LATHAM & WATKINS LLP

Wednesday, March 19, 2014

webcast

Project Development Trends and Updates: March 2014

Agenda

- Ninth Circuit Upholds National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA) Analysis for Hawaii High-Speed Rail System
- Recent Developments Related to Analysis of GHG Emissions Under California Environmental Quality Act (CEQA)

LATHAM & WATKINS LLP

Webcast

Ninth Circuit Upholds NEPA and NHPA Analysis for Hawaii High-Speed Rail System

Daniel P. Brunton
Benjamin J. Hanelin

HonoluluTraffic.com: Background

- In *HonoluluTraffic.com v. Federal Transit Administration,* 2014 U.S. App. LEXIS 2929 (9th Cir. Feb. 18, 2014), the Ninth Circuit rejected challenges to a high-speed rail project through Honolulu.
  - The high-speed rail line would stretch 20 miles from the University of Hawaii at Manoa in western Oahu through downtown Honolulu, the second-most congested metropolitan area in the nation.
  - There is an ongoing controversy over the method and route of mass transit through downtown Honolulu.
  - The project was developed as part of the federal Regional Transportation Plan.
- The district court granted summary judgment to Defendants on their NEPA and NHPA claims.

HonoluluTraffic.com

http://the.honoluluadvertiser.com/article/2004/Sep/08/ln/ln01a.html

http://www.beyondhonolulu.com/hawaii-drivers-need-to-brace-themselves-for-back-to-school-traffic/

http://www.p4sc.org/articles/all/hawaii-proposes-exempting-transit-oriented-development-land-use-laws

HonoluluTraffic.com

Honolulu Authority for Rapid Transportation

http://www.honolulutransit.org/

HonoluluTraffic.com: National Environmental Policy Act (NEPA)

- Plaintiffs challenged the NEPA purpose and need statement as unreasonably restrictive.
  - The court rejected the challenge even though the purpose was narrowly defined and included the purpose of providing "high-capacity rapid transit" in the identified corridor.
  - The purpose and need statement allowed for various routes and technologies and "did not foreclose all alternatives."
  - The project's purpose "was shaped by federal legislative purposes."

HonoluluTraffic.com: NEPA – Cont'd

- Plaintiffs challenged the alternatives analysis under NEPA for failure to analyze a sufficient range of alternatives.
  - It was proper for Defendants to omit discussion of alternatives that were rejected in prior state studies when those studies were subject to federal guidance and public review.
  - Defendants' brief discussion dismissing new managed lanes and light-rail alternatives as too costly or infeasible was sufficient.

HonoluluTraffic.com: National Historic Preservation Act (NHPA)

- Plaintiffs challenged the project for failing to conduct full archeological studies along the entire 20-mile stretch of the project's route.
  - The project was likely to disturb undiscovered burial sites.
  - The Defendants met their burden of "a reasonable and good faith effort" under Section 106 of the NHPA by commissioning an archeological report "to identify unknown burial sites and predict the likelihood of finding additional burial sites."
    - The report included "soil survey data, archeological records, land survey maps, and field observations."
    - Full surveys were likely to disturb burial sites and an exact route and support column placement had not been determined.
  - Defendants entered an agreement with the State Historic Preservation Officer, the Advisory Council on Historic Preservation, and other agencies.

HonoluluTraffic.com: Lessons

- Take away lessons from *HonoluluTraffic.com*
  - Project proponents can rely on previous planning documents to narrow the scope of alternatives an agency must evaluate under NEPA.
    - Many projects are developed in settings where state and federal agencies have made previous planning decisions.
  - The requirement to identify sites eligible for listing on the National Register of Historic Places under Section 106 of the NHPA is limited to a “reasonable and good faith effort.”
    - An EIS does not necessarily need full archeological field surveys and exploration for the entirety of the project.

Native Village of Point Hope: Background

- In *Native Village of Point Hope v. Jewell*, 2014 U.S. App. LEXIS 1150 (9th Cir. Jan. 22, 2014), the Ninth Circuit reversed the district court's decision granting summary judgment to the Bureau of Ocean Energy Management (BOEM) against challenges to its EIS and SEIS.
  - BOEM approved the lease of parcels for oil development in the Chukchi Sea between Alaska and Russia, which is home to a wide variety of animals (bowhead whales, polar bear, pacific walrus, seals, fish, and birds).
- BOEM based its environmental review on an estimate of one billion barrels of recoverable oil from only the first oil field. It also determined that certain missing information was not essential at the leasing stage.

Native Village of Point Hope

http://en.wikipedia.org/wiki/Chukchi_Sea

Native Village of Point Hope

http://www.alaskadispatch.com/article/looking-past-move-forward-0

Native Village of Point Hope: Arbitrary Estimate

- The court rejected BOEM's estimate of one billion barrels of recoverable oil as arbitrary and capricious for three reasons.
  - BOEM chose the lowest possible amount of oil that could be economically produced.
    - It was irrelevant that BOEM determined that any oil production was unlikely. BOEM should have evaluated the environmental effects if oil development *does* occur. Also, the low likelihood of production determination itself lacked a rational basis.
  - The estimate failed to account for variation in oil prices.
  - BOEM did not adequately explain its decision to limit the estimate to only the first oil field's production.
    - Later site-specific EISs were inadequate because the effects of total oil production should be evaluated at the time of the lease.
- Dissent: Predictive forecasts warrant particular deference to agency expertise.

Native Village of Point Hope: Essential Information

- The court rejected a challenge to BOEM's decision that missing information was not essential at the lease stage.
  - The EIS and SEIS did not include information about certain animal populations. The SEIS noted that the severe effects from a large oil spill would be "nearly identical under any alternative."
- The court approved BOEM's approach to rely on compliance with environmental protection statutes, such as the Marine Mammal Protection Act and Endangered Species Act, in determining the missing information was not essential.
- Consequently, BOEM did not need to determine whether the missing information was unobtainable.

Native Village of Point Hope: Lessons

- Take away lessons from *Native Village of Point Hope*
  - There is a limit to agency deference, even regarding predictive forecasts.
    - Accounting for factors that could cause variation in the predictions and predicting a range of results rather than a single point may increase the likelihood an EIS will be upheld.
  - When it is reasonably foreseeable that development will occur, even if it is unlikely, an agency should evaluate the environmental effects if the development does occur.
  - Missing information is not “essential” if compliance with other statutes will provide adequate environmental protection and the information would not affect the choice between alternatives.

LATHAM & WATKINS LLP

Webcast

Recent Developments Related to Analysis of GHG Emissions Under CEQA

Joshua T. Bledsoe

California Environmental Quality Act – The Basics

- Requires state and local agencies to:
  - Identify the significant environmental impacts of their actions; and
  - Avoid or mitigate those impacts, if feasible

- Cumulative Impacts
  - Small impacts of individual projects cannot be ignored
  - Rather, they must be aggregated with similar impacts from other projects and evaluated

CEQA Analysis of Climate Change Impacts – The History

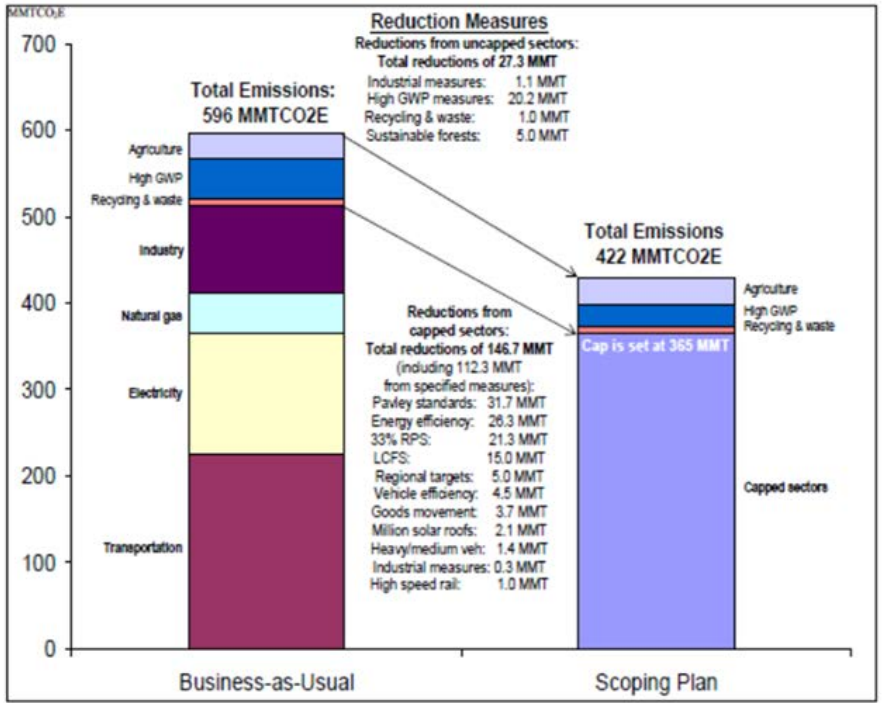
- Analysis of GHG emissions is relatively new
- Triggered by Global Warming Solutions Act of 2006 (AB 32)
- GHG emissions are prototypical cumulative impact as climate change is global
  - There are no GHG "hot spots"
- No measurement threshold to assess how a project impacts global climate
- Impacts are long-term and likely not felt until after project's useful life
- No firm guidance issued by California – a patchwork developed across the State

Approaches to Analyzing GHG Emissions in CEQA Documents

- Approach depends on:
  - Type of project; and
  - Whether lead agency or air district promulgated threshold of significance
- Most common approach is Break-From-BAU ("Business as Usual")
- Elements of Break-From-BAU:
  - Rigorous inventory of emissions (baseline, BAU project, project as proposed)
  - BAU = GHG emissions that would occur in 2020 if reduction actions are not taken
  - Emissions not significant if consistent with AB 32, as measured via the break-from-BAU required statewide (28.4% vs. 21.7% vs. 16% vs. 15%)
  - Take appropriate credit for state mandates (e.g., RPS, Pavley, LCFS, etc.)
  - Add Project Design Features to get over the hump
  - Avoid a finding of significance and requirement to adopt all feasible mitigation measures

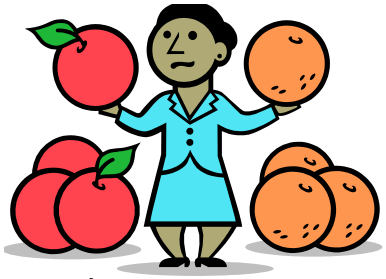
Rationale For Break-From-BAU Approach

- Since climate change is a global problem, selection of a mass-based threshold would be arbitrary
- Carbon efficiency is central to combating climate change
- Leverages AB 32 and ARB Scoping Plan since state developed emission reduction targets to avoid worst impacts of climate change
- Put State on path to achieve 2050 goal of 80% below 1990 levels, which generally equates to climate stabilization
- State is doing most of the heavy lifting, which is commonsensical given comprehensive nature of AB 32



Case Law Support – *Friends of Oroville, et al., v. City of Oroville*, 218 Cal. App. 4th 1352 (2013)

- Project = Replace an existing Wal-Mart store with a Superstore (retail + grocery)
- Confirmed that analyzing a project's GHG emissions via a threshold-of-significance derived from California's GHG emissions reduction goals is appropriate
- Used 30% Break-From-BAU
- Implicit approval of flexibility for Environmental Impact Reports (EIRs) in calculating the necessary Break-From-BAU
- Held that this threshold-of-significance was applied improperly and remanded the case to the trial court to grant the requested writ of mandate because EIR:
  - Compared store's emissions to statewide emissions (apples to oranges)
  - Failed to calculate the existing store's GHG emissions.
  - Failed to set forth, either quantitatively or qualitatively, the specific emissions reduction benefits of the EIR's Mitigation Measures



Case Law Support – *Citizens for Responsible Equitable Environmental Development (CREED) v. City of Chula Vista*, 197 Cal. App. 4th 327 (2011)

- Project = Replace old Target store with a newer, larger Target store
- Mitigated Negative Declaration (MND), not EIR
- Court deemed proper a 25% Break-From-BAU threshold-of-significance
- Project resulted in net reduction in GHG emissions from baseline
    - Begs the question of why MND even engaged in the BAU analysis

(Potential) Case Law Support – *Center for Biological Diversity v. California Department of Fish and Wildlife* (Cal. Court of Appeal, 2nd Appellate District, Case Number B245131)

- Trial court opinion is strong indictment of Break-From-BAU
  - Conflates baseline and using BAU as measurement tool
  - Clearly prefers mass-based threshold
  - Narrow reading of California Air Pollution Control Officers Association (CAPCOA) White Paper
  - No reference to *Citizens for Responsible Equitable Environmental Development (CREED) v. City of Chula Vista,* 197 Cal.App.4th 327 (2011).
- *Friends of Oroville, et al., v. City of Oroville* published since trial court decision
- Supplemental briefing on *Neighbors for Smart Rail*
- Oral argument heard on February 5, 2014
  - Decision should be released soon, though it could come as late as May
  - Opinion likely to be published

CALIFORNIA DEPARTMENT OF FISH and WILDLIFE

CAPCOA Greenhouse Gas Reduction Exchange (GHG Rx) www.ghgrx.org

- Rolled out in early January 2014
- Developed by CAPCOA, a non-profit organization composed of the 35 local air quality districts throughout the state
- New option to mitigate emissions: "CAPCOA anticipates that lead agency compliance with mitigation requirements under the California Environmental Quality Act (CEQA) will likely be the primary use for GHG credits listed on the GHG Rx."
- Locally generated credits from projects within California
- Facilitates communication between those who create the credits, potential buyers, and funding organizations
- No credits listed yet except for SJVAPCD (23 projects)

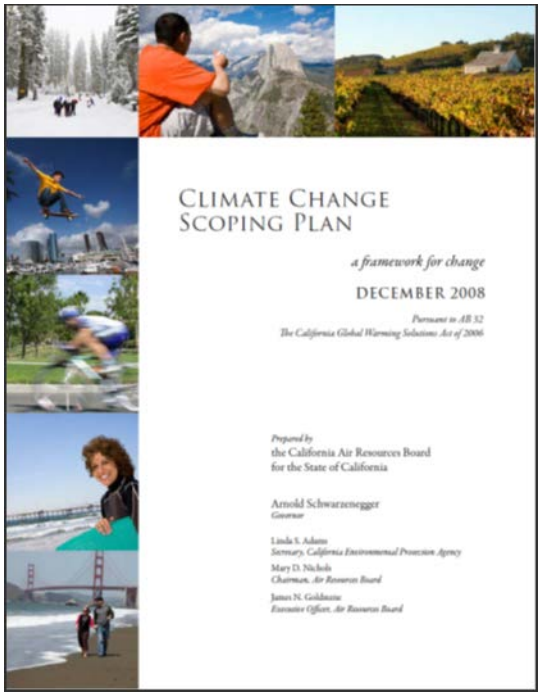
OPR CEQA Guidelines
2014 Update (released on Dec. 30, 2013)

- **Section 15064.4 (Determining the Significance of Impacts From Greenhouse Gas Emissions)**: "Clarify that analysis of greenhouse gas emissions is required, and the role of the Scoping Plan in determining the significance of greenhouse gas emissions. Further clarify that 'business as usual' (or hypothetical baseline) analysis is not appropriate. Also clarify that, particularly for long range plans, lack of complete precision in projections of emissions will not make the use of models inadequate for information disclosure purposes."

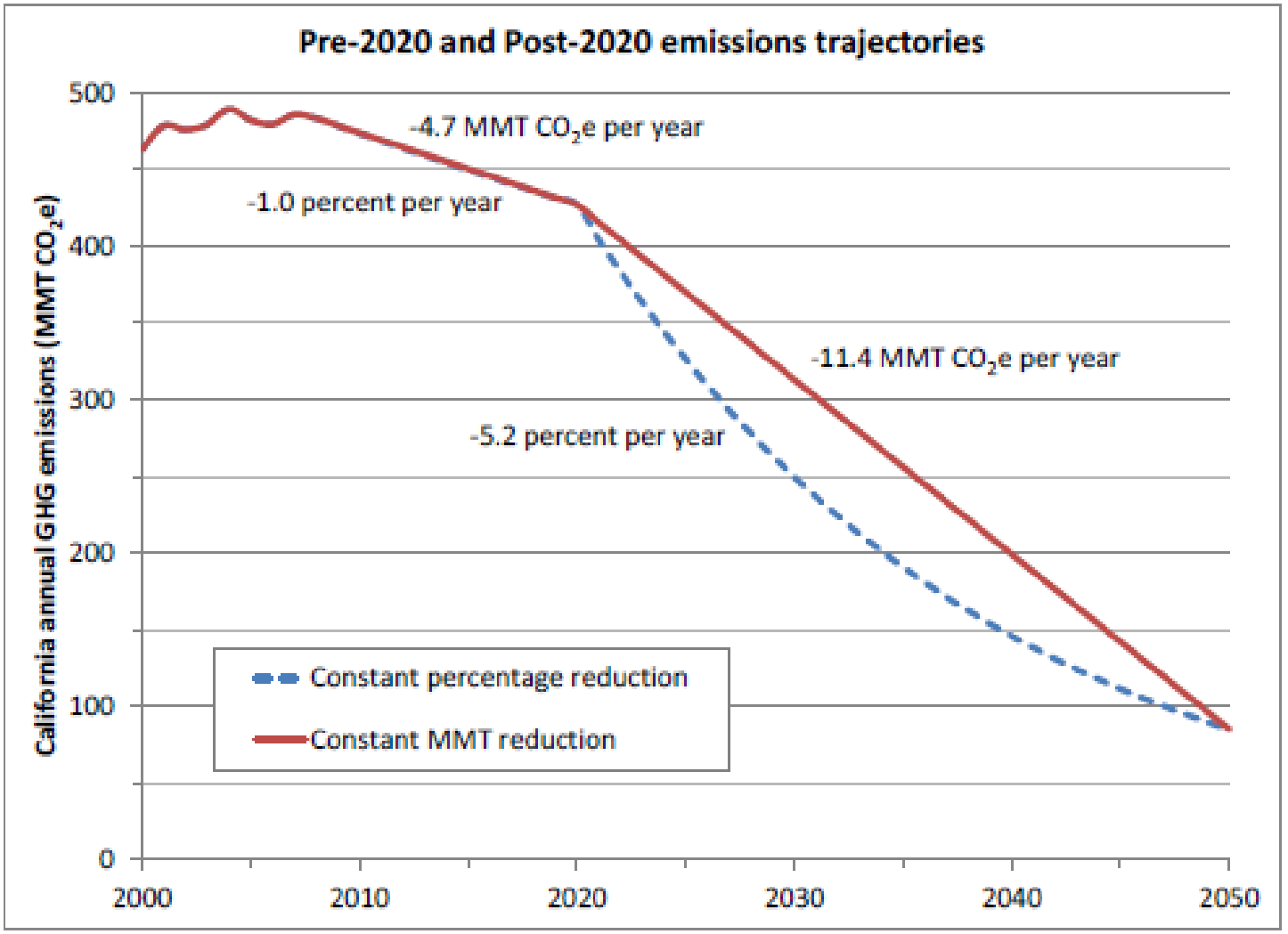
- **Section 15125 (Environmental Setting)**: "Provide guidance on appropriateness of use of alternative baselines, including changes resulting from climate change, future baselines to address large-scale infrastructure, historic use, and unpermitted uses. … Clarify the analysis of consistency with adopted plans, both local and regional."

Looking Forward
Changes to Break-From-BAU Approach

- Projects with build-outs beyond 2020
- State “preemption” or “occupying the field” of GHG regulation
- 2030 target is forthcoming – ARB Scoping Plan Update and SB 1125 (Pavley)
  - January 1, 2016 deadline for ARB “timetable” report to Legislature
  - Likely 35-45% below 1990 levels
- Title 24 and Net-zero energy buildings
  - Residential 2020
  - Commercial 2030
- Short-Lived Climate Pollutants (e.g., black carbon)



Framing the Path to 2050



LATHAM & WATKINS LLP

Webcast

Questions

Contact Information

Michael J. Carroll
Moderator
Partner, Orange County
email: michael.carroll@lw.com
Phone: +1.714.755.8105

Joshua T. Bledsoe
Counsel, Orange County
email: joshua.bledsoe@lw.com
Phone: +1.714.755.8049

Daniel P. Brunton
Counsel, San Diego.
email: daniel.brunton@lw.com
Phone: +1.858.523.5421

Benjamin J. Hanelin
Counsel, Los Angeles
email: benjamin.hanelin@lw.com
Phone: +1.213.485.1234

Disclaimer

Although this presentation may provide information concerning potential legal issues, it is not a substitute for legal advice from qualified counsel. Any opinions or conclusions provided in this presentation shall not be ascribed to Latham & Watkins or any clients of the firm.

The presentation is not created or designed to address the unique facts or circumstances that may arise in any specific instance, and you should not and are not authorized to rely on this content as a source of legal advice and this seminar material does not create any attorney-client relationship between you and Latham & Watkins.