

ENVIRONMENTAL ALERT

AFFIRMATIVE USE OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT TO REQUIRE CONSIDERATION OF CLIMATE CHANGE IMPACTS IN LAND USE PLANNING



On August 21, 2007, California Attorney General Edmund G. “Jerry” Brown Jr. and San Bernardino County reached a “landmark settlement” of the state’s climate change lawsuit under the California Environmental Quality Act (CEQA) challenging the county’s approval of the comprehensive update to its general plan. The settlement agreement establishes a “unique Greenhouse Gas (GHG) Emissions Reduction Plan” that will identify sources of emissions and set feasible reduction targets for the county¹.

CALIFORNIA LAND USE PLANNING, CEQA AND AB 32

Under California law, each city and county is required to adopt a comprehensive, long-term general plan. Serving as the city or county’s basic planning document, the general plan provides the blueprint for development throughout the community. All local zoning and land use approvals must be consistent with the general plan. As such, it is often referred to as the “constitution” for future development.

CEQA is one of several state environmental protection statutes that are roughly patterned after the National Environmental Policy Act (NEPA). Like NEPA, CEQA requires public agencies to consider the environmental consequences of their actions before approving plans and policies or committing to course of action on a project. Considered to be one of the most far-reaching of the “little NEPAs” or “SEPAs” (state environmental protection acts), CEQA includes substantive provisions that require public agencies to avoid or reduce potentially significant environmental impacts by adopting feasible project alternatives or mitigation measures. In summary, where a public agency determines that a proposed project may have potentially significant adverse effects on the environment, CEQA requires the agency to prepare an environmental impact report (EIR) to analyze and provide feasible mitigation measures for those impacts, as well as discuss project alternatives. CEQA further requires the agency to circulate the draft EIR for public comment and to provide responses, before certifying a final EIR and approving the proposed project.

¹ The settlement agreement is available at http://ag.ca.gov/cms_pdfs/press/2007-08-21_San_Bernardino_settlement_agreement.pdf.

In 2006, when Gov. Arnold Schwarzenegger signed AB 32, the California Global Warming Solutions Act of 2006, California became the first state to require targeted GHG emission reductions. Specifically, AB 32 commits California to reduce GHG emissions to 1990 levels by 2020, and requires the California Air Resources Board to adopt regulations by 2012 to accomplish this. Currently, California generates approximately 500 million metric tons of carbon dioxide (CO₂) equivalent, significantly above 1990 levels. To achieve AB 32's 2020 target, California must reduce current emissions by at least 25 percent.

Since the enactment of AB 32, the California attorney general has submitted formal comments to 13 local jurisdictions, under CEQA, encouraging them to evaluate and lessen CO₂ emission increases that would be caused by their land use decisions.

SAN BERNARDINO COUNTY'S GENERAL PLAN UPDATE

In the fall of 2006, when San Bernardino was undergoing its CEQA compliance process for its General Plan Update, then-Attorney General Bill Lockyer submitted lengthy comments on the county's draft EIR, asserting that the county must analyze GHGs and climate change impacts in light of AB 32.

In March 2007 the county certified its General Plan Update Final EIR, which, after providing substantial disclosure and analysis of GHGs and climate changes issues, concluded that there is no available methodology for determining whether GHGs attributable to the General Plan Update would be significant. Thus, the county determined that further discussion in the Final EIR of GHGs and climate change would be speculative. Based on the certified Final EIR, the county approved the General Plan Update, along with various other community plans and related amendments to its Development Code, which together would provide the blueprint for physical development of land in those areas under the county's jurisdiction out to the year 2030.

CALIFORNIA ATTORNEY GENERAL'S CEQA CHALLENGE AGAINST THE COUNTY'S GENERAL PLAN UPDATE AND EIR, AND SETTLEMENT OF THE LAWSUIT

On April 13, 2007, Attorney General Brown filed a lawsuit under CEQA challenging the county's approval of its General Plan Update and alleging that the county's General Plan Update Final EIR failed to adequately analyze GHG emissions, climate change and diesel engine exhaust emissions. Specifically, the attorney general asserted that the GHG emission increases reasonably expected to result from implementation of the General Plan Update were not adequately disclosed, and that no comparison was made between those GHG emission increases expected under the General Plan Update and the GHG emission reductions mandated by AB 32.

The attorney general's lawsuit brought into focus the potential power of CEQA to enhance the immediate impacts of AB 32. This challenge proved so controversial that California Senate Republicans reacted by temporarily blocking passage of the state budget, unless CEQA were amended to prevent such climate change-based litigation. Ultimately, the budget impasse ended only after the Legislature also agreed to pass SB 97, which – in addition to requiring the Office of Planning and Research to develop and promulgate by July 1, 2009, guidelines for feasible mitigation of GHG emissions – would bar until January 1, 2010, CEQA lawsuits challenging certain publicly funded transportation and flood control projects based on an alleged failure to analyze GHG emissions or climate change impacts. Notably, this prohibition would not have barred the attorney general's lawsuit against San Bernardino County regarding the county's General Plan Update, nor would it bar future climate change-based CEQA challenges to private development projects.

On August 21, 2007, the attorney general and the county settled the lawsuit. Under the settlement agreement, the county is required to amend its General Plan to add a policy that describes the county's goal to reduce "those [GHG] emissions reasonably attributable to the county's discretionary land use decisions and the county's internal government operations." The agreement further calls for the adoption of a "Greenhouse Gas Emissions Reduction Plan," which shall include—

- an inventory of all known or reasonably discoverable sources of GHGs that currently exist in the county
- a baseline inventory of the GHGs currently being emitted in the county
- an inventory of the GHG emissions from the same sources in 1990
- a projected inventory of new GHGs expected to be emitted in 2020 due to the county's discretionary land use decisions pursuant to the General Plan Update and internal government operations
- a target and feasible measures for reduction of those emissions.

In the News Alert regarding the settlement, the attorney general further recommends that feasible mitigation measures to reduce GHGs may include—

- 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.

The News Alert also quotes the attorney general's remarks from his news conference on the settlement: "San Bernardino now sets the pace for how local government can adopt powerful measures to combat oil dependency and climate disruption. This landmark agreement establishes one of the first greenhouse gas reduction plans in California. It is a model that I encourage other cities and counties to adopt."

START OF A TREND?

The attorney general's recent settlement with San Bernardino County clearly signals the need for CEQA documents to address GHGs and climate change impacts – at least in the local government land use planning context. In the context of other land use approvals and development projects, public agencies and private developers can expect similar CEQA challenges based on GHG emissions and climate change impacts.

AB 32 establishes economy-wide obligations for reduction of GHG emissions. While, understandably, much attention is paid to large stationary sources like power plants or ubiquitous sources like automobiles, a large percentage of GHG emissions are estimated to come from residential and commercial buildings. The GHG emissions from buildings are estimated to be as high as 30 percent of the state's total emissions. To meet the AB 32 reduction targets, significant reductions in emissions from these sources will be necessary.

SB 97's temporary bar against certain climate change-based CEQA challenges against publicly funded transportation and flood control projects leaves the attorney general and environmental organizations a wide playing field on which to operate. As noted above, the attorney general's powers to proceed against other counties as it did against San Bernardino remains unchanged. Perhaps even more significantly, state law does not bar CEQA climate change challenges against private development projects. Currently, there are at least three pending CEQA lawsuits challenging the adequacy of EIR climate change analyses for private development projects. These lawsuits challenge a proposed 2,700-unit residential development in the Desert Hot Springs, a 1,500-unit residential/commercial development in Banning, and a commercial composting facility in San Bernardino County. In each case, the Center for Biological Diversity alleges that the CEQA analyses supporting the proposals failed to assess GHG emissions and discuss potential GHG mitigation measures. Success in these cases is likely to spawn additional lawsuits, raising new hurdles for private developers to clear in developing their proposed projects.

CONTACT INFORMATION

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