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CEQA And Climate Change: One Year After AB 32

1/14/2008 --- Climate change has captured the attention of the media, the courts, and the legislature since California Governor Arnold Schwarzenegger signed the Global Warming Solutions Act of 2006 (Assembly Bill 32 or AB 32) in September 2006.

One year after the passage of this landmark legislation, it is clear that one of the most controversial questions raised by AB 32's passage is how to address climate change under California's environmental disclosure law, the California Environmental Quality Act.

California Attorney General Jerry Brown has played a central role in this debate by vigorously advocating for climate change analysis in CEQA documents.

After taking office in January 2007, Attorney General Brown accelerated the practice initiated by former Attorney General Bill Lockyer of filing comment letters urging local agencies to study, disclose, and mitigate climate change impacts in CEQA documents.

CEQA litigants, including the attorney general, have also filed suit based on agencies' alleged failures to consider climate change adequately. At least three trial courts have addressed the issue, and several recent ground-breaking CEQA settlements will require considerable efforts to reduce greenhouse gas (GHG) emissions.

Largely in response to these CEQA lawsuits, a summertime budget standoff in the California legislature persisted for two months as Republican senators advocated for a moratorium on such suits until AB 32 is fully implemented in 2012.

The budget impasse generated Senate Bill 97, which directs the governor's Office of Planning and Research to develop CEQA guidelines on climate change by July 2009.

In the midst of these events, the California Air Resources Board, the governor's Climate Action Team and numerous state agencies continue to implement AB 32 and the governor's 2005 executive order on climate change. [1]

Clearly, California's rapidly evolving climate change laws raise significant issues for CEQA compliance. This article reviews those issues and possible approaches to addressing climate change under CEQA.

The Legislation: AB 32 and SB 97

By enacting AB 32, the legislature voiced its opinion that, consistent with the scientific consensus, climate change is partly attributable to human-generated GHG emissions.[2]

AB 32 declares climate change to be "a serious threat to the economic well-being, public health, natural resources, and the environment of California," and directs the California Air Resources Board to reduce GHG emissions to 1990 levels by 2020 (see Chart 1).[3]

CARB has proposed a 25,000 metric ton emissions level as the de minimis threshold below which it will not regulate. [4]

Chart 1: AB 32 Implementation Timeline

Notably, AB 32 included no language addressing the intersection between California's new climate change requirements and CEQA obligations.

While this lack of guidance has created a great deal of uncertainty, work is being done to address this issue. SB 97, discussed above, now requires OPR to provide the California Resources Agency with CEQA Guidelines regarding GHG emissions by July 1, 2009.[5]

The Resources Agency must then certify and adopt these CEQA Guidelines by Jan. 1, 2010.

SB 97 also bars climate change-based CEQA suits against projects funded by the Highway Safety, Traffic Reduction, Air Quality and Port Security Bond Act of 2006, or the Disaster Preparedness and Flood Prevention Bond Act of 2006.6 This narrow litigation exemption sunsets on Jan. 1, 2010.

The Attorney General: Comment Letters, Litigation, and Settlements

In a September 2007 speech to the California League of Cities, Attorney General Brown stressed the importance that he places on local agency action to reduce GHG emissions, and his willingness to force this action by litigating against local agencies.

Indeed, since January 2007, the attorney general has submitted CEQA comment letters throughout the state, filed suit challenging the county of San Bernardino's General Plan Update EIR based on climate change and engaged in landmark settlements with the County of San Bernardino and Conoco to address project-related GHG emissions.

In his comment letters, the attorney general has urged lead agencies to analyze climate change impacts in their CEQA documents, arguing that CEQA requires this analysis.[7]

The letters have recommended that agencies use AB 32's 1990 target for

2020 GHG emissions as a significance threshold but recognize that "lead agencies must rely only on their own 'careful judgment...based to the extent possible on scientific and factual data' in determining whether a project's global warming-related impacts are significant."[8]

In April 2007, the attorney general brought a high-profile challenge to the county of San Bernardino's General Plan Update Environmental Impact Report, alleging that the county violated CEQA because it "failed to fully evaluate and disclose the reasonably foreseeable effects of the General Plan update on global warming" and "failed to consider and adopt appropriate mitigation...".[9]

In its EIR, the county did not quantify GHG emissions associated with the General Plan Update. The attorney general alleged that the county's approval would aggravate climate change by increasing vehicle miles traveled, increasing consumption of fossil fuel-based energy and developing forested and vegetated land that currently sequesters carbon.

In particular, the attorney general criticized the county for failing to compare "the increases in greenhouse gas emissions that are reasonably expected to result from implementation of the General Plan update and the reductions in greenhouse gas emissions mandated by AB 32."

In August 2007, the attorney general and the county entered into a settlement agreement that requires the county to prepare an amendment to its General Plan Update calling for the adoption of a Greenhouse Gas Emissions Reduction Plan (GHG ERP).

This GHG ERP must inventory the county's GHG emissions as of 1990, as of the notice of preparation for the General Plan Update EIR, and as of 2020 (which will include GHG emissions arising from development under the General Plan Update).

The county must also set a target for reducing GHG emissions, and adopt feasible reduction measures to meet this target.

Similarly, in September 2007, the attorney general entered into a project-specific settlement agreement with Conoco. Conoco agreed to, among other things, spend approximately $10 million to offset GHG emissions from its Clean Fuels Expansion Project in Northern California until AB 32's implementing regulations take effect in 2012.

In exchange, the attorney general withdrew his administrative protest against the EIR for allegedly failing to address GHG emissions and associated climate change impacts adequately.

Most recently, in December 2007, the attorney general, Los Angeles Mayor Antonio Villaraigosa and the City of Los Angeles Harbor Department entered into a Memorandum of Understanding regarding GHG emissions associated with the Port of Los Angeles' expansion.

The MOU obligates the Port to: (1) conduct an annual inventory of GHG emissions, beginning in 2008 and continuing until AB 32's regulations become effective; and (2) to move forward with a planned 10 MW solar energy project, which it estimates will offset 17,000 metric tons of GHG emissions per year.

The MOU recognizes that the Port used a much more limited geographic scope to evaluate GHG emissions in its EIR for the Port's expansion than that to be used in the GHG Inventory.

Perhaps most significantly, the MOU also contains the attorney general's agreement to submit a letter of support for the expansion and to refrain from filing a CEQA challenge against the project.

CEQA Litigation

The attorney general has not been the only litigant to challenge CEQA documents on climate change grounds. Advocacy organizations also have challenged CEQA documents in court. Several of these legal challenges, which have not yet resulted in any reported appellate opinions, are summarized below.

Trial Court Decisions

Natural Resources Defense Council v. Reclamation Board (Super. Ct. Sacramento County, 2007, No. 06 CS 01228).

The trial court held that the petitioner failed to show that a supplemental EIR was necessary to analyze how climate change may affect a development project in the Sacramento Delta, because no new information on climate change impacts had become available since approval of the previous supplemental EIR in 2005.

American Canyon Community United for Responsible Growth v. City of American Canyon (Super. Ct. Napa County, 2007, No. 26-27462). The trial court ruled that the city's EIR Addendum was legally adequate and no additional CEQA analysis was necessary based on the court's finding that AB 32 does not constitute new information under CEQA.

Santa Clarita Oak Conservancy v. City of Santa Clarita (Super. Ct. Los Angeles County, 2007, No. BS 084677). The trial court upheld the City of Santa Clarita's discretion in an EIR to accept the Department of Water Resources' expert opinion that quantifying climate change impacts on the city's water supply would be speculative, based on the city's analysis of scientific studies available as of May 2006.

Pending CEQA Suits

Highland Springs Conference Center and Training Center v. City of Banning

(Super. Ct. Riverside County, filed Nov. 21, 2006, No. RIC 460950). Four separate CEQA suits filed against the City of Banning's Black Bench residential project have been consolidated into one action.

The court will hold a hearing on the merits of the cases on November 30, 2007. The four cases include challenges brought by the Center for Biological Diversity (No. RIC 460967), and several local non-profit citizens groups (Nos. RIC 461035, RIC 461069).

Three of the four actions allege that the EIR failed to consider climate change impacts associated with the project adequately.

Center for Biological Diversity v. City of Desert Hot Springs (Super. Ct. Riverside County, filed Jan. 24, 2007, No. RIC 464585).
Petitioners challenge the City of Desert Hot Springs' approval of 2,700 homes outside the city's existing limits based on the EIR's failure to analyze the project's GHG emissions and climate change impacts, among other issues.

Petitioners have filed their opening brief, respondents' opposition briefs were due Jan. 9, 2008, and petitioners' reply brief is due Feb. 6, 2008, with a hearing set for Feb. 22, 2008.

Center for Biological Diversity v. County of San Bernardino (Super Ct. San Bernardino County, filed Mar. 29, 2007, No. BCV 09950).
Petitioners challenge a proposed open-air sewage sludge composting project near Hinkley, alleging that the EIR failed to quantify the project's GHG emissions and to analyze or mitigate the GHG emissions' effects, among other issues. Briefing is ongoing, and a hearing is set for Jan. 28, 2008.

Center for Biological Diversity v. County of San Bernardino (Super. Ct. San Bernardino County, filed April 11, 2007, No. CIV SS 0700293).
Although the attorney general settled his suit against the county, the petitioners continue to allege that the county's General Plan Update EIR did not sufficiently analyze climate change. The briefing in this case is not yet underway.

Center for Biological Diversity v. Riverside Local Agency Formation Commission ("LAFCO") (Super Ct. Riverside County, filed May 31, 2007, No. RIC 472581). This suit challenges the Riverside LAFCO's approval of the City of Desert Hot Springs' annexation of the land necessary for the project at issue in Center for Biological Diversity v. City of Desert Hot Springs (Super. Ct. Riverside County, filed Jan. 24, 2007, No. RIC 464585), discussed above. The briefing in this case is not yet underway.

Bus Riders Union v. Metropolitan Transportation Authority (Super. Ct. Los Angeles County, filed June 26, 2007, No. BS 09618). In their joint opening petition, the petitioners contend that MTA should have prepared an EIR when it raised bus fares, based in part on the alleged impact to GHG emissions that the bus fare increase will have. The briefing in this case is not yet

underway.

Center for Biological Diversity v. City of Perris (Super Ct. Riverside County, filed Aug. 9, 2007, No. RIC 477632). Petitioner contends that the EIR for approximately 520,000 square feet of commercial uses was flawed because it failed to analyze the project's GHG emissions and climate change impacts. The briefing in this case is not yet underway, although a hearing on the petition is set for February 29, 2008.

Host Hotels & Resorts, Inc. v. County of Sacramento (Super Ct. Sacramento County, filed Sept. 12, 2007, No. 07 CS 01222). Petitioner alleges that the County of Sacramento's approval of the Sacramento International Airport Master Plan and the underlying EIR failed to comply with CEQA because, among other issues, the EIR did not provide sufficient opportunity for public comment on new information added in response to public comments on GHG emissions. The briefing in this case is not yet underway.

Preparing CEQA Documents After AB 32

OPR recently surveyed CEQA documents submitted to the CEQA State Clearinghouse between April and August 2007 to identify those that discussed climate change.

Only 3.4 percent of the documents (36 EIRs and 12 negative declarations) submitted to OPR discussed climate change.[10] As of Nov. 1, 2007, however, that number had more than doubled to 102 documents.[11]

We expect that number will grow as lead agencies and project proponents seek to avoid challenges to CEQA documents based on a claim of inadequate analysis of climate change.

Areas of Consensus

Although the existing CEQA Guidelines do not specifically refer to GHG emissions, we have observed a growing consensus that lead agencies should quantify baseline GHG emissions at the project site and compare them to the project's estimated GHG emissions.

Analytical tools to calculate GHG emissions from various sources are available, and several protocols have been prepared to calculate and report GHG emissions.[12]

While it is possible to estimate GHG emissions from a specific project, it is important to note that multiple factors may complicate attempts to calculate a project's alteration of baseline GHG emissions accurately.

Key issues include the following:

Excluding existing GHG emissions. It may be impossible to determine how much of a project's GHG emissions were occurring previously but are

subsequently attributed to the project.

For example, if a family drives 100 miles per day living in one location, and then moves to the project and continues driving 100 miles per day, there is no net increase in GHG emissions. The project, however, may be charged with the family's 100 miles per day of vehicle miles traveled.

Out-of-state residents.If out-of-state residents move to California, their prior emissions will now take place in-state. But due to California's focus on energy efficiency, the California Energy Commission reports that in 2001, California had the fourth-lowest rate of GHG emissions per person in the nation.[13]

Accordingly, out-of-state residents moving to California may actually decrease total GHG emissions in the United States. Yet, the GHG emissions attributed to the project may increase under a standard GHG analysis.

Replacement of higher emitting or lower efficiency GHG sources. Some projects replace older, less-energy efficient construction with more energy- and water-efficient construction. Other projects drastically improve energy efficiency, although they do not necessarily decrease on site GHG emissions (e.g., co-generation projects).

Thus, while a new project may not appear to reduce total GHG emissions, it may still play a part in accomplishing California's GHG emissions target.

Accounting for reduced VMT. Current methodologies for calculating VMT may not provide a reliable basis for quantifying changes in VMT associated with the project. Standard methodologies for VMT now use only "generic" trip length tables for certain land uses, rather than estimating actual VMTs on a project-by-project basis.

Research has shown that co-location of jobs and housing is one of the best ways to reduce VMT.[14] To the extent that a project brings jobs closer to housing, or vice versa, it may result in a net reduction in GHG emissions.

Accounting for external GHG emission reductions. Project-related GHG emissions can be expected to decline as state and federal programs reduce emissions from sources beyond a local agency's jurisdiction (e.g., reductions in auto-related emissions or increases in the percentage of renewable energy powering a project).

These future reductions are reasonably foreseeable based on the degree of past legislative action and current interest, but they may be difficult to quantify.

Multiple Approaches to the Significance Question

CEQA practitioners continue to debate how lead agencies should address climate change impacts in their CEQA documents, and more specifically,

how to determine if a project will have a significant environmental effect on climate change, either directly, indirectly or cumulatively.[15]

While it is clear that a lead agency is not required to foresee the unforeseeable or evaluate speculative impacts, it is equally clear that it "must use its best efforts to find out and disclose all that it reasonably can."[16]

By the same token, California still does not have a sector-by-sector or statewide GHG emissions threshold, although some regional and local agencies have adopted their own thresholds.[17]

As California continues to implement AB 32 and study climate change, how to determine whether climate change impacts are significant remains an open question.

Over the past year, some EIRs have discussed climate change but have stopped short of making a significance determination. At the other end of the spectrum, some EIRs have reasoned that the net increase of even a single GHG molecule constitutes a significant impact requiring mitigation (the so-called "one molecule rule").[18]

Still other EIRs have concluded that a project's consistency with AB 32's GHG emission reduction goals render the project's cumulative impact less than significant.19] Until the courts or OPR issue guidance on how a climate change analysis should be performed, a diversity of approaches will persist.

If a lead agency finds that a project's GHG emissions or global climate change effects are a significant environmental impact, then CEQA requires changes to the project "through the use of alternatives or mitigation measures when the governmental agency finds the changes to be feasible."[20]

Mitigation may be able to reduce a project's incremental contribution of a pollutant to a level below significance, as can the implementation of a project's "fair share of a mitigation measure or measures designed to alleviate the cumulative impact."[21]

Of course, a lead agency's selection of a significance threshold will also be important for determining the extent to which a project's GHG emissions must be mitigated to achieve a less-than-significant finding.

Consistent with the "one molecule rule" approach outlined above, some commentators suggest that GHG emissions should be mitigated to zero, and that if this cannot be achieved through mitigation for the project itself, then GHG offsets should be acquired to achieve zero net emissions.[22]

While several recent settlements have utilized GHG offsets, this is not a common approach in the EIRs we have reviewed.

Additionally, CEQA recognizes that legal, economic, social, environmental

and technological factors can make mitigation measures infeasible.[23]

In such cases, "individual projects may be approved in spite of one or more significant effects thereof,"[24] so long as the lead agency adopts a Statement of Overriding Considerations to identify the project benefits that override the project's significant environmental impacts.[25]

Looking Forward

In the coming year, we expect that lead agencies and the courts will continue to provide guidance on how to incorporate climate change considerations into CEQA documents.

In particular, we expect to see development as to when GHG emissions constitute a significant environmental impact. In the meantime, however, CEQA documents should carefully tailor the discussion of climate change to the specifications of each particular project.

Additionally, project proponents would be well-advised to monitor legislative, judicial and agency action addressing climate change. In this rapidly evolving regulatory environment, it is critical to be cognizant of and to utilize the latest information, retaining the flexibility to consider innovative solutions.

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[1] Health and Safety Code sections 38500-38599 (Deering 2007); Governor's Exec. Order No. S-3-05 (June 2005).

[2] Global climate change refers to changes in average climatic conditions on Earth as a whole, including temperature, wind patterns, precipitation and storms.

Global temperatures are moderated by naturally occurring GHGs like carbon dioxide (CO2), methane (CH4), and nitrous oxide (N2O), as well as by hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, all of which are regulated under AB 32. See Health and Safety Code section 38505(g).

These GHGs allow solar radiation (sunlight) into the Earth's atmosphere but prevent radiative heat from escaping.

Thus, they warm the Earth's atmosphere in the same manner that glass traps radiative heat from sunlight inside a greenhouse.

The current scientific consensus is that a significant portion of observed warming can be attributable to increased concentration of GHGs in the

atmosphere due to human activities.

[3] Health and Safety Code sections 38501 and 38550. For more information about AB 32, see Latham & Watkins LLP, Client Alert No. 539, "California Legislature Approves the 'California Global Warming Solutions Act of 2006;' Schwarzenegger Announces Intent to Sign" (Sept. 5, 2006).

[4] See California Air Resources Board, Staff Report: Initial Statement of Reasons For Rulemaking, Proposed Regulation For Mandatory Reporting of Greenhouse Gas Emissions Pursuant to the California Global Warming Solutions Act of 2006 (AB 32) (Oct. 19, 2007).

[5] Public Resources Code section 21083.05(a)-(c).

[6] Id. section 21097.

[7] See, e.g., Cal. Attorney General, Letter from Deputy Attorney General Janill L. Richards to Jared Hart and Darryl Boyd, City of San Jose, regarding the Draft EIR for the Coyote Valley Specific Plan (June 19, 2007); Cal. Attorney General, Letter from Deputy Attorney General Sandra Goldberg to Marilyn Mirrasoul, City of San Diego, regarding the City of San Diego General Plan Update Draft EIR (June 11, 2007); Letter from Edmund G. Brown, Jr., Cal. Attorney General, to Sacramento Area Council of Governments, attn. Debra Jones (Feb. 13, 2007).

[8] Cal. Attorney General, Letter from Deputy Attorney General Janill L. Richards to Jared Hart and Darryl Boyd, City of San Jose, regarding the Draft EIR for the Coyote Valley Specific Plan (June 19, 2007), quoting CEQA Guidelines section 15064(b) (2007).

[9] California v. County of San Bernardino (Super. Ct. San Bernardino County, filed April 12, 2007, No. CIVSS 0700329).

[10] California Governor's Office of Planning and Research, Presentation to the Climate Action Team, "Climate Change and CEQA" (Sept. 19, 2007), at

