

CLIMATE CHANGE AND THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

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I. Introduction

With the passage last year of AB 32, the California Global Warming Solutions Act, claims are now commonly being raised that when preparing an environmental impact report pursuant to the California Environmental Quality Act, agencies must evaluate a land use project's contribution to global climate change. AB 32 broke new ground by committing California to reduce greenhouse gas emissions back to 1990 levels and establishing a multi-year regulatory process, spearheaded by the California Air Resources Board, to achieve those emissions reductions.

AB 32 does not reference CEQA, nor do either of the Executive Orders recently issued by Governor Schwarzenegger with respect to greenhouse gas emissions, Order S-3-05 (addressing greenhouse gas emissions reduction targets) and S-01-07 (addressing lower fuel emissions requirements). AB 32 does contain legislative findings regarding the risks and potential impacts of global warming on California's environment. Based on these findings, some argue that lead agencies must conduct some level of environmental review of a project's potential to have a significant impact on California's environment due to emissions of greenhouse gases. As a result, most EIRs currently underway on projects and plans being considered by lead agencies are including some evaluation, discussion and disclosure of greenhouse gas emissions and/or climate change issues.

Such an evaluation places lead agencies in a difficult position because CARB and other air quality regulatory agencies have not issued any guidance that agencies can follow in evaluating how land use developments contribute to climate change. While there are some established methodologies and mitigation measures for stationary source emissions, there is no such accepted methodology for evaluating how land use projects may contribute to climate change via mobile source emissions, primarily from the cars and trucks driving to and from the development. In particular, there is no guidance on how to determine whether a project's potential contribution to climate change is significant. Such guidance may be provided in the future, pursuant to Senate Bill 97, which was adopted in August 2007 and directs the Office of Planning and Research and the Resources Agency to adopt CEQA Guidelines for the mitigation of greenhouse gas emissions, by 2010 (See Exhibit E attached).

Further, while there is a general consensus that climate change is occurring and a consensus that human activity contributes to some (likely substantial) degree, the consensus does not extend much beyond that (popular opinion notwithstanding). In particular, there is not yet a

developed methodology that can be used to define the baseline climatic conditions that result from normal fluctuations of multiple climatic cycles in any particular region or location. For example, the Fourth Assessment Report from the Intergovernmental Panel on Climate Change concludes that it is generally not yet possible to attribute temperature changes on smaller than a continental scale. Similarly, there is not a developed methodology to determine the “delta,” or increment of change, that emissions related to any given land use project may contribute either to the severity or the frequency of those fluctuations in any particular region or location.

Despite the lack of guidance and the substantial uncertainty over the impacts of particular projects, a number of CEQA lawsuits have been filed challenging the adequacy of the analysis (or the lack thereof) provided by lead agencies in EIRs for individual projects, as well as for general and specific Plans. These lawsuits, predating as they do the establishment of any state standards for measuring a land use project’s contribution of greenhouse gas emissions, or the relative impact of such emissions, essentially place the cart before the horse.

The task of evaluating a project’s contribution to climate change is going to continue to be difficult until some guidance is provided by air quality regulatory agencies. Normally, EIRs make their conclusions about the significance of emissions impacts based on whether emission generated by a project either exceed a threshold adopted by the applicable air district, or whether a project will comply with the air quality plans that are adopted throughout California to reduce impacts. AB 32 has given the CARB the task of developing a program to reduce greenhouse gas emissions, but the plans and programs to achieve such reductions are years away from being complete.

In the authors’ opinion, it is important to keep the CARB in the AB 32 driver’s seat. Once CARB has established plans to achieve emissions reductions, then those plans can and should be applied in the CEQA process to evaluate whether the impacts of particular projects are significant. Absent such a reliance on the AB 32 process, the rules regarding whether and how climate change impacts must be evaluated are likely to be developed on an *ad hoc*, case-by-case basis by local lead agencies and local judges considering EIRs on particular development projects and plans. Such *ad hoc* development of CEQA rules on climate change will, unfortunately, maximize the uncertainty facing all types of projects. It may also lead to a serious misallocation of mitigation resources because land-use decisionmakers will consider mitigation strategies before CARB has determined which emissions reductions strategies are more effective and which are less effective.

II. Conducting CEQA Review In the Absence of Legislative or Regulatory Guidance: CEQA’s Regular Rules Should Apply

In the absence of legislative or regulatory guidance, and faced with the challenge of trying to anticipate the *ad hoc* development of case law on this issue, lead agencies’ CEQA analysis of climate change and their response to climate change claims will vary - and should vary – substantially from document to document. That said, in assessing the relative merits of approaches to analyzing climate change issues, it is important to remember that the CEQA statute, the CEQA Guidelines, and over twenty years of CEQA case law, already provide detailed guidance as to how lead agencies should analyze potential impacts. Given this, and

absent other direction, whether from the legislature or the courts, CEQA's regular rules should be applied in determining how and whether climate change impacts must be evaluated.

A. Lead Agencies Are Required to Evaluate Impacts to the Extent Feasible

First among these general rules is the "rule of reason," under which an EIR is required to evaluate impacts to the extent that it is reasonably feasible to do so. CEQA Guideline §15151; *San Francisco Ecology Center v. City and County of San Francisco* (1975) 48 Cal.App.3rd 584. Also, while CEQA does require lead agencies preparing EIRs to make a good faith effort to find out and disclose what they reasonably can, CEQA does not demand what is not realistically possible. *Residents ad hoc Stadium Committee v. Board of Trustees* (1979) 89 Cal.App.3rd 274, 286.

B. Lead Agencies' Determinations Must Be Supported By Substantial Evidence

As well, lead agencies' determinations must be supported by substantial evidence - facts, reasonable assumptions predicated on facts, and expert opinions supported by facts, rather than speculation or argument. Public Resources Code § 21080(c); CEQA Guideline § 15384(a) ("substantial evidence" is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might be reached"). Accordingly, when evaluating a challenge to an EIR, a reviewing court may not reweigh the evidence considered by the lead agency but will be limited to determining whether the record contains relevant information that a reasonable mind might accept as sufficient to support the conclusion reached.

C. Lead Agencies Have Discretion In Developing Environmental Documents and Selecting Mitigation Measures

CEQA permits lead agencies to pursue a wide range of approaches in implementing the CEQA process and in determining what types of environmental documents to prepare. A lead agency preparing an EIR also has discretion to design an EIR, and an EIR does not need to conduct every recommended test or perform all requested research or analysis. CEQA Guideline §15204(a); *Laurel Heights Improvements Association v. Regents* (1988) 47 Cal.App.3rd 376, 410. Further, a lead agency's decision on the effectiveness of mitigation measures proposed by an EIR is subject to deference and the lead agency has considerable discretion in determining what mitigation measures are appropriate. *Laurel Heights Improvements Association, supra*, 47 Cal.App.3rd 376, 407.

D. Lead Agencies May Determine that an Impact Is Speculative

A lead agency is not required to analyze speculative impacts of a project so long as it has conducted a thorough investigation before concluding that the impact is too speculative for further analysis. CEQA Guideline § 15145 ("if, after thorough investigation, a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact"). E.g., *Alliance of Small Emitters v South Coast Air Quality Management District* (1997) 60 Cal.App.4th 55, 67 (upholding CEQA analysis of air regulatory program that did not evaluate environmental impacts that were speculative because future technology was unknown).

E. Lead Agencies May Determine That Compliance With a Plan Mitigates a Cumulative Impact.

Generally, when a lead agency is considering a cumulative impact such as climate change, the lead agency may determine that a project's contribution to the significant cumulative impact is rendered less than cumulatively considerable if the project mitigates its contribution to the cumulative impact through compliance with a plan. CEQA Guideline §15130(a)(3). Pursuant to this Guideline, a project's contribution may be determined to be less than cumulatively considerable if the project implements its share of mitigation measures designed to alleviate the cumulative impact. The lead agency must identify facts and analysis supporting its conclusion that the contribution will be rendered less than cumulatively considerable.

III. "Urban Decay" Cases Illustrate the "Regular Rules" Theme

The history of "urban decay" cases illustrates the principle that CEQA's regular rules should apply to the evaluation of climate change impacts. Prior to the arrival of climate change on the CEQA scene, the urban decay cases represented the latest wave of an arguably "new" claim that was raised to challenge a variety of projects (typically large retail stores). The courts in deciding those cases generally applied CEQA's well-established rules, including the rule that speculative impacts need not be evaluated.

For example, in evaluating urban decay claims in the context of big box retail development, courts have applied the rule that impacts that are speculative need not be evaluated in detail, providing there is a reasoned explanation for the determination that the impact is speculative. *Anderson First v City of Anderson* (2005) 130 Cal.App.4th 1173. The agencies which have run into trouble on urban decay claims are those that dismissed the issue without providing a reasoned analysis supporting their conclusions. Those agencies which won their urban decay cases did so because, depending on the particular facts of those cases, they either evaluated the urban decay issue, or determined that it was speculative and did not require further evaluation, or determined that it had already been evaluated in another CEQA document. In other words, the entire panoply of CEQA rules apply and the result of a lead agency's analysis of a potential impact should be tailored to the particular situation. Given this, the validity and defensibility of any particular approach to climate change claims may depend as much or more on the administrative record and factual record that is developed to support that approach, as it will on the particular approach selected.

IV. Recent Trial Court Decisions Illustrate the "Regular Rules" Theme

Three recent trial court decisions illustrate the point that CEQA's regular rules should apply to climate change claims. As trial court decisions, these decisions are not legal precedent for how other cases may be decided. Such legal precedent in a CEQA climate change case will not be available until there is a published Court of Appeal decision in such a case. Nevertheless, these decisions are illustrative of the way in which CEQA's regular rules may be applied to climate change issues.

In *Natural Resources Defense Council v. Reclamation Board of the Resources Agency of California*, the Sacramento County Superior Court rejected a claim that the Reclamation Board

should have prepared a subsequent or supplemental EIR for the River Islands project to take into account new information regarding the impacts of climate change (See Exhibit A for the relevant part the trial court's decision.) The court applied the standard rules of Public Resource Code section 21166 (which governs when further CEQA review is required after there has already been one CEQA review) in considering whether climate change was "new information." It concluded that the concept of climate change and its impact on hydrology was not new information, as the issue became well known to the public at large prior to the completion of the last environmental document prepared for the project. Thus, it was not information which "could not have been known at the time the environmental impact report was certified as complete." Public Resources Code § 21166(c). The court also found that the petitioners had failed to present new information as to the specific effects of climate change on the project site. In other words, the court held that claims regarding the potential impacts of climate change, as with any claims regarding potential environmental impacts, must be specific to the project being challenged.¹

In *American Canyon Community United For Responsible Growth v. City of American Canyon*, the Napa County Superior Court found that, in preparing an Addendum to comply with a writ issued on an EIR, the City of American Canyon was not required to include an analysis of climate change due to the passage of AB 32. Just as in the *NRDC* case, the trial court applied the standard rules of Public Resource Code section 21166 in considering whether climate change was "new information." The Court concluded that AB 32 was not "new information" as "legislation requiring creation of state regulations certainly does not pertain to this particular Project or its effects." (See Exhibit B for the relevant part of the trial court's decision.)

Finally, in *Santa Clarita Oak Conservancy v City of Santa Clarita*, the Los Angeles County Superior Court ruled that an EIR analysis document for an industrial park project had adequately evaluated the impact of climate change on the water supply for the project. The document in question was entitled a "final additional analysis", and was added to an EIR in response to an earlier court ruling in the same case. This EIR document surveyed the technical literature, including reports from the Department of Water Resources. Based on that survey, the document concluded that the impact of climate change on water supply was too speculative to conduct a quantitative review of climate change impacts. The court upheld this analysis citing CEQA Guideline §15145, which authorizes lead agencies to determine that an impact is too speculative for evaluation. This is the first trial court decision which has evaluated climate change impacts outside of the "subsequent EIR" context, although it did evaluate claims regarding the impact of climate change on a project, rather than claims about a project's contribution to climate change through the generation of emissions. (See Exhibit C for the relevant part of the trial court's decision.)²

¹ Alicia Guerra of Cox Castle & Nicholson was part of the legal team representing the real party in interest in this case.

² Annie Mudge and Sarah Owsowitz of Cox, Castle & Nicholson represent the real party in interest in this case.

