 2010 CEQA Guideline amendments do not prescribe or adopt threshold levels for determining the significance of a project's GHG emissions impacts. Rather, consistent with the CEQA Guidelines generally, lead agencies are afforded considerable discretion in determining the appropriate method to evaluate the significance of such impacts.

Since the California Natural Resources Agency's adoption of the CEQA Guideline amendments, there has been disagreement among stakeholders as to the appropriate method for evaluating a project's

[1] 14 Cal. Code Regs. § 15000 et seq.; *see* Pub. Res. Code § 21083.05 (directing the California Office of Planning and Research (OPR) to "prepare, develop and transmit to the Resources Agency guidelines for the mitigation of greenhouse gas emissions"). While titled "guidelines," the CEQA Guidelines are regulations adopted by the OPR having the force of law.

[2] 14 Cal. Code Regs. § 15064.4(b).

GHG emissions impacts. In addition, the state's local air quality management districts have adopted guidance documents supporting different methods for evaluating GHG emissions impacts. One method is to evaluate the project's estimated emissions under a BAU scenario, and compare such reductions to GHG emission reductions required by AB 32 (the California Global Warming Solutions Act of 2006). Specifically, AB 32 requires California to reduce its GHG emission to 1990 levels by 2020, and CARB's Scoping Plan, in turn, estimates that GHG emissions in the state need to be reduced by approximately 29% (as compared to BAU) in order to meet this GHG emissions reduction requirement.[3] Under the BAU method for evaluating a project's GHG emissions impacts, if a project meets or exceeds a 29% reduction in GHG emissions, the impacts from such emissions will be less than significant for CEQA purposes. The California Court of Appeals upheld the BAU method in 2011 in *Citizens for Responsible Equitable Environmental Development (CREED) v. City of Chula Vista*.[4]

While CARB's 2008 Scoping Plan estimated that GHG emissions in the state need to be reduced by approximately 29%, in 2011, the agency updated its estimate of the GHG emission reductions necessary to satisfy AB 32.[5] Based on current conditions influenced by the recent economic downturn, CARB estimated that a 16% reduction below the estimated BAU levels is needed to return the state's GHG emissions to 1990 levels by 2020.[6]

Friends of the Northern San Jacinto Valley v. County of Riverside

In *Friends of the Northern San Jacinto Valley et al. v. County of Riverside*, Petitioners challenged the adequacy of the EIR for the Village of Lakeview, a 2,800-acre development project consisting of 11,350 dwellings, a mixed use town center with approximately 500,000 square feet of retail, office and commercial uses, public facilities including four schools and a library, and nearly 1,000 acres of open space/conservation areas. Petitioners claimed, among other things, that the BAU method in the EIR failed to establish an accurate scenario from which to evaluate the impacts of the proposed project, and instead compared the project to an unrealistic scenario that did not accurately reflect the existing legal constraints and practical considerations for this type of project. In addition, Petitioners argued that the BAU method is contrary to the Supreme Court's ruling in *Communities for a Better Environment (CBE) v. South Coast Air Quality Management District (SCAQMD)*, which reaffirmed that the environmental baseline for a project must be based on a comparison to existing conditions, not a hypothetical scenario.[7]

The Riverside Superior Court agreed with Petitioners that the project's EIR failed to accurately establish BAU conditions. The court found that the EIR used an unrealistic "worst case" scenario that ignored local planning and zoning laws, stripped all vegetation from the project, and contemplated development on mountainous portions of the project site. Because the EIR's hypothetical scenario did not accurately reflect these considerations, the project's GHG emissions impacts were estimated to be much lower *in comparison* to the hypothetical scenario than would be the case if the project's GHG emissions were compared to a realistic scenario as part of the BAU analysis.

While the court found that the scenario in the EIR was not credible, it did not hold that the BAU method was *per se* improper for evaluating the significance level for GHG emissions. Rather, the court noted that the holding in *CREED* implicitly endorsed the use of the BAU method for assessing the

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[3] Climate Change Scoping Plan, A Framework for Change (December 2008), ES-1 ("Reducing greenhouse gas emissions to 1990 levels means cutting approximately 30 percent from business-as-usual emission levels projected for 2020, or about 15 percent from today's levels.").

[4] 197 Cal. App. 4th 327, 335-37 (2011).

[5] Final Supplement to the AB 32 Scoping Plan, Functional Equivalent Document, Attachment D (August 19, 2011), 10-11.

[6] The EIR challenged in *Friends of the Northern San Jacinto Valley et al.* was certified in March 2010, well before CARB completed its final supplement to the Scoping Plan in August 2011.

[7] 48 Cal. 4th 310, 321-22 (2010).

significance of a project's GHG emissions impacts, so long as the scenario used is credible. The court said the facts were distinguishable, however, because, in *CREED*, the BAU analysis was based on an existing project, "not some hypothetical scenario". Although the court recognized that *CBE v. SCAQMD* addressed the general issue of CEQA baseline conditions (and not its specific application to the BAU method), the court found that the concerns expressed by the Supreme Court in *CBE v. SCAQMD* that the baseline must reflect current conditions "are the same". That is, use of a "hypothetical 'BAU'", which was tied neither to existing conditions nor reasonably likely conditions could only mislead the public and decision-makers and therefore run afoul of CEQA.[8] Finally, the court was clear that local agencies have discretion under the CEQA Guidelines and can use guidance issued by regulatory agencies to formulate and establish the threshold of significance for GHG impacts on the environment.

While the ruling is likely to be appealed, it suggests that project proponents and lead agencies should proceed cautiously in relying upon the BAU method to determine that a project's GHG emissions impacts are insignificant. In particular, they should not rely upon unreasonable projections of what the project's emissions would be in the absence of legally binding measures and voluntary mitigation.

Evaluation of GHG Emissions Impacts for CEQA Purposes

There are 35 local air quality management districts in California that are responsible for regulating emissions from stationary sources and several have adopted guidelines for determining threshold of significance for GHG emissions.[9] For example, the San Joaquin Valley Air Pollution Control District's guidance supports the BAU method based on compliance with CARB's Scoping Plan.[10] Alternatively, the South Coast AQMD's guidance document has a numeric threshold of significance of 10,000 metric tons of CO_2 equivalent ($MTCO_2e$) emissions per year for industrial projects,[11] and other air districts commonly rely upon the South Coast AQMD's GHG emissions threshold.[12] This lack of uniformity

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[8] Statement of Decision, 4.

[9] In addition to implementing AB 32, CARB is responsible for regulating emissions from mobile sources and for California's compliance with its state implementation plan required under the federal Clean Air Act. In October 2008, CARB circulated a preliminary draft proposal for recommended approaches for setting significance thresholds for GHG emissions, but has not finalized this proposal. *See* CARB Preliminary Draft Staff Proposal, Recommended Approaches for Setting Interim Significance Thresholds for Greenhouse Gases Under the California Environmental Quality Act (October 24, 2008).

[10] San Joaquin Valley Air Pollution Control Guidance for Valley Land-Use Agencies in Addressing GHG Emission Impacts for New Projects Under CEQA, 5 (December 2009).

[11] South Coast AQMD Interim CEQA GHG Significance Threshold for Stationary Sources, Rules and Plans, Board Meeting: December 5, 2008, Agenda No. 31, Table 1 Comparison of CARB's and SCAQMD Staff's Interim GHG Significance Threshold Approaches; *see* San Luis Obispo County Air Pollution Control District, CEQA Air Quality Handbook, A Guide for Assessing the Air Quality Impacts for Projects Subject to CEQA Review, 3-6 (April 2012) (adopting a 10,000 $MTCO_2e$ per year threshold for stationary-source projects, and, for land use development projects, a threshold of either (i) annual emissions of 1,150 $MTCO_2e$, (ii) annual emissions of 4.9 $MTCO_2e$ per service population, or (iii) compliance with a qualified GHG reduction strategy). The Bay Area AQMD likewise adopted a numeric threshold of significance of 10,000 $MTCO_2e$ per year for industrial projects, as well as a threshold of 1,100 $MTCO_2e$ per year for land use projects, but was recently found to have failed to comply with CEQA when it adopted such thresholds. *See California Building Industry Association v. Bay Area Air Quality Management District*, Alameda County Superior Court, Case No. RG10-548693 (March 5, 2012). Consequently, the Bay Area AQMD is no longer recommending that its GHG emission thresholds be used to evaluate the significance of a project's environmental impacts.

[12] *See* Sacramento Metropolitan AQMD, Guide to Air Quality Assessment in Sacramento County, 6-5 (permitting lead agencies to consider thresholds of significance adopted or recommended by other lead agencies) (April 2011).

across local air districts and the discretion afforded to lead agencies in this regard will continue to subject projects to different significance thresholds for GHG emissions and, as a result, to different mitigation obligations depending on the project's location within the state.

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Paul Hastings Environmental and Energy lawyers are experienced in all aspects of CEQA compliance and associated litigation related to industrial, commercial, and residential projects. If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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