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Preparation Of An EIR Is Not A Prerequisite To Promulgating Thresholds of Significance Levels For GHG And Other Emissions

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Introduction

On August 13, 2013, the California Court of Appeal for the First Appellate District ruled that the Bay Area Air Quality Management District's ("BAAQMD" or the "District") promulgation of its thresholds of significance levels ("Thresholds") for emissions of greenhouse gases ("GHGs"), fine particulate matter ("$PM_{2.5}$") and toxic air contaminants ("TACs") did not require prior environmental review under the California Environmental Quality Act ("CEQA"). After several years of uncertainty (and pending further review by the California Supreme Court), lead agencies and proponents for projects constructed in the San Francisco Bay Area may now utilize the Thresholds—which include the District's first-ever thresholds for GHG emissions—in completing their CEQA analysis.

Background

In March 2010, amendments to the State's 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 Guidelines 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.

To that end, on June 2, 2010, the District's Board of Directors adopted new thresholds of significance for GHGs, as well as for TACs and $PM_{2.5}$ (particulate matter with a diameter of 2.5 microns or less). The District also published its CEQA Air Quality Guidelines, which included the Thresholds and describe the procedures for conducting an environmental impact analysis of air emissions resulting from land development activities and stationary sources in the San Francisco Bay Area. The Thresholds for GHGs emissions were designed to help the Bay Area reach its regional target for reducing GHG levels by 1.6 million metric tons over 10 years.

Under the District's Thresholds, a land use project's operations generally will not be deemed to have a significant impact if the project complies with a qualified GHG Reduction Strategy consistent with the goals under AB 32 (the California Global Warming Solutions Act of 2006) or produces annual emissions of less than 1,100 metric tons (MT) per year of carbon dioxide equivalent (CO_2e) (the "bright line" threshold) or 4.6 metric tons of CO_2e per service population (residents and employees) (the "efficiency-based" threshold). For stationary sources, the Threshold for GHG was set at 10,000 MT CO_2e/year. With regard to TACs and $PM_{2.5}$ emissions, the Thresholds set significance levels for construction and operational emissions based upon the resulting "Risks and Hazards" to receptors (*i.e.*, persons who would be living or working on the site of the proposed project or within the area), as computed in accordance with accepted risk assessment methodology for increased cancer risk and other non-cancer risks associated with exposure to TACs and ambient concentrations of $PM_{2.5}$ in excess of significant impact levels ("SILs") proposed by the U.S. Environmental Protection Agency ("EPA") for stationary source permitting.[3]

California Building Industry Association v. BAAQMD

In *California Building Industry Association ("CBIA") v. Bay Area Air Quality Management District*, CBIA successfully challenged the Thresholds at the trial court by arguing that the District should have conducted a CEQA review of the Thresholds before their promulgation because the Thresholds constituted a "project" within the meaning of CEQA. Specifically, the trial court found that the Thresholds are "a discretionary activity directly undertaken by a public agency which may cause a reasonably foreseeable indirect physical change in the environment" and found the evidence in the record sufficient to support CBIA's claim that the Thresholds "might discourage infill development, encourage suburban development or change land use patterns."[4]

The Court of Appeal for the First Appellate District disagreed, however, finding that:

- A prior CEQA review of such thresholds is not required under the CEQA Guidelines' procedure for enacting generally applicable thresholds of significance; and
- The Thresholds do not constitute a "project" because CBIA's purported environmental impact of the Thresholds is too speculative to be reasonably foreseeable.

A. Thresholds Of Significance Adopted By A Public Agency Do Not Require Prior CEQA Review

Public agencies are encouraged under CEQA Guidelines to develop and publish thresholds of significance that they can use in determining the significance of the environmental effects. The District's Thresholds were adopted pursuant to section 15064.7 of the CEQA Guidelines, which provides that thresholds of significance must be formally adopted through a public review process and supported by substantial evidence if they are to be placed in general use. Looking to the plain language of the CEQA Guidelines, the court found that the public review process provided by section 15064.7 is *all* that it required, and that the preparation of an environmental impact report ("EIR")[5] or other CEQA document would be largely duplicative of the substantial evidence standard set forth in section 15064.7. In particular, the court noted that while the completion of an EIR would provide "the most rigorous" level of review, "it is difficult to see how that information would have substantively differed from what the District considered during the public review process" and that "requiring an EIR in addition to the process already in place would result in a duplication of effort, at taxpayer expense and to little if any purpose."

B. Thresholds Are Not A "Project" Under CEQA Because Purported Environmental Impacts Were Not Reasonably Foreseeable

In addition to causing a direct physical change to the environment, under CEQA, an action may constitute a "project" if it "causes a reasonably foreseeable indirect physical change in the environment."[6] An "indirect physical change in the environment" is "a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project."[7] Importantly, "a change which is speculative or unlikely to occur is not reasonably foreseeable."[8]

CBIA asserted that the Thresholds will have the perverse effect of making it more difficult for developers to build residential projects in urban areas (thus causing more housing to be built in suburban and currently rural areas), because (i) the Thresholds for TACs and $PM_{2.5}$ are more stringent than under previous thresholds and will require a more thorough environmental analysis (*e.g.*, a full EIR when a less extensive mitigated negative declaration may have sufficed), and (ii) the Thresholds for GHG are designed to promote infill and transit-oriented development.

The Court of Appeal was unconvinced. While it recognized that several local governments and land use planning agencies expressed concern that the Thresholds would deter urban infill development by requiring more extensive environmental review of projects next to freeways or other transportation corridors, the court found that there was no evidence presented that, as result of such higher costs or infeasibility, housing developers in San Francisco or Oakland "would move their projects to the suburban fringes or rural areas." Thus, according to the court, even if the application of the Thresholds would make certain infill projects more difficult to complete, "it does not follow that the urban sprawl projected by CBIA is reasonably foreseeable."[9] Accordingly, the court decided that, even if the CEQA Guidelines did not define the entirety of the process to be used when enacting thresholds of significance, the District's Thresholds did not constitute a "project".

Conclusion

Lead agency and proponents of projects to be constructed in the San Francisco Bay Area may now begin using the District's threshold of significance for TAC, $PM_{2.5}$, and GHG emissions as part of their CEQA analysis. While the court's ruling ends the uncertainty associated with these Thresholds over the past several years, no public agency, other than the District when acting as lead agency, is committed to using them (and the District will typically only act as lead agency if no other discretionary approval is required for a project). Further, if used by another agency, the Thresholds simply set the levels at which an environmental effect will *normally* be deemed significant or insignificant, and thus, are not necessarily conclusive for determining whether emissions impacts will be deemed significant and mitigation measures required for a particular project.

Absent a successful appeal by CBIA to the California Supreme Court, BAAQMD will rejoin several other local air quality management and air pollution control districts in California that have adopted guidelines for determining the threshold of significance for GHG emissions.[10] Further, the District's Thresholds will now resume their place within its CEQA Air Quality Guidelines, where the step-by-step instructions on how to evaluate the air quality and GHG impacts of a project were incomplete since the trial court ordered the District to set aside the Thresholds.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings San Francisco Lawyers:

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[1] Tit. 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] Tit. 14 Cal. Code Regs., § 15064.4(b).

[3] Under these Thresholds, significance will be found if the cumulative emissions from all TAC sources within 1,000 feet expose receptors to an increased cancer risk greater than 100 in a million, or if the TACs from any single source within 1,000 feet expose receptors to an increased cancer risk of greater than 10 in a million. Additionally, an incremental annual average increase of more than 0.3 micrograms per cubic meter ("$\mu g/m^3$") $PM_{2.5}$ from a single source or 0.8 $\mu g/m^3$ from all sources, as projected by dispersion modeling, would be deemed cumulatively significant. Notably, these ambient concentrations were among three options initially proposed by EPA for use in determining *de minimis* contributions under the Prevention of Significant Deterioration ("PSD") program (*see* 75 Fed. Reg. 64864, 64890 (Oct. 20, 2010); only the former was subsequently finalized (*see id*., 75 Fed. Reg. at 64866) and that final rule was recently vacated and remanded to EPA by the U.S. Court of Appeals for the District of Columbia Circuit (*see Sierra Club v. EPA*, 705 F.3d 458 (D.C. Cir. 2013)).

[4] Under CEQA, a "project" means "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment," and, among other things, is an activity undertaken by any public agency or activity that involves the issuance of a permit, license, certificate, or other entitlement for use by such an agency. Pub. Res. Code, § 21065; *see also* CEQA Guidelines, § 15378. The adoption of a rule, regulation or ordinance satisfying this definition may be "project" subject to CEQA.

[5] An EIR is required under CEQA if it can be "fairly argued" on the basis of substantial evidence that the project will have a significant environmental impact.

[6] Pub. Res. Code, § 21065; CEQA Guidelines, § 15378(a).

[7] CEQA Guidelines, § 15064(d)(2).

[8] *Id*. at § 15064(d)(2).

[9] CBIA also claimed that the Risk Hazards section for the TAC and $PM_{2.5}$ Threshold for new receptors (the "receptor thresholds") is impermissible because the purpose of an EIR is to identify the significant impacts of a project on the environment, not the significant effect of the environment on the project. However, the court concluded that CBIA's challenge to the receptor thresholds as being unauthorized by CEQA is analogous to a facial claim that the receptor thresholds are unconstitutional. The court found that the receptor thresholds could be used in a number of different ways permissible under CEQA, e.g., where a project's individual contribution would exceed a cumulatively considerable level, and thus, the receptor thresholds are not invalid as a matter of law.

[10] *See* 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); 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; 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).