



Vol. 18 No. 4

April 4, 2008

CALIFORNIA USING JUDICIAL ACTION TO REGULATE GREENHOUSE GASSES

by
Kevin T. Haroff

In 2006, the California State Legislature enacted the “Global Warming Solutions Act” (AB 32), one of the most far-reaching legislative attempts so far to control greenhouse gas (GHG) emissions in the United States. The law requires adoption of a statewide GHG emissions limit or cap, based on the state’s estimated 1990 statewide emissions level, to be achieved by 2020 and beyond. The California Air Resources Board (CARB) is charged with setting the cap and developing implementing regulations to establish more particularized GHG emission limits and emission reduction measures. Under the law, however, the final rules likely will not be adopted until 2011 and will not go into effect until 2012.

In the meantime, other state and local agencies are pressing ahead with efforts to address climate change in an entirely different way, through local land use planning policies and processes for approval of new development and industrial projects. The California Environmental Quality Act (CEQA), CAL. PUB. RESOURCES CODE §§ 21000 et seq., is a state statute that requires local agencies to assess the potentially significant environmental impacts of proposed projects and, where feasible, adopt measures to mitigate against those impacts. Increasingly, both public agencies and private businesses are being asked to evaluate and mitigate the potential impacts of proposed activities on climate change. According to the State Office of Planning and Research (OPR), which oversees the implementation of CEQA, over 150 of the CEQA review documents it has received since July 2006 contain some discussion of potential climate change impacts.

On August 24, 2007, California Governor Arnold Schwarzenegger signed SB 97, which directs OPR to develop new, standardized guidelines for “the mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions . . . including, but not limited to effects associated with transportation or energy consumption.” The new guidelines are to be completed by July 1, 2009, and would go into effect on January 1, 2010. At the same time, climate change assessment guidance policies are being developed by a variety of agencies and organizations, including the California Air Pollution Control Officers Association (CAPCOA), the League of California Cities, and the California State Association of Counties.

Even as these efforts go forward, California’s Attorney General, Edmund (“Jerry”) Brown is pursuing a separate initiative to enforce imposition of climate change mitigations through formal administrative challenges and litigation. The Attorney General’s office has filed CEQA comment letters

Kevin T. Haroff is a partner with the Environmental, Climate Change, and Litigation Practice Groups at Sonnenschein Nath & Rosenthal LLP, with offices in California and throughout the U.S.

raising climate change issues for at least 28 proposed local government land use plans and industrial projects, including proposed changes to local land use and transportation plans, as well as proposed projects at airports, oil refineries, ethanol plants, and dairies. In addition, the Attorney General has negotiated settlement agreements with governmental entities and businesses that impose extensive and potentially costly GHG mitigation requirements on the settling parties.

The first agreement was the result of administrative action and a judicial complaint filed by the Attorney General's office on April 12, 2007 against the County of San Bernardino in Southern California (*State of California v. County of San Bernardino*, San Bernardino Sup. Ct. No. CIVSS 0700329). The Attorney General was challenging the adequacy of an environmental impact report (EIR), prepared under CEQA to support the adoption of an update to the County's general land use plan. The Attorney General contended that the EIR failed to adequately address the potential climate change impacts from future development contemplated by the plan update, going out to the year 2030. The parties subsequently entered into a settlement, effective on August 21, 2007, which requires the County to adopt a "Greenhouse Gas Emissions Reduction Plan" consistent with the emissions reduction goals of AB 32. The Plan is to contain an inventory of all GHG emission sources currently existing in the County, an estimate of the quantity of emissions associated with those sources, a target for reduction of emissions "reasonably attributable to the County's discretionary land use decisions and government operations," and the identification of "feasible Greenhouse Gas emission reduction measures" designed to meet the County's target. In addition, the settlement agreement commits the County to a process for adopting "feasible measures to control the emissions of diesel engine exhaust on projects and facilities under the County's discretionary land use jurisdiction."

The County of San Bernardino settlement set the stage for an even more ambitious agreement with ConocoPhillips in September 2007. Earlier in the year, the County of Contra Costa (near San Francisco) approved an EIR for a proposed project called the "Clean Fuels Expansion Project" at ConocoPhillips' refinery in Rodeo, California. The Attorney General challenged the EIR administratively, based on an alleged failure to adequately address the project's anticipated GHG emissions and the impact of those emissions on global warming. Before the matter could get to court, the parties settled the dispute with an agreement committing the County to undertake a number of significant mitigation actions, including an energy efficiency audit at the refinery and a GHG emissions audit of all of the company's California facilities. In addition, the settlement requires ConocoPhillips to pay \$7 million to a carbon offset fund created by the San Francisco Bay Area Air Quality Management District, \$2.8 million for reforestation and/or forest conservation projects; and \$200,000 for the restoration of local wetlands. Finally, the company has to surrender the operating permit for a calcining plant it has run in Santa Maria, California.

The settlement agreements with the County of San Bernardino and ConocoPhillips (along with a similar "memorandum of understanding" with the Port of Los Angeles to address GHG emissions from the Port's operations in Los Angeles County) are likely to be just the first steps in an ongoing campaign to address California climate change issues independent of AB 32 and other actions of the state legislature. The Attorney General has stated his intent to use the "persuasive and coercive" power of the office to challenge proposed development and industrial projects "from the ground up," using CEQA as the principal tool to exercise that power. The Attorney General's office is sponsoring a series of workshops in the first half of 2008 to address CEQA, climate change, and the role of local California agencies "to combat global warming." Further use of the judicial system to pursue this agenda seems inevitable as well.