

GHGs in CEQA: Considerations for Lead Agencies

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GHGs in CEQA: Considerations for Lead Agencies

1) Introduction and Background:

The California Environmental Quality Act (CEQA) is the primary law for considering the environmental impacts in land use decisions. Greenhouse gas emissions (GHGs) have recently been recognized by the State as an environmental impact. The passage of AB32, the Global Warming Solutions Act in the Fall of 2006, followed by recent lawsuits over the consideration of GHGs in land use plans have raised the question of how GHGs fit into CEQA.

CEQA is implemented by the designated “lead agency” that reviews projects. CEQA has a substantial case law that guides agencies in their considerations, and the Governor’s Office of Planning and Research provides Guidelines for local agencies to follow. Regional Planning Agencies and special districts such as Air Quality Management Districts also provide guidelines to help local agencies facilitate the CEQA process.

The problem of global climate change has risen in prominence over the past few years to the point where it is now recognized by millions of Americans, and a majority of Californians, as a major environmental issue. In brief, climate change is caused by the increase in man-made emissions that trap heat in the atmosphere. The primary greenhouse gases (GHGs) include carbon dioxide (CO₂) and methane, by products of the combustion of fossil fuels for transportation and electricity, as well as certain land use, agricultural and forestry practices. Many reports have been written on the environmental impacts of climate change in California, which include impacts on water availability, air quality, wildlife habitat, agriculture, sea level rise, and more.

The goal of this paper is to inform local agencies about the issue of incorporating greenhouse gas emissions into the California Environmental Quality Act. First, this paper will review the literature around CEQA, including critiques of CEQA and calls for CEQA reform. Second, this paper will examine the recent lawsuits over GHGs in CEQA, the perspectives of the plaintiffs and respondents in those cases, and the rulings from those cases. The paper considers whether Air District Guidance Documents are useful in determining thresholds of significance for air quality pollutants, and how GHGs have been incorporated into an EIR for a Regional Transportation Plan. Finally, this paper will discuss several recent White Papers on GHGs in CEQA from various attorneys around the state. The paper ends with a discussion and conclusions for agencies in incorporating GHGs into CEQA.

2) The CEQA Reform Debate:

The question of including GHGs into CEQA is not a simply a question about whether GHGs are an environmental impact. An important consideration is CEQA’s effectiveness as a tool to address environmental impacts generally. A discussion of

CEQA's history and controversies may provide insight into how GHGs may fit into CEQA's framework.

CEQA became law in 1970, but it became controversial in 1972, after a landmark court decision expanded its reach to nearly any project that was deemed to have a significant impact on the environmental resources of California.¹ Ever since then, a debate has raged over the costs imposed on developers by the CEQA process, the effectiveness of the mitigations imposed through the CEQA process, and the amount of litigation over CEQA decisions.

The California Environmental Quality Act's purpose is to require state and local agencies to identify and mitigate environmental impacts of land use decisions. The important steps in this process are:

- 1) A "screening process" leads to a determination of whether the project contains no significant environmental impacts and is exempt under CEQA.
- 2) If not exempt, the lead agency makes a determination of whether certain simple mitigations would qualify the project for a Negative Declaration (or Mitigated Negative Declaration) of Significant Impact.
- 3) If not, then the next step is the creation of an Environmental Impact Report (EIR) which lists potential impacts of the project, and mitigations.² A critical element is whether impacts are over or under a threshold of significance.
- 4) Then the Agency reviews the EIR, which is open for stakeholder comment, and the agency determines whether the EIR adequately discusses the impacts.
- 5) Finally, the agency may determine whether the mitigations proposed fulfill the requirements to lessen the impacts sufficiently, or if not, if there are "overriding considerations" which allow a project with unmitigated impacts to proceed.

There are more than two sides to the debate over CEQA's effectiveness, but in simplistic terms the debate is between developers, who believe CEQA is too expensive, and environmental consultants and local agencies, who believe CEQA plays an important role in informing the public about the environmental impacts of proposed projects and facilitating public review.

The Spring 1993 issue of the journal *Land Use Reform* provides a succinct introduction to the debate over CEQA reform. The journal issue was entitled "CEQA Turns 21," a reference to the fact that although technically CEQA was turning 23, *the Friends of Mammoth* case that gave CEQA its wide reach was only 21 years before. In consecutive articles, the journal presents perspectives from Don Collin, the General Counsel for the California Building Industry Association, one of the most vocal critics of CEQA, and

¹ *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247.

² California Environmental Resources Evaluation System website: State Guidelines for the implementation of CEQA online at http://ceres.ca.gov/topic/env_law/ceqa/guidelines/

from Tina Thomas, a co-author of the *Guide to the California Environmental Quality Act* and defender of CEQA.³ Collin believes a major overhaul of CEQA is needed for economic reasons, while Thomas writes a rebuttal titled, “In Defense of CEQA.”⁴ Thomas writes that at times defending CEQA feels like “defending the French nobility in 1789,” implying that even if there are large numbers of people opposed to CEQA, the CEQA reform movement contains elements of mob mentality. Both articles agree that an example of “CEQA abuse” is “the filing of litigation by apparently well meaning citizen groups in order to pursue social and environmental agendas unrelated” to CEQA’s intended purpose, i.e. the project’s environmental impact (pg. 105). The authors agree on the general sentiment that “phony environmentalists” may use CEQA to prevent, delay, or raise the costs of the development to advance intentions outside of specific environmental protection. This concept was revived recently when Attorney General Jerry Brown filed a lawsuit against the County of San Bernardino for failing to include GHGs in its County General Plan, discussed later in this paper. Critics of the Attorney General applied many of the same anti-CEQA arguments to GHGs.

Michael Zischke’s article in the same journal, “A Summary of Current Reform Proposals” consolidates several 1993 CEQA reform proposals, and lists them by interest group (business or environmental) and organizational category (government agencies, professional groups, State Legislature, etc.). Zischke lists 50 bullet pointed reform proposals, which limit, expand, or alter CEQA’s reach. Interestingly, every interest group has a wish-list for improving CEQA.⁵

John Landis, a professor of city and regional planning at UC Berkeley, with three co-authors, described controversies around CEQA in a 1995 California Policy Seminar research report, “*Fixing CEQA: Options and opportunities for reforming the California Environmental Quality Act.*”⁶ The report describes the history of CEQA, the common criticisms of CEQA, and makes recommendations for reform of CEQA.

The Landis Report highlights the common criticisms are that CEQA, including:

- CEQA leads to paperwork but not environmental protection
- Lead agency consideration is often *Ad hoc*
- CEQA results in too much litigation
- The CEQA process is too expensive
- CEQA is not well integrated with other environmental laws
- There is no required follow up or enforcement of required mitigations

³ Remy, Michael, Tina Thomas, James Mose and J. William Yates. *Guide to the California Environmental Quality Act (CEQA)*, Point Arena, CA: Solano Books Press, 1993.

⁴ Collin, Don. “CEQA Turns 21: Broken, but will it be fixed?” in *Land Use Reform*, Spring 1993.

Thomas, Tina. “In Defense of CEQA,” in *Land Use Reform*, Spring 1993.

⁵ Zischke, Michael. “A Summary of Current Reform Proposals.” in *Land Use Reform*, Spring 1993.

⁶ Landis, John, Rolf Pendall, Robert Olshansky, and William Huang. “*Fixing CEQA: Options and opportunities for reforming the California Environmental Quality Act.*,” California Policy Seminar Research Report, 1995.

The Report describes the results of a 1991 survey titled “CEQA and Planning Practice” which was mailed to planning directors in all 455 cities and 58 counties in California. The Landis Report proceeds to describe the findings of the survey and draws conclusions which reject some of the above criticisms as unfounded by citing the following data:

- 94.3% of CEQA reviews in 322 cities resulted in negative declarations not EIRs.
- Typical EIRs in cities cost between \$38,000 and \$50,000.
- One out of every 354 CEQA reviews between 1986 and 1990 resulted in a lawsuit.

The report concludes that many of the criticisms are “myths.”

Nevertheless, the Report admits that CEQA is in need of reform. The Landis Report lists recommendations to improve CEQA. Here are a few:

- Require local governments to adopt standardized thresholds for local government impacts and specify when the thresholds trigger more intensive environmental assessment.
- Require a menu of regional standard cumulative-impact mitigation measures.
- Improve the alternatives analysis section of EIRs and require it to be as detailed as the preferred alternative.
- Improve mitigation monitoring for cumulative impacts.

In developing its recommendations, the Landis Report reviews the CEQA processes of about a dozen local jurisdictions to determine whether CEQA’s criticisms have merit. The Report describes the City of Santa Barbara as a leader in efficiently conducting EIRs. The City’s distinguishing feature was uniform standardized threshold and mitigation policies that the report encouraged other cities to emulate. The report arrives as the suggestion of streamlining CEQA without weakening its environmental protections. Certainty and consistency were mentioned throughout the report as important themes to improve CEQA implementation. This point may be useful in our later consideration of GHGs in CEQA.

The Report notes that local governments conduct EIRs when there are multi-issue considerations that are likely to be unmitigated, involving for example, water quality, habitat protection, and congestion. But air quality was found to be a stand-alone issue, where agencies may choose to conduct an entire EIR based only on the potential for unmitigated air quality impacts. Some of the White Papers cited later in this paper on GHGs express a concern that climate change may be like air quality and be a single-issue cause for EIRs rather than mitigated negative declarations.

Robert Olshansky’s “Evaluation of the California Environmental Policy Act” discusses the survey of 513 local governments that Landis describes.⁷ His conclusion is that CEQA helps local governments in four major ways:

⁷ Olshansky, Robert. “Evaluation of the California Environmental Quality Act,” in *Environmental Management*, Vol. 20, No. 1, 1996.

- evaluating environmental impacts
- reducing impacts through mitigations
- informing the public
- and coordinating public review agencies

Ten years later, the Public Policy Institute of California produced a report for the CEQA Improvement Advisory Group that was convened by the California Resources Agency in February 2005. The report, titled, “CEQA Reform: Issues and Options” provides an updated overview of CEQA criticisms for the 10 years that passed. It is a different decade, but many of the same perspectives remain. Many building industry interest groups feel that CEQA is often used to delay or prevent development. Predictably, they call for a repeal or substantial curtailment in CEQA. Smart growth advocates are discouraged by CEQA mitigations resulting in low density development that leads to sprawl, but environmentalists consider most reform efforts would result in harm to California’s environment. The report says a major question is balancing the value of state standards to local flexibility in interpretation. One idea for reform is to make CEQA more of a regional, instead of local, planning tool, in order to implement smart growth, address the housing shortage, and combat sprawl. The report concludes that no one is happy with CEQA’s ad hoc approach, but that given the contentiousness of the debate, actually reforming CEQA would be like opening Pandora’s Box.

One of the most recent reviews of CEQA comes from the San Francisco Planning and Urban Research Association, dated February 1, 2006. “Form and Reform: Fixing the California Environmental Quality Act” is critical of CEQA. It contends that the result of CEQA is that it has improved some individual projects, but overall it leads to sprawl by preventing infill, density, and smart growth. Citizen “Not in my backyard” (NIMBY) concerns in opposition to dense infill projects, the listing of traffic congestion as an environmental impact, and lack of parking spaces, cause agencies to “mitigate” those impacts by reducing density, forcing development elsewhere. This criticism was mentioned as an environmental interest group concern in Zischke’s article back in 1993. This is a key point for agencies looking at incorporating GHGs into CEQA. If smart growth and efficient land use are part of the efforts to address climate change, then CEQA mitigations should be in alignment with that goal, not counter to it.

Although this paper focuses on CEQA, and does not discuss issues in other states or nationally, it should be noted that other states have similar laws to CEQA, patterned, like CEQA was, on the National Environmental Policy Act (NEPA). Many other states have “little NEPA” laws, and CEQA was considered such a law before it was substantially strengthened by the *Friends of Mammoth* ruling. NEPA follows much of the same process as CEQA, but is usually implemented on projects that take place on federal land, or where the federal government is the lead agency. Also, since there was no Federal equivalent of the *Friends of Mammoth* ruling, the reach of NEPA does not extend as far as CEQA’s does. There has been discussion of NEPA reform as well.

For example, in “Toward a Smarter NEPA,” Bradley Karkkainen contends that one of NEPA’s flaws is that it lacks follow-up monitoring of mitigations.⁸ He notes additional criticisms of NEPA include:

- cost
- overemphasis on procedures
- unclear if it results in any environmental benefits

Karkkainen feels that there is an incentive for agency staff to avoid an Environmental Impact Statement by issuing Mitigated Findings of No Significant Impact (FONSI), the equivalent of a Mitigated Negative Declaration for CEQA. The author proposes strengthening NEPA by incorporating environmental management systems-type monitoring of mitigations instead of *ex ante* predictions of mitigations. This provides a potential key point for incorporating GHGs into CEQA: providing a broad list of mitigations could reduce uncertainty for a category of such wide-ranging impacts.

Several of the papers mention reforming CEQA to streamline the process by allowing Master EIRs that can be referred to by specific projects that fall within its purview (this is referred to as “tiering”). This reform was incorporated into CEQA in the late 1990’s. Current planning practice views a General Plan as the 1st Tier, a Specific Plan as the 2nd Tier, and the site specific or project specific plan and EIR as the 3rd Tier.⁹

The CEQA reform debate shows that CEQA’s history has been contentious, that for many stakeholders the only point of agreement is that CEQA is imperfect, and that over the past several decades CEQA’s imperfections have still resulted in benefits to local governments. A major issue for smart growth advocates is the tendency for local agencies to impose traffic mitigations resulting in lower density development and sprawl.

In summary, the criticism over CEQA’s effectiveness in terms the administrative burden felt by developers may arise later in relation to GHGs. Question specific to GHGs in CEQA relate to the cumulative impact of GHGs, whether project reviews will be streamlined by the development of standardized mitigations, and whether the threshold of significance for GHGs will be zero.

3) State Action and Lawsuits

State Action: AB32 initiates more serious debate:

In California, the passage of AB32, the Global Warming Solutions Act, in the Fall of 2006 intimated to many that the State now considered GHGs to be an environmental impact. AB32 was a wide-ranging law that empowered the California Air Resources Board to develop a plan and reduce greenhouse gas emissions to 1990 levels by 2020. In doing so, the Legislature stated that GHGs were a threat to California’s environment.

⁸ Karkkainen, Bradley. “Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance,” *Columbia Law Review*, Vol 102, No 4, May 2002.

⁹ Remy et al. Pg 487.

The scientific community, notably the Intergovernmental Panel on Climate Change (IPCC), had been issuing reports stating that the threats of climate change were increasing, and that international action was necessary to reduce potentially catastrophic scenarios for the mid and late 21st century. Local governments had been taking action through ICLEI's Cities for Climate Protection program, and the Mayor's Agreement on Climate Change. However, AB32 was the first time that a state imposed a mandatory cap on emissions, sending a strong message that it was time to move beyond voluntary approaches to the problem.

Lawsuits raise the stakes:

Following AB32, several legal decisions and legal actions contributed to the increasing interest in the status of GHGs.

On April 2, 2007, the U.S. Supreme Court ruled that greenhouse gas emissions fit within the Clean Air Act's definition of a pollutant.¹⁰ No federal laws regulating GHGs have been adopted.

On April 13, 2007, State Attorney General Jerry Brown filed a lawsuit against the County of San Bernardino for neglecting to consider climate change in their General Plan update.¹¹ The case was settled on August 21, 2007. According to the Settlement, the County had "concluded that there is no available methodology for determining whether greenhouse gas emissions attributable to the General Plan Update are significant." In the Settlement, the County agreed to prepare a Greenhouse Gas Emissions Reduction Plan. The Attorney General's Office issued a News Alert listing actions such as energy efficiency and smart growth principles that local governments could include in their General Plans and EIRs that would reduce GHGs from projects. Those actions are listed in the Appendix. Law firms around the state began assembling practices focusing on climate change.

Around the same time in late 2006-early 2007, the Center for Biological Diversity filed several lawsuits under CEQA contending that the climate change impacts of various projects, including a housing development and a commercial development, needed to be reviewed and addressed under CEQA.

In *Center for Biological Diversity v. City of Banning*, the Center for Biological Diversity contended that an EIR for a proposed 1,500-unit residential development called Black Bench, located at the outskirts of Banning, must analyze GHG emissions as a potential environmental impact.¹²

¹⁰ *Massachusetts vs. Environmental Protection Agency*

¹¹ *People of State of California v. County of San Bernardino* Settlement Agreement, August 21, 2007. http://www.opr.ca.gov/ceqa/pdfs/San_Bernardino_AG_settlement_agreement.pdf

¹² *Center for Biological Diversity v. City of Banning* (Case Number RIC460967, Riverside County Superior Court) (consolidated with *Cherry Valley Pass Acres and Neighbors v. City of Banning* and *Highland Springs Conference and Training Center v. City of Banning*, RIC460950, pending)

The respondent's Opposition Brief in the *City of Banning* case explains the reasoning behind the claim that GHGs should not be included in the EIR for this local project.¹³ The Brief's opinion is that AB32 does not imply GHGs should be analyzed by CEQA. The Brief states that the California Air Resources Board has not developed specific land use regulations, and the actions it has taken under AB32 do not relate to residential developments (pg. 41). The Brief contends that GHGs lack significance thresholds from the South Coast Air Quality Management District, and that the climate change impacts of the proposed project remain speculative.

Three other cases filed by the Center for Biological Diversity raise similar issues.

Center for Biological Diversity v. City of Desert Hot Springs, (Riverside County Superior Court) challenges the EIR for a 2,700 unit residential/commercial development for not analyzing GHGs resulting from the project. *Center for Biological Diversity v. City of Perris*, (Case Number RIC477632, Riverside County Superior Court) challenges the approved EIR for a proposed shopping center containing a WalMart. The Final EIR contained a discussion of climate change and greenhouse gases but did not quantify or analyze the intent and impact on the grounds that any impact was speculative.¹⁴ *Center for Biological Diversity v. San Bernardino County*, (San Bernardino County Superior Court) challenges the CEQA process in permitting a commercial compost facility for not discussing the GHGs emitted by the project.

Another case brought by the Natural Resources Defense Council raises the issue of whether the agency must identify changes in project impacts due to the projected effects of climate change, including such risks as increased flooding due to rising sea levels.¹⁵ The case was dismissed.

Attorney General Jerry Brown's office also settled a lawsuit over climate impacts in an EIR for ConocoPhillips' Clean Fuel Project.¹⁶ The settlement requires Conoco Phillips to complete a greenhouse gas emissions audit of its California refineries by the end of 2008, make a \$7 million payment to the BAAQMD carbon offset fund, fund a \$2.8 million reforestation project, and fund wetlands restoration.

The state takes action:

Within months of the passage of AB32, the question of how GHGs should be addressed in CEQA became a top statewide political and legal issue.

¹³ Respondent's Opposition Brief filed 9/14/07, accessed online at <http://75.28.114.12/OpenAccess/CIVIL/civildetails.asp?casenumber=460950&courtcode=A&dsn=&casetype=RIC> on 11/3/07.

¹⁴ Writ of Mandate accessed online at <http://75.28.114.12/OpenAccess/CIVIL/civildetails.asp?casenumber=477632&courtcode=A&dsn=&casetype=RIC>

¹⁵ *Natural Resources Defense Council v. Reclamation Board* (Sacramento Superior Court, No. 06CS01228

¹⁶ Settlement agreement online at http://ag.ca.gov/cms_pdfs/press/N1466_CoCoSettlementAgreement.pdf.

In 2007, some lawmakers' unease with the GHG-CEQA suits was a factor in the delay of the passage of the State Budget. The LA Times published an editorial describing one of the reasons for the 2007 Budget delay as the Republican backlash against Attorney General Jerry Brown's lawsuit against the County of San Bernardino for not including GHGs in the County's General Plan. The editorial acknowledged that other factors were at play, including Republican lawmakers' frustration with Governor Schwarzenegger, but that the lawsuits was prominent.¹⁷ Some legislators claimed that infrastructure bond money would be wasted defending future lawsuits from the Attorney General.

Immediately following the budget stand-off, the State passed a new law on August 24, 2007, SB97, that assigns the Governor's Office of Planning and Research (OPR) the task of developing Guidelines for including GHGs into CEQA by July 1, 2009.¹⁸ These recent state actions and lawsuits have raised the profile of the question of GHGs in CEQA. The lawsuits have added an element of urgency to avoid being sued, and to define what is involved in including GHGs in CEQA. Local agencies would benefit from following the OPRs development of rules for including GHGs in CEQA. Because of the intense scrutiny on these issues around the state, local agencies may wish to begin mentioning GHGs in EIRs and other CEQA documents. The next section discusses potential ways to do this.

4) Templates? Air Quality Guidance and SANDAG's Regional Transportation Plan

This section describes two potential templates for including GHGs in CEQA: following a model based on Air Quality Guidance Documents and how GHGs were described in SANDAG's Regional Transportation Plan. At the end of the discussion, I conclude that GHGs cannot be folded into air quality sections, and that SANDAG's qualitative approach is more appropriate for local agencies at this time.

Air Quality Guidance Documents:

A key concept in assessing environmental impacts in an EIR is the "threshold of significance." Such thresholds are defined for criteria air pollutants. As mentioned earlier, there are no current guidelines for addressing GHGs in CEQA. Can any lessons be learned from Air District guidelines for criteria pollutants?

South Coast Air Quality Management District provides an Air Quality Analysis Guidance Handbook.¹⁹ The Handbook contains a section on "localized significance thresholds," which is used by the Air District for oxides of nitrogen (NOX), carbon monoxide (CO), and particulate matter (PM10 or PM2.5). The handbook is for use by lead agencies such as cities and counties, but it is voluntary, not mandatory, guidance. According to the LST

¹⁷ Los Angeles Times Editorial. "GOP bottom line: The governor needs to exert some discipline and break the budget free of an internal Republican squabble." August 10, 2007.

¹⁸ Senate Bill 97 http://www.opr.ca.gov/ceqa/pdfs/SB_97_bill_20070824_chaptered.pdf

¹⁹ SCAQMD Air Quality Analysis Guidance Handbook accessed online at <http://www.aqmd.gov/CEQA/hdbk.html>, localized significance thresholds section online at <http://www.aqmd.gov/CEQA/handbook/LST/LST.html>

section, “The LST concentrations are derived by ensuring that the total concentrations (i.e., background plus project contribution) are just less than the most stringent applicable state and federal ambient air quality standards.” (Section 2-5, page 17) The PM calculations differ from the NOX and CO calculations because the region is in non-attainment for PM, so there is no need to calculate the background levels. The SCAQMD Air Quality Significance Thresholds document lists the mass daily thresholds for air quality pollutants.²⁰

Another example is the Sacramento Metropolitan Air Quality Management District’s *Guide to Air Quality Assessment in Sacramento County*. This guidebook is provided to assist local agencies in the Sacramento Air Basin in determining whether air pollution impacts are significant under CEQA.²¹ The book focuses on two categories of project impacts on air quality: impacts due to construction, and due to operation. The way the air quality standards are set relate to thresholds set by the U.S. EPA based on projected health impacts.

The main issue with comparing the air quality standards to possible standards for GHGs is that the criteria air pollutant standards are based on U.S. EPA thresholds set by risk assessments for health impacts. GHGs differ from air quality pollutants in that their impact is global, not local. There is no local health impact from GHGs. Some environmental justice advocates contend that since GHGs are a byproduct of fossil fuels, they can be described as a co-pollutant, found in large quantities near refineries or large industrial and fuel processing facilities.²²

Because GHGs do not correspond to any direct health impacts, the EPA may need to choose a standard other than localized health impacts by which to set the level. GHGs also differ from criteria air pollutants in that they disperse and their impact is cumulative. GHGs emitted in China have the same effect on climate change that GHGs emitted in California do. CO₂ lasts in the atmosphere for about 100 years. Scientists estimate that global CO₂ levels are over 380 ppm, rising at approximately 1.5 ppm per year, and that irreversible effects such as ice cap melting could take place above 450 ppm.

Local agencies must consider the global nature of GHGs, the fact that it disperses uniformly in the atmosphere, and its lack of localized health impacts. In the absence of a health standard, local agencies would be setting arbitrary levels. Although CEQA does give local agencies discretion over determining what is significant, they may prefer to follow the following example instead.

²⁰ SCAQMD Air Quality Significance Thresholds, <http://www.aqmd.gov/CEQA/handbook/signthres.doc>

²¹ Sacramento Metropolitan Air Quality Management District. *Guide to Air Quality Assessment in Sacramento County*. July. Sacramento, CA. July 2004.
<http://www.airquality.org/ceqa/2004AQMDCEQAGuidelines.pdf>

²² AB32 Environmental Justice Advisory Committee, <http://www.arb.ca.gov/cc/ejac/ejac.htm>

SANDAG's Regional Transportation Plan:

The San Diego Association of Governments (SANDAG) included GHGs in their 2007 2007 Regional Transportation Plan update.²³ This provides an interesting example for local agencies to consider.

The Air Quality Significance Criteria section of the EIR for the Plan states that significant impacts to air quality would occur if the proposed 2007 RTP results in a cumulatively considerable net increase of emissions of any criteria pollutant for which the project region is in nonattainment (Section 4.5.1).

The EIR used methodology and GHG emission factors from the California Climate Action Registry General Reporting Protocol and the Bay Area Air Quality Management District (BAAQMD) to estimate existing levels of fuel and electricity consumption and compared it to fuel and electricity consumption under the proposed 2007 RTP. The result is an increase in CO₂ equivalent emissions from approximately 17.4 million tons of carbon dioxide-equivalent (CO₂e) in 2006 to 22.8 million tons of CO₂e in 2030, an increase of approximately 31 percent, or about 5.3 million tons of CO₂e over existing conditions. The EIR declares, "This is slightly lower (about 1.7 percent) than the approximately 23.2 million tons of CO₂e that would result in 2030 under the No Build scenario." (pg. 168)

Then the EIR lists mitigation measures (pg. 178). Following the San Bernardino settlement, the EIR states that SANDAG shall, through a public process, establish a Regional Climate Change Action Plan (Action Plan). Despite the Plan, the EIR still anticipates that climate change impacts from the implementation of the proposed 2007 RTP would be cumulatively significant and unavoidable.

A qualitative approach to GHGs would discuss how land use decisions may result in either direct or indirect GHGs. Direct GHGs come from a smokestack or tailpipe onsite. Examples of direct emissions are a factory whose emissions are not just from electricity use, or generators that consumer fossil fuel onsite. Indirect GHGs would be a byproduct of the use of the site, or are produced somewhere due to the use of the site. Examples of indirect emissions are auto emissions from employees commuting, or the emissions produced elsewhere to generate the electricity used onsite. The qualitative approach is better than nothing, but it lacks numerical thresholds for significance.

OPR Presentation

Cynthia Bryant, the Director of the Governor's Office of Planning and Research produced a Powerpoint Presentation titled, "Climate Change and CEQA," which showed

²³ SANDAG 2007 Regional Transportation Plan. Note: The 2005 Plan did not include GHGs or climate change. The 2007 Update includes over 40 mentions and an entire section.
http://www.sandag.org/programs/transportation/comprehensive_transportation_projects/2030rtp/2007eir_4.pdf

her office's approach to implementing SB97.²⁴ Between April and August 2007, 48 planning documents submitted to her office mentioned climate change. This represents 3.4% of the documents of that type submitted at that time.

Bryant's presentation discusses elements of GHG sections of EIRs. The analyses have typically included the regulatory setting. Some have included a calculation of GHGs from the project. If the agencies found significance, then they included suggested mitigations that would reduce GHGs. Two examples of mitigations were planting trees in riparian zones, and turning off truck engines when idling. The presentation ends by noting that three organizations are developing guidance to local agencies: California Air Pollution Control Officers Association (CAPCOA), the League of California Cities, and the California State Association of Counties (CSAC).

The lack of a specific health standard for GHGs from the EPA leaves the determination of significance on the lead agency. Lead agencies cannot use existing air quality guidance documents for criteria pollutants for use in determining a level for GHGs. SANDAG's qualitative description of GHGs provides a template that can be easily inserted into EIRs.

5) Recent White Papers

The most recent "literature" in assessing GHGs in CEQA is a set of White Papers written by various attorneys, law firms, associations, and consultants.

The September 14, 2007 newsletter of the lawfirm Akin, Gump, Strauss, Hauer & Feld LLP discussed, "Affirmative use of the California Environmental Quality Act to require consideration of climate change impacts in land use planning."²⁵ The newsletter described AB32, the Attorney General's San Bernardino settlement, the Center for Biological Diversity's lawsuits, and ends by raising the possibility that CEQA lawsuits over GHGs may be the start of a trend.

Owen White Paper for Planning and Conservation League

Dave Owen, an attorney at the law firm of Rossmann and Moore, wrote a memo titled, "Climate Change and the California Environmental Quality Act" which has been circulated by the Planning and Conservation League, an advocacy group in Sacramento that works with a number of environmental groups to advocate for environmental protection.²⁶ The memo describes the dangers of climate change, and lists reasons why CEQA requires agencies to consider GHGs. The author states unequivocally that climate

²⁴ Bryant, Cynthia, Director, Governor's Office of Planning and Research. "Climate Change and CEQA," Power Point Presentation to the Climate Action Team, September 19, 2007, accessed at www.climatechange.ca.gov/documents/2007-09-19_OPR_PRESENTATION.PDF.

²⁵ Akin, Gump, Strauss, Hauer & Feld LLP, "Affirmative use of the California Environmental Quality Act to require consideration of climate change impacts in land use planning," September 14, 2007 newsletter. <http://www.akingump.com/docs/publication/1026.pdf>

²⁶ Owen, Dave. "Climate Change and the California Environmental Quality Act" Rossmann and Moore. LLP. For details contact mvandersluis@pcl.org.

impacts “pose an extraordinary environmental threat,” are significant and must be mitigated. Owen suggests agencies list potential climate change impacts, and include project alternatives that result in lower GHGs. For example, in an EIR for a road project, the EIR could list a transit improvement as an alternative. For a power plant, the EIR could list a renewable energy project as an alternative. When alternatives are infeasible, Owen recommends on-site mitigation followed by off-site mitigation.

Zischke memo for AB32IG

Michael Zischke, the attorney who also wrote an article in the 1993 Land Use Reform journal on CEQA Reform recently presented a paper at an environmental law conference titled, “Climate change and the California Environmental Quality Act.”²⁷ The authors believe that with AB32 the State intended CARB to be the main decisionmaker in how the state addresses climate change. They believe the activity in the courts and by the Attorney General is counterproductive, and if it causes land use agencies to require actions to address climate change under CEQA ahead of CARB’s decision, that it could put an unfair burden on the land use sector. If CARB decides to put GHGs in CEQA, that is a different matter, but the authors believe we don’t know what CARB will do at this point, and we shouldn’t try to guess.

One interesting point the paper makes is that in some cases land use projects are shifting emissions around the state, but not creating new emissions. The reason for this is that a new housing development in one part of the state may attract residents from another part of the state, and the emissions will decrease elsewhere when people move away from their old city. This makes quantification more difficult.

The authors also believe that GHGs are not a special case separate from other environmental impacts, and they defend the choice of lead agencies to describe climate change as a possible impact, and then state that it is impossible to quantify the impact. They describe two approaches to including GHGs in CEQA.

First, the EIR could include a qualitative discussion which concludes that any specific impacts would be speculative. The reasoning is that there is no accepted methodology and no threshold of significance or guidelines for GHGs.

Second, the EIR could take a quantitative approach, conduct emissions inventory to assess cumulative impact, add some mitigations, and then conclude that either given some mitigation, the project is less than significant, or declare overriding considerations in order for the project to continue. The authors feel that this approach has some problems. They point to the limitations in aggregate data models such as EMFAC which is used to estimate vehicle miles traveled, an important input to estimate GHGs resulting from transportation. The authors believe that land use projects may shift transportation demand around the state, but do not necessarily create new VMTs. In other words, the VMTs from the project may reduce VMTs elsewhere, unless people move from out of

²⁷ Zischke, Michael and Sarah Owsowitz. “Climate change and the California Environmental Quality Act ,” October 21, 2007.

state to the project location. The one example cited that may use this approach is Marin County's General Plan.

It should be noted that the article was published on the AB32 Implementation Group website. The AB32 Implementation Group was formed by the California Chamber of Commerce, and has as members a constituency much more aligned with the building industry cited earlier as being more skeptical of CEQA.

Jones and Stokes White Paper

The environmental consulting firm Jones and Stokes issued a White Paper in August 2007 entitled, "Addressing Climate Change in NEPA and CEQA Documents."²⁸ The paper discusses GHGs in CEQA and NEPA and states that there are two main questions that frame any subsequent analysis: 1) How will the project affect climate change? And 2) How will the project be affected by climate change? The paper believes that the "*de minimis argument*" that the proposed project's contribution relative to the size of the problem is inconsequential is problematic, and that until guidelines are adopted local agencies will pursue an ad hoc approach. The paper also discusses the two categories of emissions: direct emissions and indirect emissions. The paper discusses qualitative and quantitative approaches, and also poses the question about defining a non-zero significance threshold for GHGs. For California, they could approximate the AB32 goals as a percentage below baseline, and apply that to the project. Another approach could be to take local Climate Action Plans such as those in Marin and San Francisco and if a project used all mitigations listed, they could claim they had taken all the steps they could.

Pat Nelson Memo for Climate Protection Campaign

Pat Nelson, an attorney based in Sonoma County, assembled a memo on behalf of the Climate Protection Campaign, a non-profit that works with local government and community stakeholders to reduce GHGs in Sonoma County. The memo, titled "CEQA Analysis of Climate Impacts," discusses AB32, the lawsuits mentioned above, and potential approaches in California. It also explains how, in contrast to California, the State of Massachusetts mandated the incorporation of climate change impacts in all MEPA documents due to executive order of the Governor, and that Canada and Australia's Northern Territory produced guidance language through legislation.

Association of Environmental Professionals

Michael Hendrix and Cori Wilson, and several contributing authors released a White Paper for the Association of Environmental Professionals titled, "Alternative Approaches to Analyze Greenhouse Gas Emissions and Global Climate Change in CEQA

²⁸ Held, Tony et al. "Addressing Climate Change in NEPA and CEQA Documents" Jones & Stokes. Climate Change Focus Group. www.climatechangeandfocusgroup.com.

Documents.”²⁹ The paper states that individual projects do not emit enough GHGs to affect the global climate, therefore, GHGs are only a cumulative impact. The paper lists several possible approaches: no analysis, screening analysis, qualitative analysis without significance determination, qualitative analysis with significance determination, quantitative analysis without significance determination, quantitative analysis with zero net threshold, quantitative analysis relative to California’s GHG emission strategies. Mitigation measures may be onsite, or they may involve “carbon offsets” in future carbon trading schemes.

6) Analysis, discussion, and conclusions:

Defining a Threshold of Significance for GHGs:

All of the White Papers written since AB32 believe that climate change impacts will be incorporated into CEQA. The question is how. The same issues that affect CEQA in other environmental issues also affect the opinions of the writers on GHGs:

Will climate change just become one more section in already-too-long EIRs? Will agencies use boilerplate language and then declare either “no significant impact,” “there is no protocol,” or “overriding considerations” and continue as if nothing had changed? These are valid concerns, but no different than concerns about any other environmental problem in CEQA. Judging from the CEQA reform literature, this is a problem that may be with us for the foreseeable future.

One question that seems to be settled is whether any single project in California should have to mitigate its climate change impact when coal-fired power plants are being built in China every week. This objection is met by the language of CEQA and AB32. If the project contributes to an environmental problem, and climate change is now formally recognized as such, then China’s actions are irrelevant to whether GHGs must be considered in CEQA. The White Papers agree that climate change is a cumulative impact, and must be addressed in CEQA.

Another question is whether offsite offsets should be allowed as mitigations. UCLA Environmental Law Professor Sean Hecht believes that not allowing offsite offsets may result in no mitigations being adopted, since agencies may simply cite overriding considerations every time. In his view, offsets will at least provide some measurable outcome while allowing projects to proceed. The opposing view is that it may end up like offsite wetland mitigation, which was more problematic to implement than first envisioned. Further research could be done on criteria for offsite offsets to comply with CEQA.

²⁹ Hendrix, Michael and Cori Wilson et al. “Alternative Approaches to Analyze Greenhouse Gas Emissions and Global Climate Change in CEQA Documents.” Revised Draft, Association of Environmental Professionals, April 27, 2007 available online at <http://www.califaep.org/userdocuments/File/AEP%20White%20Paper%20April%2027%20print.pdf>

Air Quality Guidance Documents provided little help in determining a threshold of significance. Lead agencies may find themselves using arbitrary standards until the OPR issues its guidance. Also the U.S. EPA will need to develop new methodologies separate from localized health impacts. In the meantime, SANDAG's Regional Transportation Plan's qualitative approach provides a safe approach for local agencies to include GHGs in CEQA. However, lacking a quantitative approach, agencies will be out on a limb in determining the significance of the impact and in prescribing mitigations.

Should the threshold for GHGs be zero?

In interviews, several observers believe that zero is the most likely outcome for a threshold of significance.³⁰ The reasons given for this are:

- GHGs are a cumulative impact, so any addition is significant
- It would be more difficult to justify any non-zero threshold than a zero threshold

On the other hand, the AEP White Paper discussed using a percent reduction equivalent to the state reduction target as a threshold. One could also make the case for matching local reduction plans, such as Marin County's. The difficulty is translating a percent reduction from a "constructed" baseline. This is the same problem faced by carbon offsets which cannot prove "additionality" – which elements of the baseline are fixed, and which are additional.

One possible approach to determine baselines taken by some cities is to define a "Level of Service." This is sometimes used for traffic congestion. Lead agencies are able to determine for themselves what level of service is acceptable. This concept could be applied to GHGs. A jurisdiction could apply a Level of Service to aspects of its operations within the context of a GHG Reduction Plan. The cumulative impact problem makes this less than ideal, but it could provide one answer to a non-zero threshold of significance.

Determining a "baseline" against which to compare impacts is important. Most climate change plans refer to 1990, a convention taken from the Kyoto Protocol, but when data is lacking, many local jurisdictions may use 2000 or 2005. CEQA case law says that EIRs should use "existing facilities" or "existing environment" as the baseline for determining significant impacts. This prevents the difficulties in comparing a General Plan with a General Plan Update when future development is still hypothetical. For this reason, past baselines are more consistent with CEQA than "constructed business-as-usual" baselines.

Standardized Mitigation Measures:

The CEQA reform literature recommended improving CEQA by adopting uniform standardized threshold and mitigation policies. It seems that this recommendation would apply especially to climate change impacts and GHGs given the confusion over the presumed ad hoc assignment of impact and application of mitigations. Providing a broad

³⁰ Interview with Professor Sean Hecht, UCLA Environmental Law Clinic 11/1/2007. Interview with Matt VanderSluis, Director of Climate Change Programs at Planning and Conservation League 11/14/2007.

list of mitigations could reduce uncertainty for a category of such wide-ranging impacts. The U.S. Green Building Council's LEED-ND (Neighborhood Design) checklist could be the basis for a set of standard mitigation policies.³¹ LEED-ND is still in the pilot phase, but it holds much promise for providing a platform for comparing neighborhood design. Rather than focusing on a specific structure as previous LEED standards did, LEED-ND looks at whole neighborhoods, and allows for integration of existing surroundings into the points system. This specifically would reward infill and smart growth, and penalize sprawl. The LEED-ND checklist may have broad applicability in CEQA. A suggested topic for future research is the applicability of the U.S. Green Building Council's LEED-ND checklist as a standardized approach to mitigations of GHGs in CEQA.

An important criticism of CEQA from the perspective of climate change impact is that its application could lead to sprawl, as common impacts are traffic congestion, lack of parking, etc. The typical mitigation is to decrease density. With California's affordable housing crisis and rampant sprawl, it is very important to provide incentives for local agencies to preserve higher densities, infill, and smart growth. Adding GHGs to CEQA could counter the traffic mitigations and help lead agencies look to other mitigations besides simply reducing density. Examples could be reducing the minimum parking allotment, requiring a certain percentage of residents to utilize car-sharing services, and encouraging development near existing transit (implying continued or increased investment in transit).

Another suggestion from the CEQA and NEPA reform literature is developing an environmental management systems-type monitoring of mitigations. Adding GHGs to CEQA could facilitate in this regard, since monitoring of GHGs could provide a quantitative perspective on several issues, from vehicles miles traveled to electricity use, energy efficiency, renewable energy, and more.

In conclusion, the incorporation of GHGs into CEQA will hopefully improve the environmental impacts of projects. Lead agencies need additional guidance to make dealing with the climate change impacts of land use decisions manageable. The arguments for a threshold of significance for GHGs of zero are stronger than for an arbitrary numerical threshold. Even so, developers could survive the imposition of such a strong standard if standardized mitigation measures are adopted. Perhaps the LEED-ND checklist could provide an example of such a list.

³¹ See Appendix C.

Appendix A:

The Attorney General's Office issued a News Alert listing actions such as energy efficiency and smart growth principles that local governments could include in their General Plans and EIRs that would reduce GHGs from projects, including:

- high-density developments that reduce vehicle trips and utilize public transit
- parking spaces for high-occupancy vehicles and car-share programs
- electric vehicle charging facilities and conveniently located alternative fueling stations
- limits on parking
- transportation impact fees on developments to fund public transit service
- regional transportation centers where various types of public transportation meet
- energy-efficient design for buildings, appliances, lighting and office equipment
- solar panels, water reuse systems and on-site renewable energy production
- methane recovery in landfills and wastewater treatment plants to generate electricity
- carbon emissions credit purchases that fund alternative energy projects.

Appendix B:

Sample Qualitative Language from SANDAG 2007 RTP EIR:

Although a discussion of global warming (also referred to herein as "climate change" or "global climate change") impacts is not currently required by the CEQA Statutes or Guidelines, it is the view of the State Legislature (as expressed in its adoption of AB 32, The California Climate Solutions Act of 2006) and the Governor (through the issue of Executive Order #S-3-05) that global warming poses significant adverse effects to the environment of California and the entire world, and that mitigation measures are needed to limit these impacts. In addition, the global scientific community has expressed very high confidence (i.e., at least 90 percent) that global warming is anthropogenic (i.e., caused by humans) and that global warming will lead to adverse climate change effects around the globe (IPCC 2007). In addition, it is the opinion of the California Attorney General that SANDAG has an obligation under CEQA to evaluate the potential global warming impacts of the proposed 2007 RTP (AG 2007). Therefore, this section evaluates the potential direct and cumulative global warming impacts of development under the proposed 2007 RTP for potential significance under CEQA.

The State Legislature adopted the public policy position that global warming is, "a serious threat to the economic well-being, public health, natural resources, and the environment of California" (Health and Safety Code § 38501). Further, the State Legislature has determined that, "the potential adverse impacts of global warming include the exacerbation of air quality problems, a reduction in the quality and supply of water to the state from the Sierra snowpack, a rise in sea levels resulting in the displacement of

thousands of coastal businesses and residences, damage to marine ecosystems and the natural environment, and an increase in the incidences of infectious disease, asthma, and other human health-related problems," and that, "(g)lobal warming will have detrimental effects on some of California's largest industries, including agriculture, wine, tourism, skiing, recreational and commercial fishing, and forestry (and)...will also increase the strain on electricity supplies necessary to meet the demand for summer air-conditioning in the hottest parts of the State" (Health and Safety Code § 38501). These public policy statements became law with the enactment of AB 32, Statutes of 2006.

Under the emissions scenarios of the Climate Scenarios report (California Climate Change Center 2006), the impacts of global warming in California are anticipated to include, but are not limited to, the following:

- Public Health
- Water Resources
- Agriculture
- Forests and Landscapes
- Rising Sea Levels
- and more.

In light of the substantial GHG emission reductions established by the State Legislature to mitigate the significant adverse environmental effects of global climate change, the following global climate change significance threshold is used for this analysis. This threshold has been identified for the purposes of the proposed 2007 RTP EIR only. The project's incremental contribution to global climate change would be considered cumulatively significant if it would generate a cumulatively considerable increase in GHG emissions.

Appendix C:

USGBC's LEED-ND could be used in the future as a mitigations checklist to address GHGs in CEQA.

Pilot Version: LEED for Neighborhood Development Rating System³²

Updated June 2007

Project Checklist

Smart Location & Linkage

Prereq 1 Smart Location

30 Possible Points

Required

Prereq 2 Proximity to Water and Wastewater Infrastructure

Required

Prereq 3 Imperiled Species and Ecological Communities

Required

Prereq 4 Wetland and Water Body Conservation

Required

Prereq 5 Agricultural Land Conservation

Required

Prereq 6 Floodplain Avoidance

Required

³² US Green Building Council: LEED for Neighborhood Development Rating System
www.usgbc.org/leed/nd/

Credit 1 Brownfield Redevelopment	2
Credit 2 High Priority Brownfields Redevelopment	1
Credit 3 Preferred Locations	2-10
Credit 4 Reduced Automobile Dependence	1-8
Credit 5 Bicycle Network	1
Credit 6 Housing and Jobs Proximity	3
Credit 7 School Proximity	1
Credit 8 Steep Slope Protection	1
Credit 9 Site Design for Habitat or Wetlands Conservation	1
Credit 10 Restoration of Habitat or Wetlands	1
Credit 11 Conservation Management of Habitat or Wetlands	1
Neighborhood Pattern & Design	39 Possible Points
Prereq 1 Open Community	Required
Prereq 2 Compact Development	Required
Credit 1 Compact Development	1-7
Credit 2 Diversity of Uses	1-4
Credit 3 Diversity of Housing Types	1-3
Credit 4 Affordable Rental Housing	1-2
Credit 5 Affordable For-Sale Housing	1-2
Credit 6 Reduced Parking Footprint	2
Credit 7 Walkable Streets	4-8
Credit 8 Street Network	1-2
Credit 9 Transit Facilities	1
Credit 10 Transportation Demand Management	2
Credit 11 Access to Surrounding Vicinity	1
Credit 12 Access to Public Spaces	1
Credit 13 Access to Active Public Spaces	1
Credit 14 Universal Accessibility	1
Credit 15 Community Outreach and Involvement	1
Credit 16 Local Food Production	1
Green Construction & Technology	31 Possible Points
Prereq 1 Construction Activity Pollution Prevention	Required
Credit 1 Certified Green Buildings	1-3
Credit 2 Energy Efficiency in Buildings	1-3
Credit 3 Reduced Water Use	1-3
Credit 4 Building Reuse and Adaptive Reuse	1-2
Credit 5 Reuse of Historic Buildings	1
Credit 6 Minimize Site Disturbance through Site Design	1
Credit 7 Minimize Site Disturbance during Construction	1
Credit 8 Contaminant Reduction in Brownfields Remediation	1
Credit 9 Stormwater Management	1-5
Credit 10 Heat Island Reduction	1
Credit 11 Solar Orientation	1
Credit 12 On-Site Energy Generation	1
Credit 13 On-Site Renewable Energy Sources	1
Credit 14 District Heating and Cooling	1

Credit 15 Infrastructure Energy Efficiency	1
Credit 16 Wastewater Management	1
Credit 17 Recycled Content in Infrastructure	1
Credit 18 Construction Waste Management	1
Credit 19 Comprehensive Waste Management	1
Credit 20 Light Pollution Reduction	1
Innovation & Design Process	6 Possible Points
Credit 1 Innovation in Design	1-5
Credit 2 LEED Accredited Professional	1
Project Totals	106 Possible Points
Certification Levels:	
Certified 40-49 points	
Silver 50-59 points	
Gold 60-79 points	
Platinum 80-106 points	