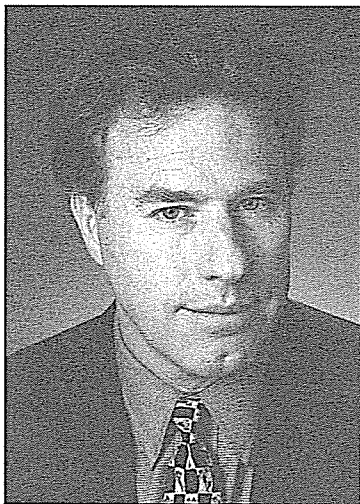


Fitting Climate Change Into CEQA:

Some Relevant Legal Considerations

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Climate change is the environmental issue of the moment. For lawyers, one big question is whether and how this issue must be treated under the California Environmental Quality Act ("CEQA"), the law that requires state and local public agencies to assess the environmental impacts of a proposed project and prescribe feasible mitigation measures to lessen those impacts. Pub. Resources Code §§ 21000 *et seq.* Although there is no published case law to date, many assume that CEQA requires treatment of climate change

issues, but few agree on what that compliance entails. This article examines the relevant statutory and regulatory mandate,

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reviews how some agencies have been addressing climate change in their CEQA documents, and concludes with some recommendations on what California litigators might look for in a CEQA document's treatment of this issue.

In considering a proposed project for approval, CEQA requires public agencies to focus their review on all potentially significant effects on the environment. Pub. Resources Code § 21002.1(e). Typically, this includes an analysis of project effects on biota, water quality, traffic, noise, aesthetics, and several other environmental issue areas. Cal. Code Regs. tit. 14 §§ 15000 *et seq.*, Appendix G ("Environmental Checklist Form"). Seemingly relevant to this mandate, therefore, is the 2006 declaration by the California Legislature that "global warming poses a serious threat to...the environment." Health & Saf. Code §§ 38500 *et seq.*, California Global Warming Solutions Act of 2006 (also known as "AB 32"). This declaration, however, does not directly translate into a legislative finding that the greenhouse gas ("GHG") emission from any individual project subject to CEQA review "poses a serious threat." We know that at least some proposed projects may because the Legislature took action in 2007 to exempt certain transportation and flood control projects from CEQA challenges for failure to address the climate change issue. Pub. Resources Code § 21097. The Legislature's action leaves open the question as to whether all other projects are, by implication, subject to CEQA review on the climate change issue. But see, *San Diego Service Authority for Freeway Emergencies v. Superior Court*, 198 Cal. App. 3d 1466, 1472 (1988). ("A court should not presume the Legislature intended to legislate by implication.")

Without direct guidance from the Legislature, it becomes the duty of the CEQA "lead agency" (the state or local public

agency with principal authority for carrying out or approving a proposed project) to determine whether and how to address this issue. Cal. Code Regs. tit. 14 §§ 15064(b); 15367. The Governor's Office of Planning and Research ("OPR") issued a Technical Advisory to lead agencies on this subject in June of 2008. See Technical Advisory, CEQA

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and Climate Change: Addressing Climate Change Through California Environmental Quality Act (CEQA) Review, June 19, 2008. Although the Advisory is full of recommendations and helpful references to information sources, OPR acknowledged that each lead agency "needs to develop its own approach to performing a climate change analysis for projects that generate GHG emissions." *Id.*, p.5.

Based on our review of impact assessment

documents prepared pursuant to CEQA, discussed in more detail later in this article, lead agencies typically find that proposed projects do not by themselves have the capability of significantly contributing to the global warming problem. Greenhouse gas emissions in California alone are currently approaching 500 million metric tons of carbon dioxide equivalent per year. See, http://www.arb.ca.gov/cc/inventory/data/tables/rpt_Inventory_I_PCC_Sum_2007-11-19.pdf. The GHG emissions from an individual project subject to CEQA review are typically estimated to contribute only a micro-fraction of this amount. Even a large stationary emitter would contribute less than one percent of this amount on an annual basis. See, *e.g.*, Final Environmental Impact Report, Conoco-Phillips Rodeo Refinery Expansion Project, SCH #2005092028 (refinery expansion project with hydrogen plant). Under CEQA, lead agencies may include only a "brief explanation" in their environmental impact report of effects not deemed to be potentially significant. Pub. Resources Code § 21002.1(e).

Moreover, CEQA requires an assessment of only those project effects that have the potential to cause a "physical change in the environment." Pub. Resources Code § 21065. Since global warming is a "global" phenomenon, it can be argued that any proposed project that has the effect of moving emitters around without actually resulting in significant new emissions of GHG's is not a "change" in the global environment. Consider, for example, the proposed residential development project that will only have the effect of enticing people (and their cars) to move from their existing location to a new one, with no corresponding net increase in global GHG emissions. See, Kostka & Zischke, Practice Under the California Environmental Quality Act § 20.84 (CEB 2008). Recently, the Attorney General entered into a Memorandum of Understanding

with the Port of Los Angeles that is intended in part to monitor and mitigate for GHG

⁶ *For those projects that do have the potential to adversely contribute to climate change, a lead agency may find that detailed CEQA analysis is still not required because the project's GHG impact is "too speculative" for evaluation.*⁹

emissions from ship, rail and truck traffic associated with proposed expansion at the Port. See "Memorandum of Understanding

between the State of California, the Office of the Mayor of the City of Los Angeles, and the City of Los Angeles Harbor Department," December 2007. Had this issue been litigated, one interesting factual and legal question may have been whether "but for" the Port expansion, would these targeted ships, trains and trucks have emitted the same amount or more greenhouse gases anyway? If yes, then there arguably would be no net adverse change to global warming resulting from this project, and arguably, no requirement for CEQA review on this particular issue. See, e.g., *Prentiss v. Board of Education*, 111 Cal. App. 3d 847, 853 (1980) (local agency decision to close one elementary school and transfer the pupils five-eighths mile to another school not a CEQA "project").

For those projects that do have the potential to adversely contribute to climate change, a lead agency may find that detailed CEQA analysis is still not required because the project's GHG impact is "too speculative" for evaluation. Cal. Code Regs. tit. 14 § 15145. Although several modeling techniques have been developed to quantify a proposed project's GHG emissions, many lead agencies trying to figure out whether those estimated emissions are "significant" for CEQA purposes find themselves engaged in pure guesswork. The lack of any guidance from the air regulatory agencies compounds this problem, although several such agencies are now focused on that issue. See, e.g., <http://www.aqmd.gov/ceqa/handbook/ghg/april30mtg/ghgmtg1b.ppt>.

For its part, the California Legislature has directed the Office of Planning and Research ("OPR") to develop CEQA guidelines by January 1, 2009, on how to "mitigate" GHG emissions (Pub. Resources Code § 21083.05). The Technical Advisory issued earlier this year does not satisfy this obligation, which remains outstanding. However, the legislative mandate to OPR to develop

CEQA guidelines appears to some degree to be putting the cart before the horse because the duty to mitigate under CEQA follows from a finding that a significance threshold has been breached (Pub. Resources Code § 21002.1 (a)), not the other way around.

Notwithstanding these uncertainties, the decision by some lead agencies to terminate their discussion of the GHG issue on the grounds that it is "too speculative" has been the basis for much of the litigation that has been threatened to date. The single court that has ruled on this issue held in favor of the lead agency's "too speculative" determination: *California Water Impact Network v. Newhall County Water District* (Case No. B203781, Second Appellate District, appeal filed November 21, 2007).

The greatest vulnerability to a successful CEQA challenge, however, may be the failure to adequately discuss "cumulative impacts." Cal. Code Regs. tit. 14 § 15130. Although there are still dissenters, there is an emerging consensus that man-made activities — in the aggregate — are accelerating global warming. In this context, the legal question under CEQA is whether a particular project's GHG emissions are "cumulatively considerable," even if individually limited. Cal. Code Regs. tit. 14 § 15130(a). If yes, then mitigation is required (Cal. Code Regs. tit. 14 § 15130(b)(5)), unless the proposed project is consistent with an existing local plan in which GHG issues have already been analyzed pursuant to CEQA in the adoption of that plan. Pub. Resources Code § 21083.3; Cal. Code Regs. tit. 14 § 15130(d); see, e.g., Marin Countywide Plan Update, Final Environmental Impact Report, SCH #20044022076 (November 2007).

In the absence of a locally approved plan, there are no standards to guide a lead agency's determination as to whether a project's effects are "cumulatively considerable," other than the requirement that any such

finding must be supported by substantial evidence. *Sierra Club v. West Side Irrigation Dist.*, 128 Cal. App. 4th 690 (2005). The CEQA Guidelines provide that the "mere existence of significant cumulative impacts

effect" caused by a project does not "necessarily" create a significant cumulative impact." *Communities for a Better Environment v. California Resources Agency*, 103 Cal. App. 4th 98, 120 (2002). Beyond that, however, lead agencies are charting new waters under CEQA when deciding whether a proposed project's GHG emissions are "cumulatively considerable."

In light of all this uncertainty, how are lead agencies responding? For purposes of this article, the authors undertook a "snapshot" review of 60 environmental review documents prepared by lead agencies pursuant to CEQA between April 2007 and March 2008. All were draft CEQA documents that had been released for public review. These documents included environmental impact reports, mitigated negative declarations, and environmental assessments that considered residential, commercial, industrial, agricultural, infrastructure and planning projects across the state. They were prepared by a variety of lead agencies, including cities, counties, air pollution control districts, the California State Lands Commission, irrigation districts, the California State University, water districts, the California Public Utilities Commission, regional planning agencies and the California Department of Transportation. The 60 documents, which were identified from a list of 218 environmental documents referenced on OPR's website in April 2008, were chosen to provide a sample of the GHG analyses that were prepared for a variety of proposed land uses.

Of these 60 CEQA documents, 39 did not adopt significance criteria for purposes of assessing the proposed project's climate change impacts. In all cases, however, the lead agency did discuss the GHG issue to some degree, sometimes qualitatively, and sometimes quantifying the proposed project's estimated GHG emissions. In many cases, the lead agency simply concluded that the pro-

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caused by other projects" does not constitute the requisite substantial evidence (Cal. Code Regs. tit. 14 § 15064(h)(4)), and one court has declared that "any additional

ject's GHG emissions were not significant or less than significant, without reference to any measure of significance. In other cases lead agencies concluded that a significance determination was not possible because significance criteria were not available due to the absence of any GHG regulatory standards. Fourteen lead agencies noted that the subject area was simply "too speculative" to allow further informed discussion, and terminated the treatment of the GHG issue in their CEQA document. In those 14 documents, only four lead agencies specifically cited to the CEQA Guidelines (Cal. Code Regs. tit. 14 § 15145) to support a finding that the discussion was too speculative.

For the 21 CEQA documents that did include GHG significance criteria, nearly all used a variation of the following standard: "Would the project interfere with the State's ability to achieve GHG reduction goals and strategies as identified in AB 32 and Executive Order S-03-05?" Significance criteria used by other agencies considered whether the project would alter air movement, moisture or temperature or cause any change in the climate. Another lead agency questioned if, due to the size or nature of the project, it would generate a substantial increase in GHG emissions relative to existing conditions. Only one lead agency used a quantitatively-defined threshold of significance, which it set at 42,000 metric tons of carbon dioxide equivalent per year.

The use of significance criteria, however, did not automatically lead to a finding that the proposed project's GHG emissions would be "significant" in the absence of mitigation measures. Only seven of the 21 CEQA documents that employed significance criteria reached that conclusion, based on a qualitative or quantitative analysis of the project's GHG emission effects. Only five of those documents prescribed mitigation to lessen the proposed project's GHG emission effect.

Mitigation measures included the use of energy star appliances; low flow plumbing fixtures; energy efficient building design and lighting; tankless water heaters; solar panels and orientation; idling restrictions; prohibitions on wood burning stoves; drought resistant landscaping; shade trees; drip irrigation; light colored building materials; cool paving; controlled intersections; ridesharing and car-sharing; transportation demand management plans; construction materials recycling; renewable, recycled and local building materials; infill and mixed use development; Leadership in Energy and Environmental Design (LEED) certification; and carbon credits.

In the 60 CEQA documents reviewed, the treatment of the "cumulative impacts" question varied greatly, with 29 specifically discussing the issue in cumulative terms. A review of those 29 CEQA documents revealed that only eight lead agencies made a finding that the proposed project's GHG emissions were "cumulatively considerable." Others had either already determined that the entire subject was too speculative to allow informed analysis, or simply concluded that the proposed project's contribution to the cumulative effect was not significant or less than significant because of the project's negligible impact on such an uncertain and worldwide phenomenon. Only six lead agencies that made cumulative findings required mitigation to lessen those effects.

To summarize, of the 60 CEQA documents reviewed for the period between April 2007 and March 2008, only seven utilized significance criteria, determined that the project's GHG emissions would constitute a significant adverse environmental effect, and prescribed mitigation to ameliorate that effect. Four of those seven documents — plus four others that did not utilize significance criteria — made the additional finding that the project's GHG effects were "cumulatively consider-










able." The remainder of the documents, after varying degrees of discussion of the issue, either expressly found that the project's climate change effects were "too speculative" to allow informed discussion, or simply concluded that the GHG emissions associated with the proposed project were not significant or less than significant.

This "snapshot" review offers some insights into how lead agencies under CEQA have been treating the GHG issue. In terms of defending or attacking a lead agency's CEQA document on this issue, however, the lessons to be drawn at this early stage of this emerging issue are few. As noted at the outset of this article, there is no published CEQA case that specifically addresses the appropriate or necessary scope of climate change analysis. The Attorney General has been active in this field, but to date, has filed only one CEQA challenge for the alleged failure of a county to adequately address GHG issues in the environmental impact report it prepared in conjunction with its general plan update. *People of the State of California v. County of San Bernardino* (San Bernardino Superior Court, Case No. CIVSS 700329). That case resulted in a settlement. However, the Attorney General is commenting on other CEQA documents that are in preparation, and has reached at least four out-of-court settlements with various lead agencies and the respective real parties in interest. Public interest law groups are active as well, commenting on draft CEQA documents, and, in some cases, suing the lead agency after the draft document has been approved as final. Pub. Resources Code § 21167 (procedure for action against public agency on grounds of noncompliance). The few lawsuits that have been brought to date have alleged that the CEQA review document approved by the lead agency failed to adequately address the climate change issue, or failed to address it altogether.

From all this, it is still possible to glean a few key things to look for in the CEQA document subject to judicial review on the GHG issue. First and foremost, has the lead agency "disclosed" the issue? Whether detailed discussion of the issue is warranted depends in large part on the specifics of the proposed project, but a CEQA document's failure to adequately address this disclosure obligation may lead to a finding that the lead agency has prejudicially abused its discretion. See, Pub. Resources Code § 21005(a). Second, if the lead agency has determined that a GHG discussion may be warranted, but then concludes that the issue is "too speculative" to allow it to complete its analysis, does the record support the finding that the lead agency reached its conclusion only after "thorough investigation"? See, Cal. Code Regs. tit. 14 § 15145. Third, and assuming that the "too speculative" determination has not been made, are the significance criteria adopted by the lead agency for purposes of evaluating the proposed project's GHG emissions, and the conclusions drawn from that analysis, supported by substantial evidence in the record? See, e.g., *National Parks & Conservation Assn. v. County of Riverside*, 71 Cal. App. 4th 1341, 1357 (1999) (finding substantial evidence to support County's significance determinations). Fourth, and finally, is the lead agency's determination that a project's GHG emissions are or are not "cumulatively considerable" supported by substantial evidence in the record? See, *Sierra Club v. West Side Irrigation Dist.*, *supra*, 128 Cal. App. 4th at 701.

These judicial review issues are generally the same as with any CEQA challenge. The trick will be to navigate this particular issue in the face of heightened scrutiny and considerable uncertainty attendant to our rapidly evolving knowledge about climate change, and how individual projects subject to CEQA review fit into that global dynamic.

GHG CEQA Analysis

CEQA Documents Reviewed		60
Determined GHG issue was too speculative to allow informed CEQA analysis		14
Finding of no significant impact made without reference to thresholds of any significance		27
Adopted threshold(s) of significance ("significance criteria")		21
Based on significance criteria, found significant effect on the environment		7
Prescribed measures to mitigate the effects determined to be significant		5
Addressed potential "cumulative impacts"		29
Determined project's GHG emissions to be "cumulatively considerable"		8
Prescribed measures to mitigate the "cumulatively considerable" impacts		6