



Environmental Due Diligence Guide

REPORT

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An Insider's Perspective

Climate Strategies in California Have Implications for Land Use, Transactions

A triad of legislative initiatives aimed at reducing greenhouse gas (GHG) emissions in California will need to be tracked by affected agencies, industries, and real estate developers as regulations to implement the policies take effect, an attorney told BNA Feb. 12.

AB 32, which mandates statewide GHG reductions to 1990 levels by 2020; SB 375, designed to limit transportation-related GHG emissions by improving the efficiency of regional land development patterns; and SB 97, which directs the governor's Office of Planning and Research (OPR) to prepare and submit guidelines for the analysis and mitigation of GHG emissions and their effects under the California Environmental Quality Act (CEQA), exemplify California's innovative approach to climate change and ultimately may provide a road map for federal policy, Chelsea Holloway, an attorney with Holland & Knight's San Francisco office, told BNA.

However, she explained, because not all regulations to implement these policies have been issued yet, it can be very difficult for different agencies, businesses, and developers to know exactly what needs to be done to comply with the goals of the legislation.

"For practitioners assisting entities affected by the legislation, it will be important to be proactive and track the regulatory actions taken by state agencies, especially the California Air Resources Board (CARB) and OPR, as they issue draft guidelines on how to comply. Reviewing draft guidance, visiting agency Web sites, getting on agency mailing lists to figure out how regulations are shaping up" is critical, Holloway explained.

Climate Litigation

In the meantime, litigation is being filed, she said. "Litigation also needs to be tracked to see what kinds of issues are being raised and the decisions being rendered."

"One of the most litigious environmental statutes in California is CEQA," Holloway explained, with hundreds of CEQA lawsuits filed each year. Because of its sweeping reach, requiring agencies to consider the environmental consequences of their actions before approving plans and policies or committing to a course of action, there already have been at least eight superior court decisions on climate change-related CEQA lawsuits, she added.

The first round of lawsuits essentially addressed the question of whether a climate change analysis was necessary, Holloway said. Because the state agencies had not yet issued regulatory guidance, some courts ruled no analysis was necessary. However, during the next wave of lawsuits, the courts began

ruling the climate analysis was necessary.

"Now we are beginning to see cases about whether the analysis conducted was appropriate," she continued. To this end, the courts have not been particularly helpful in telling parties what kind of analysis is needed but more often merely have ruled the analysis did not go far enough. "Looking forward, litigation likely will focus on whether measures adopted to mitigate impacts were adequate and if significance determinations were appropriate," Holloway predicted.

Tie-in to Brownfields

Regarding brownfields redevelopment, Holloway said SB 375 is particularly applicable because of its goals. "SB 375 provides that even with lower carbon fuels and better mileage standards, it is still necessary to achieve GHG reduction from changing land-use patterns. SB 375 envisions more densely populated urban areas and dense, urban infill projects. Because of this, the brownfields model works really well with SB 375 goals," she said.

Also, Holloway explained, a new focus on reduction of GHGs resulting from environmental remediation also is reshaping brownfields cleanups. For example, she said, "it makes less sense to conduct remediation that will haul dirt offsite because of the emissions that result from truck trips. Instead, it is preferred to treat the soil onsite." Also, she continued, remediation equipment in California now is using al-

ternative energy and low-carbon fuels.

Brownfields projects also are being incentivized under SB 375 via streamlining provisions under CEQA for projects that meet certain qualifying criteria.

Due Diligence Considerations

Climate change policies in California also have implications for environmental due diligence, Holloway explained.

For example, in relation to SB 375 it is important to consider the transit-

oriented nature of a project to see if there is a possibility to tie in a transit-oriented component, she said. Also, it will be important for parties to figure out how local agencies are dealing with CEQA documents and mitigation measures as well as determining significance thresholds.

Outside of the land-use sector, AB 32's scoping plan for achieving the maximum technologically feasible and cost-effective reductions in GHG emissions to meet the legislation's GHG reduction goals is critically important, Holloway said, because it reaches all sectors of GHG generating activities.

"The implementation schedule for the scoping plan measures has just been issued," Holloway explained. "If you are looking into a facility's future operations, you'll want to know what the scoping plan has in mind for that operation. CARB is moving very quickly and is coming up with lots of specific ideas," she said.

An in-depth commentary and analysis of California's climate change legislation and related case law written by Holloway will be published in a forthcoming issue of EDDG. She can be reached at chelsea.holloway@hklaw.com.