

# Warming Up to Global Climate Change

By Leslie Z. Walker\*

The global warming debate is not merely heating up, it is boiling over. Now that former Speaker Newt Gingrich and Speaker Nancy Pelosi have appeared together on national television in a public service announcement about global climate change (“GCC”), there is no turning back.<sup>1</sup> GCC is an issue of both public and legal consequence, regardless of its scientific underpinnings. Increased media attention, coupled with the United States Supreme Court’s decision in the case of *Massachusetts v. EPA*,<sup>2</sup> the Ninth Circuit’s decision in *Center for Biological Diversity v. National Highway Traffic Safety Administration*,<sup>3</sup> the U.S. Fish and Wildlife Service’s decision to list the Polar Bear,<sup>4</sup> and the passage by the California Legislature of Senate Bill 97 (Chapter 185, Statutes 2007), have converted GCC into the proverbial 900 pound polar bear in the living room; it is too big to ignore, but nobody knows what to do about it. This article provides an overview of GCC, the legal and political framework as it exists in California, and practical considerations for local governments wrestling with these issues in the context of the California Environmental Quality Act<sup>5</sup> (“CEQA”).

## I. CLIMATE CHANGE OVERVIEW

Climate change refers to any change in climate over time, whether due to natural variability or as a result of human activity.<sup>6</sup> It is believed that human actions such as electricity production and vehicle use have increased the amount of greenhouse gases (“GHG”) in the environment beyond natural levels, causing GCC. GHG include water vapor, carbon dioxide, methane, nitrous oxides, chlorofluorocarbons, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride, ozone, and aerosols.<sup>7</sup> GHG emissions are generally measured in carbon dioxide equivalents (CO<sub>2</sub>e). California generated 497 million metric tons of CO<sub>2</sub>e in 2004.<sup>8</sup> The single largest contributor to CO<sub>2</sub>e is fossil fuel consumption in the transportation sector, which accounts for 41 percent of California’s GHG emissions.<sup>9</sup> At this point, the relationship between GCC and

the myriad of individual land use decisions is subject to ongoing study and speculation, but the linkages are neither universally understood nor agreed upon.

## II. CEQA OVERVIEW

CEQA’s purpose is to compel government at all levels to consider environmental consequences of their decisions.<sup>10</sup> The law applies to projects involving governmental action, including the granting of discretionary permits such as tentative subdivision maps and conditional use permits.<sup>11</sup>

When a government agency determines a “project involve[s] government action, it conducts a ‘preliminary review’ and determines whether there is any possibility that the activity may have a significant effect on the environment.”<sup>12</sup> In doing so, the agency evaluates the project’s direct and indirect environmental effects, and assesses the cumulative environmental effect.<sup>13</sup> “Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.”<sup>14</sup> If there is a possibility of a significant effect, then the agency conducts an initial study to determine if the project, either individually or cumulatively, may cause a significant effect on the environment.<sup>15</sup> If so, the agency must prepare an environmental impact report (“EIR”).<sup>16</sup>

The EIR must identify the possible significant direct and indirect impacts of the proposed project.<sup>17</sup> It must also discuss the cumulative impacts of a project when the project’s incremental effect is cumulatively considerable.<sup>18</sup> An effect is cumulatively considerable if “the incremental effects of the individual project are considerable when viewed in connection with past, current, and probable future projects.”<sup>19</sup> If feasible mitigation measures exist which would avoid or substantially lessen the significant environmental effect of a project, the agency must adopt them.<sup>20</sup>

## III. DRIVERS OF CLIMATE CHANGE ANALYSIS UNDER CEQA

There are no published appellate court decisions which address the relationship of CEQA to GCC, but as the public debate over GCC has intensified, the Legislature and the Attorney General have brought the issue to the forefront. Given new laws and their interpretation by the Attorney General, state agencies and project proponents, the practical issue is no longer whether or not GHG analysis is necessary, but rather what kind and what level of analysis are appropriate.

### A. NEW LAWS

In June 2005, Governor Schwarzenegger issued Executive Order S-3-05 calling for statewide reductions in GHG emissions and creating the Climate Action Team. The Executive Order set emission targets, the first of which is reducing GHG emissions to 2000 levels, by 2010.

The Legislature, acting to codify goals of the Executive Order, passed Assembly Bill 32 (Chapter 488, Statutes 2006), the Global Warming Solutions Act of 2006.<sup>21</sup> The law requires the reduction of the State’s GHG emissions to 1990 levels by 2020. The law also requires the California Air Resources Board to adopt emission limits and emission reduction measures to take effect by January 1, 2012. Neither the Executive Order nor Assembly Bill 32 makes any reference to the California Environmental Quality Act.

The legislative findings for the Global Warming Solutions Act state, “[g]lobal warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California.”<sup>22</sup> Advocacy groups and the Attorney General have seized upon this language to argue that since CEQA requires the consideration of a project’s environmental impact, Assembly Bill 32 and CEQA together require the consideration of GHG in CEQA documents.

In 2007, the Legislature weighed in on the CEQA/GCC interface by passing Senate Bill 97 (Chapter 185, Statutes 2007).<sup>23</sup> The law requires the Governor's Office of Planning and Research (OPR) to prepare CEQA guidelines for the mitigation of GHG emissions. These guidelines must be transmitted to the Resources Agency by July 1, 2009. The Resources Agency must then certify and adopt the guidelines by January 1, 2010. While the bill legislates future requirements, it does not address how, or if, GHG should be accounted for and mitigated now. Senate Bill 97 does, however, contain a safe harbor exemption for projects funded by certain bond acts of 2006. This implies that all other non-exempt projects are required to conduct a GHG analysis in the interim. In sum, neither Assembly Bill 32 nor Senate Bill 97 gives a clear indication of what the Legislature expects today with respect to GHG analysis in CEQA documents.

### B. ATTORNEY GENERAL

Although the legal requirements remain uncertain, the California Attorney General's position on the issue is clear. Over the last year, the Attorney General has sent over 30 letters to agencies commenting on their failure to include an analysis of GHG in the CEQA process and claiming that under CEQA the lead agencies are required to do so.<sup>24</sup> In San Bernardino, the Attorney General brought suit against the County seeking to set aside the recently updated general plan. He claimed that the County did not comply with CEQA because it failed to analyze the increased GHG emissions that would result from the County's proposed general plan amendment.<sup>25</sup> The parties settled and agreed that the County would amend the general plan within 30 months, inventorying GHG emissions and adding a policy of GHG reduction.<sup>26</sup> The settlement also called for the development and adoption of a Greenhouse Gas Emissions Reduction Plan. In the absence of other guidance, the terms of the settlement serve as a guidepost for lead agencies attempting to determine their obligations under CEQA.

Following the settlement, the Attorney General held a number of workshops throughout the state, calling for local agencies to act immediately to address GHG emissions in their CEQA documents. The workshops introduced potential methods for measuring,

evaluating and mitigating GHG emissions, including pointing agencies to a chart of modeling tools and a table of mitigation measures, both of which are available on the Attorney General's web site.<sup>27</sup>

### C. OPR TECHNICAL ADVISORY

Recognizing that practitioners need some guidance during the year-long wait for the CEQA guidelines mandated by Senate Bill 97, OPR released a technical advisory on the issue on June 19, 2008. The technical advisory, *CEQA and Climate Change, Addressing Climate Change Through the California Environmental Quality Act*,<sup>28</sup> largely echoes the message of the Attorney General. The advisory calls for each lead agency to "develop its own approach to performing a climate change analysis for projects that generate GHG emissions."<sup>29</sup> The approach should "identify and quantify the GHG emissions; assess the significance of the impact on climate change; and if the impact is found to be significant, identify alternatives and/or mitigation measures that will reduce the impact below significance."<sup>30</sup> While the advisory contains appendices inventorying and describing models to identify and quantify GHG strategies, and proposing mitigation measures, like the Attorney General documents, it does not prescribe a method for the process it advocates.

### IV. PROBLEMS WITH ADDRESSING CLIMATE CHANGE UNDER CEQA

Since climate change is a global issue, it is best addressed at the international, national or statewide level. Nonetheless, in the absence of federal or state legislative guidance, project opponents argue that CEQA is the forum for documenting and mitigating GCC. One can seriously question the wisdom and efficiency of requiring every public entity to evaluate this issue on an ongoing basis.<sup>31</sup> Beyond this theoretical question, quantification of GHG presents some very real world problems.

First, although several models have been developed to estimate project emissions, most likely an attempt to quantify the GHG emissions associated with a development project will necessarily overestimate those emissions. The largest portion of GHG production comes from vehicle use.<sup>32</sup> It is difficult to know if any single project will

necessarily increase the number of vehicle miles traveled by any predictable level, since most of the people living, working, shopping, or going to school in the proposed development currently perform those activities somewhere. In other words, in the global context, many trips generated by a proposed project will not be newly created trips. They will be trips relocated from elsewhere. The impact on GCC will not be the same as if an entirely new trip were generated, which, under many models, is how the project trips will be counted.

The second issue is that of scale. Considering that climate change is a global issue, it is difficult, if not impossible to argue that a single project's contribution to GCC is significant. For example, the development of Roblar Road Quarry is proposed in Sonoma County. The Draft EIR for the project estimates that the annual CO<sub>2</sub>e emitted from the project will be 5,404 metric tons.<sup>33</sup> This is approximately 0.000027 percent of the CO<sub>2</sub>e emitted globally in 2004.<sup>34</sup> It would stretch the limits of reason to argue that an increase of 0.000027 percent would be cumulatively considerable. Even if a project that generated emissions equivalent to those generated by all of Marin County were added to the planet in a year, the increase would only be 0.016 percent.<sup>35</sup> The finding that GCC is significant worldwide alone does not support the conclusion that any increase in GHG is significant.<sup>36</sup>

The Attorney General and project opponents argue that GHG should be evaluated as a cumulative impact. A cumulative impact is an "impact which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts."<sup>37</sup> Even analyzed in the cumulative impact context, GHG impacts of the order of magnitude that could be created at the local level are not significant.

This theory initially sounds of the "ratio" theory rejected in *Kings County Farm Bureau v. City of Hanford*<sup>38</sup> ("Kings County"). In *Kings County*, the agency argued that since its project would only contribute less than one percent of area emissions for criteria air pollutants, it would have no significant impact on air quality.<sup>39</sup> The *Kings County* court held that

such an analysis “improperly focused upon the individual project’s relative efforts and omitted facts relevant to an analysis of the collective effect this and other sources will have upon air quality.”<sup>40</sup>

*Kings County* on its own seems to preclude the argument that a single project’s contribution is too small to actually be significant. However, *Communities for a Better Environment v. California Resources Agency*<sup>41</sup> (“*Communities*”), explained that the standard from *Kings County* was whether “any additional amount of effect should be considered significant in the context of the existing cumulative effect.”<sup>42</sup> The court noted however, that this does not mean “that any additional effect in a nonattainment area for that effect necessarily creates a significant cumulative impact, the one [additional] molecule rule is not the law.”<sup>43</sup> Furthermore, the CEQA Guidelines make clear that the “mere existence of a significant cumulative impact caused by other projects alone shall not constitute substantial evidence that the proposed project’s incremental effects are cumulatively considerable.”<sup>44</sup>

In other words, under *Kings County*, it would be improper to argue that Roblar Road Quarry only increases CO<sub>2</sub>e by 0.000027 percent and thus, its impact is insignificant. However, under *Communities*, the increase of 0.000027 percent should be considered within the context of the entire problem of GCC. What is presently lacking is any objective criteria for performing the *Communities* type analysis. Under the CEQA Guidelines, however, just because GHG have created GCC does not necessarily mean that any contribution of GHG will be significant. The mere existence of an environmental problem does not mean that any project contributing any amount to the problem will create a significant impact.<sup>45</sup> The addition of the equivalent of one molecule of GHG does not make the impact of a project significant.<sup>46</sup>

**V. HOW TO ADDRESS GHG UNDER CEQA**

Despite the difficulties of linking incremental agency decisions to GCC, public agencies need a strategy to deal with the issue until such time as the legal responsibilities are settled by the legislation or judicial fiat. To date, the best way to address GCC in CEQA

documents, on a scale larger than a project-by-project basis, is to address GHG at the general plan level.<sup>47</sup> CEQA provides for streamlined review of a project that is consistent with an existing general plan, community plan or zoning ordinance, for which an EIR has been certified.<sup>48</sup> When approving a project that falls under this provision, the agency only needs to examine those environmental effects that are “peculiar to the project and that were not analyzed or were insufficiently analyzed in the prior environmental impact report.”<sup>49</sup> If a jurisdiction or community takes on the task of evaluating and mitigating for GHG emissions, then subsequent projects consistent with that jurisdiction’s plan will not have to re-address the issues addressed in those earlier documents.

Until general plans, community plans or zoning ordinances that deal with GHG emissions are adopted on a region wide level, local agencies are left to deal with GHG on a project-by-project basis. Local agencies may find guidance in the details of the San Bernardino settlement, the Attorney General’s tables of modeling tools and mitigation measures, as well as the OPR advisory and attachments, all mentioned above. In addition, the California Air Pollution Control Officers Association prepared a paper discussing various approaches.<sup>50</sup> The document includes an appendix measuring the GHG reduction potential of various mitigation measures. However, no universally agreed upon methodologies exist and no document answers the critical question of how much mitigation is enough, or quantifies the beneficial tradeoffs of implementation. The suggested approaches all necessitate an ongoing, repeated evaluation of GCC, which is neither practical nor efficient.

More than with any other environmental issue, GCC calls out for clear policy and regulatory guidance from the Legislature and Congress. Politics such as they are, there is little optimism that this guidance will be forthcoming. Best to get used to the polar bear in the room; it likely will not be leaving any time soon.

**ENDNOTES**

1. [http://www.youtube.com/watch?v=qi6n\\_wB154](http://www.youtube.com/watch?v=qi6n_wB154).
2. *Massachusetts v. EPA* (2007) 127 S.Ct. 1438, holding that greenhouse gases are

pollutants which the EPA must regulate under the Clean Air Act (42 U.S.C. § 7401 et seq.).

3. *Center for Biological Diversity v. National Highway Traffic Safety Administration* (2007) 508 F.3d 508, finding that the impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impact analysis that NEPA requires agencies to conduct.
4. The Secretary of the Interior announced the listing of the Polar Bear as a threatened species under the Endangered Species Act (16 U.S.C. § 1531 et seq.) on May 14, 2008.
5. Pub. Resources Code, § 21000 et seq.
6. IPCC Fourth Assessment Report available at <http://www.ipcc.ch/>.
7. Health & Saf. Code, § 38505, subd. (g).
8. California Air Pollution Control Officers Association, CEQA & Climate Change, January 2008 (“CAPCOA”), available at <http://www.capcoa.org/>.
9. The Climate Action Team Report to the Governor and the Legislature, March 2006 available at [http://climatechange.ca.gov/climate\\_action\\_team/reports/index.html](http://climatechange.ca.gov/climate_action_team/reports/index.html).
10. *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Ca1.3d 376, 393.
11. CEQA Guidelines, Cal. Code Regs., tit. 14, § 15002, subd. (b) (“Guidelines”).
12. *San Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus* (1996) 42 Cal.App.4th 608, 614; Guidelines, § 15061.
13. *Communities for a Better Environment v. California Resources Agency et al.* (2002) 103 Cal.App.4th 98, 114.
14. Guidelines, § 15061, subd. (b)(3).
15. *San Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus*, *supra*, 42 Cal.App.4th 608, 614.

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