

Environmental Impact Assessment Committee Newsletter

Vol. 3, No. 1

November 2007

Special Issue: Greenhouse Gases, Climate Change, and Environmental Impact Assessment

WELCOME FROM THE CHAIR

Norman Carlin
Pillsbury Winthrop Shaw Pittman, LLP

Welcome to the special climate change issue of the Environmental Impact Assessment Committee Newsletter. This issue focuses on one of the most important and rapidly-evolving issues to emerge in years under the National Environmental Policy Act (NEPA) and the state “little NEPAs”—treatment of climate change and greenhouse gases (GHGs) in environmental impact analyses. Many thanks to our newsletter editor Joan Drake for her tireless efforts in assembling our special issue.

At this point a consensus is beginning to emerge that environmental impact documents should consider climate change in some manner. However, we are still very far from any consensus on how to evaluate and mitigate the potential contribution to global climate change from the GHG emissions associated with individual projects. The most basic questions are only beginning to be addressed. The articles in this issue include an overview of trends on assessment of climate change impacts under NEPA and the little NEPAs; a summary of the U.S. Supreme Court’s *Massachusetts v. EPA* decision, which has been widely cited as (among other things) supporting the consideration of CO₂ emissions in impact assessments; an overview of climate change cases and other developments under the California Environmental Quality Act; a discussion of one the first local policies on assessing climate

change impacts, in King County, Washington; and a description of the landmark settlement of the *California v. San Bernardino County* case, one of the most prominent cases to be litigated on this issue—but certainly not the last. We hope that this special newsletter issue will provide a useful survey of the current status of this emerging debate, while future issues will continue to track developments.

I would also like to thank our retiring Programs Vice Chair, Mike Zischke, for his efforts in the past year. At this time both the Programs vice chair and Public Service vice chair positions on the Environmental Impact Assessment Committee remain open. If you are interested in serving in either of these positions, please contact me at norman.carlin@pillsburylaw.com. We also invite the participation of any interested committee members in any of the committee’s activities—in particular, for contributions to future issues of this newsletter and to conference programs.

***ABA Section of Environment,
Energy, and Resources***

**16th Section Fall Meeting
Sept. 17-21, 2008
Phoenix, Arizona**

SAVE THE DATE!

**Environmental Impact Assessment
Committee Newsletter**
Vol. 3, No. 1, November 2007
Joan E. Drake, Editor

In this issue:

Message from the Chair
Norman Carlin 1

Assessing Climate Change—Trends
under State Environmental Policy Acts
and the National Environmental Policy Act
Dustin T. Till 2

Greenhouse Gases Ruled an Air Pollutant:
*Massachusetts v. Environmental
Protection Agency*
William C. Scott 6

Current Status of Climate Change Analysis
under CEQA
Madeline Stone 9

King County First in the Nation to
Require Climate Change Impacts to Be
Considered During Environmental
Review of New Projects
Steven G. Jones 11

Climate Change and CEQA:
San Bernardino County's Landmark
Global Warming Settlement
Rita S. Chan 14

© Copyright 2007. American Bar Association. All rights reserved. The views expressed herein have not been approved by the ABA House of Delegates or the Board of Governors and, accordingly should not be construed as representing the policy of the ABA.

This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60610.



**ASSESSING CLIMATE CHANGE—
TRENDS UNDER STATE ENVIRONMENTAL
POLICY ACTS AND THE NATIONAL
ENVIRONMENTAL POLICY ACT**

Dustin T. Till
The Marten Law Group

Introduction

There is a widespread and growing consensus among scientists and policy makers that fossil fuel combustion and land use changes such as deforestation and urban sprawl are increasing atmospheric concentrations of carbon dioxide and other heat-trapping greenhouse gases (GHGs). Increasing GHG concentrations are believed to contribute to rising global average surface temperatures. The International Panel on Climate Change (IPCC) predicts that rising temperatures may result in significant adverse consequences over the next 100 years, including rising sea levels, increased flooding, increased stress on forest resources, and disruption to agriculture. The IPCC has concluded there are two broad strategies for addressing the consequences of climate change: (1) mitigating or reducing GHG emissions, and (2) adapting to environmental changes attributable to global warming.

While Congress is presently debating the merits of various legislative proposals to reduce GHG emissions, it has not yet adopted any comprehensive plan for addressing global climate change. In the absence of federal guidance, states have taken the lead in establishing frameworks for addressing GHG emissions and other climate change impacts. To date, at least sixteen states have adopted legislation or agreed to participate in regional pacts that establish aggressive, economy-wide GHG emission reduction targets. For example, under the Global Warming Solutions Act of 2006 (AB-32), California has committed to reducing its GHG emissions to below 1990 levels by 2020. In order to achieve emission reduction targets, states must quantify historic and contemporary GHG emission levels and adopt measures for eliminating or reducing state-wide GHG emissions.

It is likely that state environmental policy acts (collectively, SEPAs) will play an important role in

states' efforts to address climate change, particularly in states with legislatively-mandated GHG reduction targets. First, all SEPA's share a fundamental informational purpose and require project proponents to reveal and quantify the environmental impacts associated with their proposals. SEPA review documents that assess GHG emissions will help regulators understand the GHG emissions associated with various activities, formulate baseline emission inventories, and identify potential sources for mitigating emissions. Indeed, two jurisdictions (Massachusetts and King County, Washington) have adopted policies which require project proponents to quantify the GHG emissions and other climate change impacts attributable to their proposals, and similar requirements in other jurisdictions seem inevitable—either through legislation or pending litigation.

Second, some SEPA's grant permitting agencies substantive authority which may be used to modify or deny projects based on GHG emissions and could play an important role in achieving GHG emission reduction targets. In order to achieve such emission reduction goals like those mandated by AB-32, a growing number of states have adopted renewable portfolio standards (RPS) which require electric utilities to produce or obtain a portion of their electricity load from renewable sources. A recent decision by the District of Vermont has likely paved the way for states to adopt GHG emission standards for the transportation sector. *Green Mountain Chrysler v. Crombie*, —F. Supp. 2d—, 2007 WL 2669444 (D. Vt. Sept. 12, 2007). While the energy and transportation sectors account for a significant portion of national GHG emissions, the U.S. Green Building Council estimates that 30 percent of GHG emissions in the United States are attributable to buildings, and SEPA substantive authority may provide an effective tool for deriving emission reductions from this sector of the economy.

Trends under State Environmental Review Statutes

Presently, two jurisdictions explicitly require quantification of GHG emissions in environmental review documents. In July 2007, Massachusetts issued

a draft policy under the Massachusetts Environmental Policy Act (MEPA) which requires state agencies and private developers to quantify and mitigate GHG emissions associated with certain types of projects. The MEPA policy specifically applies to all projects proposed or funded by a state agency, and the following private development proposals: (1) projects which require a state air permit, (2) office projects generating 3,000 or more vehicle trips per day; (3) mixed-use projects with 25 percent office space generating 6,000 or more vehicle trips per day, and (4) other private projects generating 10,000 vehicle trips or more per day. Project proponents are required to assess the direct emissions (on-site stationary sources such as boilers), indirect emissions from energy consumption and transportation, and other GHG emission sources. The MEPA policy also provides guidance on proposed measures for mitigating GHG emissions. The Massachusetts Executive Office of Environmental Affairs accepted comments on the draft policy through Aug. 10, 2007, and a final draft is expected later this fall.

In July 2007, King County, Washington Executive Ron Sims issued an executive order requiring county agencies to consider climate change impacts as part of their project review under Washington's SEPA. Under the Executive Order, which became effective on Oct. 15, 2007, project proponents are required to quantify both direct and indirect emissions in their Environmental Checklist, which forms the basis for the threshold significance determination under SEPA. In contrast to the Massachusetts policy, which applies only to specifically enumerated categories of large projects, King County's new SEPA policy applies to all proposals that are not otherwise excluded from SEPA review.

While Massachusetts and King County, Washington, are the only jurisdictions which currently require GHG assessments in their environmental review documents, there has been an up swell of litigation involving the question of when and how project proponents must address climate change issues under SEPA's, particularly the California Environmental Quality Act (CEQA). These cases raise two principal types of issues: (1) when must project proponents quantify

GHG emissions and incorporate measures for reducing them (i.e., mitigating climate change), and (2) when must project proponents assess the impacts of their proposals in light of environmental changes associated with global warming (i.e., adapting to climate change)?

The majority of CEQA climate change cases involve claims that environmental review documents failed to quantify GHG emissions or discuss potential mitigation measures. On Aug. 21, 2007, California and San Bernardino County entered into a landmark settlement resolving one of the most visible climate change cases—*California v. San Bernardino County*, San Bernardino County Super. Ct. No. CIVSS 700329 (filed Apr. 13, 2007). California Attorney General Jerry Brown filed the controversial lawsuit in April 2007, alleging that San Bernardino County’s comprehensive 30-year land use update failed to quantify GHG emissions or discuss how the 60 percent population growth predicted under the comprehensive plan (and associated emissions) would impact the state’s ability to achieve the GHG reduction targets mandated by AB-32. Under the settlement, San Bernardino County agreed to analyze, and adopt feasible measures to mitigate, GHG emissions attributable to its discretionary land use decisions.

Two other similar CEQA climate change cases are currently pending in California superior court. *See Center for Biological Diversity v. San Bernardino County*, San Bernardino County Super. Ct. (filed Mar. 29, 2007) (alleging county should have assessed GHG emissions when approving permit for commercial compost facility); and *Center for Biological Diversity v. City of Banning*, Riverside County Super. Ct. (filed Nov. 21, 2006) (alleging county should have considered GHG emissions when approving a 1,500-unit residential development). Furthermore, at least one SEPA climate change case is currently pending in Minnesota. *See Minn. Center for Env’tl. Advocacy v. Holsten*, Itasca County Dist. Ct. (filed Sept. 10, 2007) (alleging environmental impact statement (EIS) for proposed steel mill and associated mine failed to analyze GHG emissions and other climate change impacts). In each of these cases, plaintiffs allege that emission inventories and mitigation are required in light of legislatively-mandated GHG emission reduction targets.

At least one CEQA case presented the issue of whether a permitting agency must consider environmental changes attributable to global warming in environmental review documents. In *NRDC v. Reclamation Board*, Sacramento Co. Super. County Case No. 06CS01228 (filed Aug. 18, 2006), plaintiffs alleged that the California Reclamation Board should prepare a supplemental impact statement for a proposed 4,900-acre mixed-use development in the Sacramento San Joaquin Bay Delta in light of new information demonstrating how rising sea levels would exacerbate the project’s anticipated environmental impacts. The court rejected the plaintiffs’ claims on the grounds that information on the probable effects of climate change in the delta was not “new information” as it was widely known to the public and the board prior to the initial impact statement. The court also ruled that the plaintiffs had only presented general information on climate change impacts to the delta as a whole, rather than information specifically detailing anticipated changes in the project area.

The court noted, however, that its ruling was a narrow one, and indicated its willingness to address climate change issues. As the court stated, “Petitioners have made a persuasive showing that there is a growing consensus on the issue that has caused state environmental agencies to give it closer attention. As the projected effects of climate change become clearer and can be related to specific sites, there is little doubt that those effects will have to be factored into the analysis of many projects under CEQA. The present ruling in no way detracts from that reality.” It is worth noting that the court resolved this dispute on traditional CEQA grounds—demonstrating that existing environmental review case law provides an adequate basis for resolving climate change cases.

Trends under the National Environmental Policy Act

Climate change litigation under NEPA has been ongoing since at least 1990. *See Los Angeles v. NHTSA*, 912 F.2d 478 (D.C. Cir. 1990) (per curiam) (holding that a theoretical 1 percent increase in GHG emissions attributable to revised corporate average fuel economy (CAFE) standards did not constitute a significant impact requiring analysis in an EIS). Courts

in at least two circuits have concluded that federal agencies must, under certain circumstances, assess GHG emissions. *See Border Power Working Group v. Dep't of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003) (requiring the Department of Energy to quantify GHG emissions attributable to proposal to connect southern California power grid to coal-fired power plants in Mexico); *Mid-States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003) (holding that increased GHG emissions were a reasonably foreseeable consequence of a proposed railroad line that would transport low-sulfur coal from Wyoming to power plants in the Midwest). In both those cases, however, the courts subsequently upheld cursory analyses which concluded that the projects would not significantly contribute to global warming. *See Border Power Plant Working Group v. Dep't of Energy*, 467 F. Supp. 2d 1040 (S.D. Cal. 2006); *Sierra Club*; *Mid-States Coalition for Progress v. Surface Transp. Bd.*, Appeal No. 06-2031 (8th Cir. Dec. 28, 2006).

A March 2007 decision by the Northern District of California confirms that federal agencies should continue to assess climate change impacts in their NEPA documents. In *Friends of the Earth v. Mosbacher*, 2007 WL 962949 (N.D. Cal. 2007), plaintiffs alleged that two federal agencies which provide funding and loan guarantees for overseas energy projects should assess the GHG emissions attributable to those projects. The court ruled that NEPA review was not required because the agencies did not wield decision making authority sufficient to convert the foreign energy projects into federal actions subject to NEPA. In dicta, however, the court noted that it “would be difficult . . . to conclude that [there is] a genuine dispute that GHGs do not contribute to global warming,” and suggested that future NEPA climate change litigation would be focused on whether a particular agency’s action was the but-for cause of effects on the domestic environment.

At least three NEPA climate change cases are currently pending in federal courts. *See Center for Biological Diversity v. NHTSA*, Appeal No. 06-71891 (9th Cir.) (challenging the National Highway Traffic Safety Administration’s decision not to prepare an EIS when

it developed new CAFE standards for light trucks); *Montana Env'tl. Info. Center v. Johans*, 07-CV-01311-JR (D.D.C., filed July 23, 2007) (challenging U.S. Department of Agriculture program which provides funding for domestic energy projects, including new coal-fired power plants); *Center for Biological Diversity v. Kempthorne*, 07-CV-0894 (N.D. Cal., filed Feb. 13, 2007) (alleging that the Fish and Wildlife Service failed to assess environmental changes attributable to global warming under NEPA when issuing an Endangered Species Act incidental take permit for polar bears and Pacific walrus).

In addition to the litigation developments discussed above, EPA is apparently taking a firmer stance on GHG emission inventories when it reviews draft NEPA documents. In June 2007, EPA Region 8 Deputy Administrator Kerrigan Clough criticized a draft EIS prepared by the Mountain Mine Coal Company for plans to drill 168 methane drainage wells and additional ventilation shafts at the West Elk coal mine in Colorado which would result in significant methane emissions. Deputy Administrator Clough criticized the draft EIS on the grounds that it failed to quantify methane emissions or discuss options for capturing the methane and putting it to beneficial use. Accordingly, the Elk Mine draft EIS was given an EO-2 rating, which signifies that EPA objects to the analysis and could require significant changes to the proposal.

Unlike its state-level counterparts, NEPA is a purely procedural statute and does not explicitly require federal agencies to select environmentally preferable alternatives or incorporate mitigation features to eliminate or reduce the impacts associated with their proposals. In practice, however, NEPA’s tiered review framework encourages agencies to mitigate significant impacts in order to obtain a mitigated Finding of No Significant Impact (FONSI) determination and avoid the substantial costs and delays associated with preparing an EIS. This incentive may encourage federal agencies to carefully consider measures to reduce or eliminate GHG emissions and modify projects to adapt to changing environmental circumstances in order to potentially avoid litigation and facilitate timely and cost-effective project implementation.

Conclusion

In the absence of federal climate change regulation, SEPA's will likely play an increasingly important role in states' efforts to curb GHG emissions and address issues relating to mitigating and adapting to climate change. In states that have adopted formal GHG emission reduction targets, SEPA GHG analyses will allow regulators to prepare GHG emission inventories and assess options for mitigation. Furthermore, SEPA substantive provisions may provide regulators with a tool for requiring GHG mitigation measures, thereby deriving GHG emission reductions from sectors of the economy that are not subject to RPS standards or stationary and mobile source air quality regulations. In addition, litigation under SEPA's and NEPA is likely to continue. While the limited body of climate change case law suggests that state and federal agencies should quantify GHG emissions, the potentially vexing issue of when such emissions rise to the level of significance and become subject to both analysis in an EIS and potential mitigation has not yet been addressed.

GREENHOUSE GASES RULED AN AIR POLLUTANT: MASSACHUSETTS V. ENVIRONMENTAL PROTECTION AGENCY

William C. Scott




Modrall, Sperling, Roehl, Harris & Sisk, P.A.

In *Massachusetts v. Environmental Protection Agency*, 549 U.S. _____, 127 S. Ct. 1438 (2007), the Supreme Court, in a 5 to 4 decision, held that, due to the State of Massachusetts' "stake in protecting its' quasi-sovereign interests," Massachusetts has standing to challenge the U.S. Environmental Protection Agency's (EPA) denial of a petition to regulate greenhouse gas (GHG) emissions from new motor vehicles. In doing so, the Court appears to have expanded the law governing state standing. The Court further ruled that GHGs fit within the Clean Air Act's (CAA's) definition of "air pollutant" and that EPA therefore has statutory authority to regulate emissions of such gases from new motor vehicles. The Court remanded the case to EPA.

Procedural History

On Oct. 20, 1999, a group of nineteen private organizations filed a rulemaking petition with EPA asking that agency to exercise its authority under § 202(a)(1) of the CAA to regulate "greenhouse gas emissions from new motor vehicles." The petitioners "maintained that 1998 was the 'warmest year on record;' that carbon dioxide, methane, and hydrofluorocarbons are 'heat trapping greenhouse gases;' that greenhouse gas emissions have significantly accelerated climate change; and that [the Intergovernmental Panel on Climate Change's] 1995 report warned that 'carbon dioxide remains the most important contributor to [man-made] forcing of climate change.'" The petition further alleged that climate change will have serious adverse effects on human health and the environment.

On Sept. 8, 2003, EPA entered an order denying the rulemaking petition. 68 Fed. Reg. 52,922 (Sept. 8, 2003). In that order, EPA set forth two reasons for the denial: (1) the CAA does not authorize EPA to issue mandatory regulations to address global climate



**Environmental Impact Assessment
Committee Newsletter**

LIKE TO WRITE?

The Environmental Impact Assessment Committee welcomes the participation of members who are interested in preparing this newsletter.

If you would like to lend a hand by writing, editing, identifying authors, or identifying issues, please contact the editor, Joan Drake, at jdrake@modrall.com.

change, and (2) even if the agency had authority to set GHG emission standards, it would be unwise to do so at this time.

The petitioners, joined by twelve states and three cities that had intervened, then sought review of the EPA's Sept. 8, 2003 order in the United States Court of Appeals for the District of Columbia Circuit. Each of the three judges on the panel hearing the petition for review wrote a separate opinion, but two of the judges agreed that "the EPA Administrator properly exercised his discretion under § 202(a)(1) in denying the petition for rulemaking." 415 F.3d 50, 58 (D.C. Cir. 2005). The Supreme Court then granted certiorari.

The Court's Opinion

On April 2, 2007, in a 5-4 decision, the Supreme Court reversed the D.C. Circuit, holding that Massachusetts had standing to challenge the EPA's denial of the rulemaking petition and that, because GHGs fit within the CAA's definition of "air pollutant," EPA has statutory authority to regulate emission of such gasses from new motor vehicles. The Court remanded the case to EPA for further consideration.

Writing for the majority, Justice Stevens rejected EPA's argument that "because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional obstacle." 127 S. Ct. at 1453. The majority acknowledged that a litigant generally must "demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Id.* The majority, however, then departed from that standard noting that "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests' . . .—here, the right to challenge agency action unlawfully withheld, . . . 'can assert that right without meeting all the normal standards for redressability and immediacy.'" *Id.* In such circumstances, the majority declared that the litigant "has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.*

The majority then stressed the "special position and interest of Massachusetts" in the standing analysis. *Id.* at 1454.

Congress has ordered EPA to protect Massachusetts (among others) by prescribing standards applicable to the "emission of any air pollutant from any class or classes of new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). Congress has moreover recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious. § 7607(b)(1). Given the procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.

Id. With that analytical backdrop, the majority then concluded that "the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge the EPA's denial of their rulemaking petition." *Id.* at 1458.

Having concluded that Massachusetts has standing, the majority then turned to the question whether GHGs fit within the CAA's definition of "air pollutant." The majority found that the answer to that question is yes.

The Clean Air Act's sweeping definition of "air pollutant" includes "any air pollution agent or combination of such agents, including any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air. . . ." § 7602(g) (emphasis added). On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word "any." Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt "physical [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air."

Id. at 1460. The majority then rejected EPA’s alternative basis for denying the rulemaking petition. EPA had determined that, even if it had authority under the CAA to regulate GHGs, it would decline to do so because of the uncertain causal link between GHGs and climate change and because regulation of motor vehicle emissions would be a “piecemeal approach” that would conflict with the president’s “comprehensive approach” to the problem. The majority ruled that those rationales were “divorced from the statutory text” of the CAA and therefore arbitrary, capricious, and not in accordance with law. *Id.* at 1462. According to the majority, “[w]hile the statute does condition the exercise of EPA’s authority on its formation of a ‘judgment’ . . . that judgment must relate to whether an air pollutant ‘cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.’” *Id.* Thus, according to the majority, “EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.” *Id.* Because the Court found that EPA had failed to make such a determination or to provide a reasonable explanation for not doing so, the court found that EPA’s denial of the rulemaking petition was arbitrary, capricious, and not in accordance with law.

The Dissent

In a dissent authored by Chief Justice Roberts, and joined in by Justices Scalia, Thomas, and Alito, the dissenting justices expressed their views that the case should be dismissed nonjusticiable because the “redress of grievances of the sort at issue here ‘is the function of Congress and the Chief Executive,’ not the federal courts.” *Id.* at 1464. The dissent noted that it “is not at all clear how the Court’s ‘special solicitude’ for Massachusetts plays out in the standing analysis, except as an implicit concession that petitioners cannot establish standing on traditional terms. But the status of Massachusetts as a State cannot compensate for petitioners’ failure to demonstrate injury in fact, causation, and redressability.” *Id.* at 1466–67. The dissent explained that the petitioners’ “reliance on

Massachusetts’s loss of coastal land as their injury in fact for standing purposes creates insurmountable problems for them with respect to causation and redressability.” *Id.* at 1468. According to the dissent, Petitioners are never able to trace their alleged injuries back through the “complex web” of global climate patterns to the “fractional amount of global emissions that might have been limited with EPA standards.” *Id.* at 1469. The dissent then argued that “[r]edressability is even more problematic. To the tenuous link between petitioners’ alleged injury and the indeterminate fractional domestic emissions at issue here, add the fact that petitioners cannot meaningfully predict what will come of the 80 percent of global greenhouse gas emissions that originate outside the United States.” *Id.* The dissent then summarized its concerns:

The Court’s sleight-of-hand is in failing to link up the different elements of the three-part standing test. What must be *likely* to be redressed is the particular injury in fact. The injury the Court looks to is the asserted loss of land. The Court contends that regulating domestic motor vehicle emissions will reduce carbon dioxide in the atmosphere, *and therefore* redress Massachusetts’s injury. But even if regulation *does* reduce emissions—to some indeterminate degree, given events elsewhere in the world—the Court never explains why that makes it *likely* that the injury in fact—the loss of land—will be redressed. Schoolchildren know that a kingdom might be lost ‘all for the want of a horseshoe nail,’ but “likely” redressability is a different matter. The realities make it pure conjecture to suppose that EPA regulation of new automobile emissions will *likely* prevent the loss of Massachusetts coastal land.

Id. at 1470.

**VISIT THE ENVIRONMENTAL IMPACT
ASSESSMENT COMMITTEE
WEB PAGE AT:**

[http://www.abanet.org/environ/
committees/environimpactassess/](http://www.abanet.org/environ/committees/environimpactassess/)

CURRENT STATUS OF CLIMATE CHANGE ANALYSIS UNDER CEQA

Madeline Stone
Holland & Knight

Given the rapidly evolving field of climate change, land use attorneys, project proponents, government officials, community groups, and others are grappling with the question of how to address climate change and greenhouse gasses (GHGs) in environmental review documents. Until recently, documents prepared pursuant to the California Environmental Quality Act (CEQA) were typically silent with regard to potential climate change impacts resulting from the project being analyzed, and generally were not challenged based on the absence of this discussion. Now, however, with increasing attention focused on climate change, in particular following the U.S. Supreme Court's April 2007 decision in *Massachusetts v. EPA* (___ US __; 127 S. Ct. 1438) that carbon dioxide is a Clean Air Act "air pollutant," and the passage of California's AB 32—"Global Warming Solutions Act of 2006"—environmental review documents are beginning to include discussion about climate change. In addition, the California Attorney General, and environmental and community groups are challenging the sufficiency of these documents based on either their failure to address climate change at all, or the alleged inadequacy of this discussion. Agencies tasked with developing and reviewing environmental review documents are also struggling to determine the appropriate approach to climate change discussion to include in these documents and, in some cases, are pushing project proponents to include extensive analysis.

In California, the Attorney General in particular has been actively challenging CEQA environmental impact reports (EIRs) on climate change grounds. To date, the Attorney General has submitted written comment letters alleging various climate change related flaws for at least fourteen projects. While most of these are large-scale planning projects, such as regional transportation plans and county and city general plans, the Attorney General has submitted comment letters on three major industrial projects and at least one large

residential development project, as well as on a specific plan for a new community. Various community and environmental groups have also submitted comments alleging flaws in the analysis of climate change in environmental documents for numerous projects.

The comments from the Attorney General and others have generally criticized documents for failing to analyze a project's own GHG emissions and/or its cumulative contribution to climate change. Commenters also argue that such emissions will impact the state's ability to achieve AB 32's mandates to reduce GHG emissions in the state to 1990 levels by 2020 (although AB 32 itself is unrelated to CEQA). In some cases where the documents do include analysis of climate change, commenters question the failure to determine whether the impact is significant and/or the absence or alleged inadequacy of mitigation for any significant impact that the project may have.

To date, two of the challenges undertaken by the Attorney General have resulted in settlements, which may have significant implications for how future CEQA environmental review documents approach climate change analysis. On Aug. 21, 2007, *Center for Biological Diversity v. County of San Bernardino*, which is a challenge to an EIR prepared for a General Plan update for the county, was settled with regard to the Attorney General's claims. Case Nos. SS 07000293, SS 0700329 (petitions for this case were filed on April 11 and 12, 2007; the most recent filing was Petitioner Center for Biological Diversity's Statement of Issues on Sept. 21, 2007; and a hearing is scheduled for Jan. 25, 2008). The settlement resulted in substantial commitments from the county to implement GHG reduction measures. The settlement commits the county to creating an inventory of greenhouse gas emission sources in the county, an inventory of GHG emissions levels in 1990 and projected levels in 2020, and a target for reduction of GHG emissions attributable to the county's discretionary land use decisions and its own internal government operations.

The Attorney General also recently settled with Conoco Phillips over Conoco Phillips' proposed

expansion of its refinery in Rodeo. Although the Attorney General had not yet filed a claim against Conoco Phillips on climate change analysis grounds, through the administrative appeal process, the Attorney General had clearly indicated its intent to do so. The settlement requires Conoco Phillips to fund a \$7 million offset program to be administered by the Bay Area Air Quality Management District to compensate for the initial 500,000 tons/year of carbon dioxide that the project would create. In addition, Conoco Phillips must provide \$200,000 for wetlands restoration and \$2.8 million for a reforestation project. Conoco Phillips also agreed to identify GHG reduction opportunities at all of its California Refineries, including its Rodeo facility, and surrender a permit for its Santa Maria coke purification plant.

These settlements will undoubtedly influence the approach taken toward GHG analysis in documents prepared pursuant to CEQA. In addition, at least three cases (in addition to *Center for Biological Diversity v. County of San Bernardino*, which was only settled with respect to the Attorney General's claims) are working their way through the California court system. In *Highland Springs Conference and Training Center v. City of Banning*, *Center for Biological Diversity v. County of San Bernardino*, the Center for Biological Diversity (CBD) and several other environmental groups have challenged the EIR prepared for a 1,500-home development project proposed to be built in a remote, undeveloped area, claiming that the document failed to address the project's impacts on climate change. Case Nos. RIC 460950, RIC 460967, RIC 461035, RIC 461069 (the most recent filing in this case was the Petitioners' Combined Opening Brief filed on July 3, 2007). CBD and another environmental group have also challenged the EIR prepared for a proposed composting facility in San Bernardino County on the grounds that the climate change analysis was insufficient. *Center for Biological Diversity v. County of San Bernardino*, Case No. BS 09950 (petition for this case was filed on March 29, 2007), the most recent filing in this case was Petitioner's Statement of Damages filed on Sept. 18, 2007, and a hearing is scheduled for Jan. 28, 2007). And, most recently, in *Center for Biological Resources v. City*

of Perris, CBD has challenged the EIR prepared for a 520,000 square foot commercial development, claiming that the EIR failed to analyze the project's GHG impacts, or quantify its energy consumption and consider energy conservation measures. CBD also claims that the EIR is deficient for its failure to include mitigation measures to address the project's climate change and energy consumption impacts.

None of the pending cases mentioned above has yet produced a court ruling. However, three cases involving challenges to supplemental environmental documentation that were prepared for projects already approved, and which did not include climate change analysis, have been decided at the trial court level. In *American Canyon Community United for Responsible Growth v. City of American Canyon* (Case No. 06CS01228, order entered on April 27, 2007) and *NRDC v. Reclamation Board of Resources Agency of the State of California* (Case No. 26-27462, order entered on May 21, 2007), the trial courts held that AB 32 in particular and climate change in general did not represent "significant new information" such that the supplemental documents needed to include discussion of the issue. In *Santa Clarita Oak Conservancy v. City of Santa Clarita* (Case No. BS 084677, order entered on Aug. 15, 2007), the court held that the impact of climate change on water supply was too speculative to be analyzed in an EIR supplement prepared specifically to address water supply.

Both the volume of comments and the judicial challenges have raised significant questions regarding climate change analysis in documents prepared pursuant to CEQA. Because regulations have not yet been developed to implement AB 32 or to provide guidance on how to include climate change analysis in environmental review documents, many fear that CEQA challenges alleging inadequate climate change analysis will delay implementation of important projects throughout California. In an effort to prevent such delays, a group of Republicans in the state Senate proposed amending CEQA to prohibit legal challenges to environmental review documents on grounds related to climate change, and refused to vote for the state's budget until the issue was resolved. On Aug. 21, 2007,

a compromise bill, SB 97, was passed as part of the overall budget agreement. The governor signed the budget on Aug. 24, 2007 and SB 97 on Aug. 28, 2007 (SB 97 will take effect on Jan. 1, 2008). SB 97 amends CEQA to prohibit challenges to environmental review documents for specified transportation, port and flood control projects funded by state bonds based on failure to adequately analyze GHG emissions required to be reduced under AB 32. This prohibition will last until Jan. 1, 2010. By the same date, the bill also requires the California Resources Agency to adopt guidelines for mitigation of greenhouse gas emissions pursuant to CEQA. However, this compromise bill leaves other projects throughout the state subject to CEQA challenges on climate change grounds, and does not prevent any agency from voluntarily requiring analysis or mitigation of GHG emissions prior to the adoption of the new guidelines.

Although this issue is rapidly evolving and definitive conclusions are difficult to make at this time, some lessons can be drawn from the developments discussed above. Ignoring climate change impacts in environmental review documents is no longer supportable. Documents should include discussions about the GHG emissions associated with a project and how these emissions relate to the larger problem of climate change. In addition, environmental review documents that do not make a determination regarding the significance of a project's climate change impacts are increasingly likely to be challenged. Emboldened by the Attorney General's settlements with both the County of San Bernardino and Conoco Phillips, project opponents are also likely to push harder for commitments to mitigate a project's GHG emissions. Although these settlements do not represent judicial precedent requiring mitigation of climate change impacts, they may serve as practical guides to what will be expected of project proponents, and will certainly lead to ongoing pressure from agencies and members of the public to mitigate GHG emissions through the CEQA process.

KING COUNTY FIRST IN THE NATION TO REQUIRE CLIMATE CHANGE IMPACTS TO BE CONSIDERED DURING ENVIRONMENTAL REVIEW OF NEW PROJECTS

Steven G. Jones
The Marten Law Group

King County Washington's Executive Ron Sims has issued an Executive Order requiring county agencies to consider climate change impacts as part of their project review under Washington's State Environmental Policy Act (SEPA). While the Executive Order was scheduled to take effect on Sept. 1, 2007, that date was extended to Oct. 15, 2007 so that comments could be made on the new rule. The Executive Order applies to any project that requires a SEPA checklist. The Executive Order can be viewed at <http://www.metrokc.gov/exec/news/2007/pdf/climateimpacts.pdf>. In addition to the Executive Order, on Aug. 31, 2007, the county published a Fact Sheet and Worksheet to assist developers in complying with the new Executive Order. The Fact Sheet can be viewed at: <http://www.metrokc.gov/permits/codes/pdf/SEPAclimatechange factsheet%20070831.pdf> and the Worksheet can be viewed at: <http://www.metrokc.gov/permits/codes/pdf/Climatechangeimpactsworksheetaugust312007.pdf>.

Executive Order Applies to All New Projects Requiring a Preliminary Environmental Checklist

The Executive Order "require[s] and direct[s] all King County Departments, . . . to require that climate impacts, including but not limited to those pertaining to greenhouse gasses, be appropriately identified and evaluated when such Departments are acting as the lead agency in reviewing the environmental impacts of private and public proposals pursuant to the State Environmental Policy Act." Executive Order at 3.

The Executive Order cites the recent United States Supreme Court decision in *Massachusetts v. EPA*, ___ U.S. ___, 127 S. Ct. 1438 (Apr. 2, 2007), in which the Court determined that greenhouse gas (GHG) emissions are an "air pollutant." It also cites previous

Executive Orders under which county departments were directed to “employ increasingly aggressive strategies” and “innovative environmental management,” including “coordinated strategies to mitigate and adapt to global warming.” The quoted language comes from prior King County Executive Orders PUT 7-5, 7-7 and 7-8. In 2007, the King County Council adopted the “2007 King County Climate Plan.” The County’s Climate Action Plan can be viewed at: <http://www.metrokc.gov/exec/news/2007/pdf/ClimatePlan.pdf>.

Mitigation to be Deferred Until Comprehensive Plan Is Updated

Sims’ Deputy Chief of Staff Jim Lopez stated that county agencies would ask project proponents to supply information on transportation, energy usage, and other impacts of proposed projects, but that there is no current plan to require project proponents to take action to mitigate the impacts identified. Instead, emission thresholds and mitigation requirements will be developed in connection with the county’s upcoming 2008 update of its Comprehensive Plan. That update process will begin in September 2007 and run through 2008. Lopez said that the county intends to use the update process as a way to undertake outreach to groups affected by the new policy and to solicit and incorporate stakeholder involvement. Author’s interview with J. Lopez (July 30, 2007).

County’s Action May Be an Indication of New Wave of Mitigation Requirements Based on Climate Change

Sims characterized the new Executive Order as a warning shot to the rest of the state: “Every jurisdiction is on notice now,” said Sims, in issuing the directive. He pointed to the Washington Legislature’s adoption of ESB 6001 and said that the county’s action would be necessary in order to comply with the limits set in that statute: “Whether it’s the city of Seattle or the state of Washington or anybody else, they’ve got to do this now. We don’t think that people have actually thought that through.” *Id.*

This past July, the county, in partnership with the Sierra Club, helped to launch the “Cool Counties Climate

Stabilization Initiative” as an attempt to combat global warming. The Declaration can be viewed at: <http://www.metrokc.gov/exec/news/2007/0716dec.aspx>. Lopez said that it is King County’s intention to provide a template for similar regulations to be adopted by other counties who have signed up as part of the “Cool Counties” initiative. Author’s interview with J. Lopez (July 30, 2007).

Massachusetts Takes a Similar, but Somewhat More Limited Approach

King County is not the only jurisdiction nationally to require environmental review of climate change impacts. The State of Massachusetts issued administrative regulations in April 2007 under which developers and state agencies are required to quantify GHG emissions and assess GHG mitigation measures in their environmental review documents under the Massachusetts Environmental Policy Act (MEPA). *See* Massachusetts Executive Office of Energy and Environmental Affairs Greenhouse Gas Emissions Policy (Apr. 23, 2007). MEPA is codified at MASS. GEN. LAWS, ch. 30, § 61, *et seq.* As currently drafted, the regulations are applicable to: (1) projects where the state is the project proponent or is providing financing, (2) private projects that require a state Air Quality Permit, or (3) private projects that will generate a certain number of new vehicle trips per day. For private office projects, the regulations apply if the project will generate 3,000 new vehicle trips a day; for mixed-use projects, the regulations apply if the project will generate 6,000 new vehicle trips a day, and for all other private projects, the regulations apply if the project will generate 10,000 or more new vehicle trips per day.

By contrast, King County’s Executive Order requires an inventory of climate change impacts for every project that requires submittal of a SEPA checklist. This broad scope has generated concerns on the part of the building industry. David Hoffman, of the Master Builders, noted that the scope of the new Executive Order pushes King County beyond any other state or local jurisdiction in the country, and has moved the county beyond Massachusetts’ draft regulations. In addition to county government, Seattle and a number of other cities have been addressing climate

change in a variety of ways. The City of Austin, Texas, adopted a “Climate Action Plan” which contains strategic elements such as the use of a “Compact City” and “New Urbanism” development approaches. City of Austin, *Sustainability Report*, at 41. In 1999, Austin required that 5 percent of local electricity come from renewable energy sources, a goal the city’s municipal utility has met by increasing purchases of solar and wind power. The Pew Center for Climate Change, cited in “Creating a Favorable Climate: Strategies for Cities to Address Climate Change. A Casebook for a Practical Approach” (Apr. 2007) (copy in author’s possession). Portland, Oregon, adopted a global warming action plan in 1993, which included goals targeting land use planning, energy efficiency, renewable energy, solid waste and recycling, and urban forestry. See ICLEI Local Governments for Sustainability, *Global Warming Reduction Strategies Progress Report, Portland Oregon, Members in Action*, at 3. The plan has resulted in a 65 percent increase in public transit ridership, doubling of bicycle commuting, a recycling rate of 57 percent and the planting of 750,000 trees. *Id.* at 6. The City of Seattle has led the nation’s city in addressing climate change, launching a national effort to obtain commitments to reduced emission goals and itself adopting goals of increasing public transit, expanding bike and pedestrian infrastructure, implementing a new commercial parking tax, and maintaining Seattle City Light (the city’s electric utility) at zero net GHG emissions. The City of Seattle’s Climate Action Plan can be viewed online at www.seattlecan.org.

Many cities and counties have already begun adopting “urban village” or other high density designations in their comprehensive plans and regulations that encourage mixed used development as a means of reducing vehicle trips. The imposition of impact fees to encourage GHG emissions reductions and revisions in zoning and building codes to encourage green construction, particularly Leadership in Energy and Environmental Design (LEED)-certified buildings, are also being considered. See *Creating a Favorable Climate*, cited in full in the preceding paragraph.

Implementation Will Require Answers to a Number of Questions

King County’s actions raise a number of questions that will need to be addressed as its new policies are implemented and mitigation requirements under the Executive Order are developed. For those representing project proponents and municipalities who may wish to follow King County’s lead, some of the following key issues will need to be addressed:

What constitutes an impact? With no definition of a “climate impact,” the Executive Order is unclear regarding whether it requires information regarding “upstream impacts” (for example, from particular building materials), “mid-stream impacts” (i.e., impacts generated by the construction of the project itself) or “downstream impacts” (for example, increased vehicle trips associated with development). Both project proponents and municipal attorneys will need to decide what impacts are being accounted for, and what the definition of an “impact” is.

Reliability of information. Without a clear indication of what information the county is seeking, it will be extremely difficult for project proponents to know what data to collect and submit in connection with their SEPA checklists. While the county’s guidance document and worksheet provide some direction, county officials have been quick to point out that use of the worksheet will not provide a shield from possible litigation.

What will be the regulatory impact? There is no doubt that the ultimate purpose of the county’s new policy is to develop thresholds and regulatory limits that will be imposed on new development. In California, some local air quality authorities are already requiring mitigation for GHG emissions from projects pursuant to existing air quality regulations. Apart from those limited exceptions it remains unclear whether the regulatory focus will be on mitigation, for example through cap-and-trade, or through an outright reduction of impacts.

Concurrency, impact fees, and mitigation. Many local jurisdictions have concurrency requirements for

transportation impacts, which generally require road improvements and traffic signals. But true mitigation could require an overall reduction of vehicle trips, instead of building more infrastructure. King County Executive Ron Sims signaled this change in announcing the Executive Order, predicting that GHG restrictions will lead to more public transportation and less emphasis on adding capacity to highways. *See A. Garber, "Sims takes steps to limit emissions," Seattle Times* (June 28, 2007). Sims' Deputy Chief of Staff, Jim Lopez, agreed that this shift would constitute a major change in the way the County addresses transportation impacts from new development. Author's interview with J. Lopez (July 30, 2007). If these predictions are fulfilled, attorneys and consultants representing developers and their municipal counterparts will need to come up with mitigation options for GHG emissions, rather than simply building more infrastructure.

CLIMATE CHANGE AND CEQA: SAN BERNARDINO COUNTY'S LANDMARK GLOBAL WARMING SETTLEMENT

Rita S. Chan
Pillsbury Winthrop Shaw Pittman, LLP

Since the enactment of California's AB 32, also known as the Global Warming Solutions Act of 2006, California public agencies tasked with developing environmental review documents have been struggling to determine the appropriate approach to address climate change in these documents under the California Environmental Quality Act (CEQA). The California Attorney General has submitted comment letters, under CEQA, to numerous public entities, including San Bernardino County, City of San Diego, San Diego Association of Governments, Sacramento Area Council of Governments, Orange County Transportation Authority, Merced County Association of Governments, Kern Council of Governments, Council of Fresno County Governments, San Joaquin Council of Governments, Contra Costa County, Yuba County, City of Richmond, and City of San Jose. The Attorney General's comments have generally criticized environmental review documents for failing to analyze a project's greenhouse gas (GHG) emissions and/or its cumulative contribution to climate change, or for failing to determine whether the project's contribution to climate change is significant.

In the case of San Bernardino County, the Attorney General went beyond merely commenting on an environmental review document by filing a lawsuit in April 2007. The complaint alleged that the environmental impact report (EIR) for the county's General Plan Update did not adequately discuss the impact of development on global warming and that no mitigation measures were proposed. On Aug. 21, 2007, the Attorney General reached a landmark settlement with San Bernardino County, which may effectively set precedent for other similar settlements. Under the settlement agreement, the county is required to amend its General Plan to add a policy that "describes the County's goal of reducing those greenhouse gas emissions reasonably attributable to the

TRENDS NOW AVAILABLE ONLINE!

Section members are now able to view the newsletter *Trends* in .pdf format in the Section Members Only portion of the Section Web site at www.abanet.org. Issues dating back to September/October 2006 are archived. As a member of the Section, you have access to view *Trends* after logging onto the Web site with your ABA Member ID number and password.

Section members may also view *The Year in Review* and *Natural Resources & Environment* in the Section Members Only portion of the Section Web site.



County's discretionary land use decisions and . . . internal government operations." Further, the county will prepare a Greenhouse Gas Emissions Reduction Plan which includes: (1) an inventory of all known, or reasonably discoverable, sources of GHGs that currently exist in the county; (2) a baseline inventory of the greenhouse gas emissions currently being emitted in the county; (3) an inventory of the GHGs from the sources in 1990; (4) a projected inventory of GHGs in 2020 due to the county's discretionary land use decisions pursuant to the General Plan Update and internal government operations; and (5) a target for the reduction of emissions attributable to the county's discretionary land use decisions and internal government operations, and feasible emissions reduction measures.

The Attorney General issued a news alert regarding the settlement, quoting his remarks at a news conference: "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." The Attorney General further recommends a list of feasible mitigation measures, including:

- 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 plans to generate electricity.
- Carbon emissions credit purchases that fund alternative energy projects.

Although the Attorney General has dismissed his action against San Bernardino County, there is still a pending lawsuit against the county filed by the Center for Biological Diversity, as well as several other suits in California with pending claims based on allegedly inadequate climate change analysis in EIRs. The San Bernardino lawsuit and its resulting settlement demonstrate that CEQA can be a powerful tool for those who wish to push project proponents to analyze and address GHGs emission issues.

**ABA SECTION OF ENVIRONMENT,
ENERGY, AND RESOURCES**

Calendar of Section Events

**Quick Teleconference:
Environmental Issues to Consider
Now for 2008 10-K Preparation**
Dec. 4, 2007

ABA Midyear Meeting
Feb. 6-12, 2008
Los Angeles, California

26th Annual Water Law Conference
Feb. 21-22, 2008
San Diego, California

**37th Annual Conference on
Environmental Law**
March 13-16, 2008
Keystone, Colorado

Eastern Water Resources
May 1-2, 2008
Charlotte, North Carolina

***For more information, see the
Section Web site at
www.abanet.org/environ/ or
contact the Section at 312/988-5724.***

**NEW FROM ABA PUBLISHING AND THE SECTION
OF ENVIRONMENT, ENERGY, AND RESOURCES**

Global Climate Change and U.S. Law

Michael B. Gerrard, Editor

Because global climate change presents extraordinary challenges to the environment and the economy of United States as well as those of other nations, the debate about how to effectively implement more climate-friendly policies is sure to continue and amplify. The scientific case for strong action is becoming more compelling every month, and opinion polls show that the American public increasingly agrees. The law will play an important part in developing mechanisms to protect the climate, such as conserving energy, using renewable sources of energy, and implementing emission caps and trading programs.



Global Climate Change and U.S. Law provides comprehensive coverage of the country's law as it relates to global climate change. After a summary of the factual and scientific background, Part I outlines the international and national legal framework of climate change regulation and associated litigation. Part II describes emerging regional, state and local actions, and includes a 50-state survey. Part III covers issues of concern to corporations, including disclosure, fiduciary duties, insurance, and subsidies. Part IV examines the legal aspects of efforts to reduce greenhouse gases, such as voluntary efforts, emissions trading, and carbon sequestration. *Global Climate Change and U.S. Law* includes key resource aids, including a glossary of climate related terms; a list of acronyms; extensive endnotes; and a comprehensive index.

2007 784 pages 7x10 paperback

Product Code: 5350156

Regular Price: \$59.95

Section of Environment, Energy, and Resources Member Price: \$49.95

**TO ORDER ABA BOOKS, CALL 1-800-285-2221 OR
VISIT THE ABA PUBLISHING
WEB SITE AT WWW.ABABOOKS.ORG
QUESTIONS? E-MAIL: SERVICE@ABANET.ORG**