



WORLD CLIMATE CHANGE REPORT



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CLIMATE CHANGE

With legislative efforts targeting greenhouse gas reductions in all sectors, the author of this article says, rapidly evolving regulatory activities and trial court cases made 2008 an extremely busy year in shaping California's climate change landscape. Because California is regarded as a bellwether state for environmental regulations, its efforts to combat or adapt to climate change will be watched closely and potentially replicated as other states and the federal government address the issue. In this article, the author looks at recent climate change legislative initiatives in California that are affecting the way the state is viewing environmental regulation as well as land use. She also looks at litigation in California related to these policies and speculates about further legal challenges and about additional regulations and guidelines that may be established.

Legal Perspectives on Recent California Climate Change Legislation

By CHELSEA HOLLOWAY

In the first week of his presidency, President Barack Obama issued two environmental memoranda that, when taken together, indicate a clear mandate for improved automobile fuel efficiency standards.¹ Such immediate action, along with Obama's clearly ex-

¹ President Barack Obama, *Memorandum for the Administrator of the Environmental Protection Agency* (Jan. 26, 2009), available on the Web at http://www.whitehouse.gov/the_press_office/Presidential_Memorandum_EPA_Waiver/.

President Barack Obama, *Memorandum for the Secretary of Transportation* (Jan. 26, 2009), available on the Web at

pressed intention to address clean air, clean energy technology, climate change, and renewable resources, leaves little doubt the new administration will usher in a new era of environmental regulation. As part of this significant paradigm shift, many will look to learn from and replicate California's efforts to combat climate change as the state has long been a national and international leader on energy conservation and environmental regulatory efforts. A range of new California executive orders and statutes target all sectors of green-

http://www.whitehouse.gov/the_press_office/Presidential_Memorandum_fuel_economy/.

house gas emission-generating activities that lead to climate change impacts. California's most recent efforts have been shaped by decades of innovative state legislation to regulate energy efficiency and mobile sources of greenhouse gas emissions.

This article discusses some of the early precursors to the state's current greenhouse gas-reduction strategies and describes specific components and implications of the most recent legislation, including: (1) Assembly Bill 32 (Chapter 488, Statutes 2006), which mandates the reduction of statewide greenhouse gas emissions to 1990 levels by 2020 (AB 32); (2) Senate Bill 375 (Chapter 728, Statutes 2008), which is designed to limit transportation-related greenhouse gas emissions by improving the efficiency of regional land-development patterns (SB 375); (3) Senate Bill 97 (Chapter 185, Statutes 2007), which directs the Governor's Office of Planning and Research (OPR) to prepare and submit guidelines for the analysis and mitigation of greenhouse gas emissions and their effects under the state's environmental review act, the California Environmental Quality Act (CEQA)² by 2010 (SB 97). The article also summarizes preliminary decisions in the trial courts on the need for and adequacy of greenhouse gas analysis under CEQA prior to the finalization of regulations implementing AB 32, SB 375, and SB 97.

In all these efforts, California again is exercising a leadership role in addressing climate change. As other states and the federal government shape climate change strategies in this new era, California's laboratory of innovative programs provide ample opportunity to learn from and advance future regulations throughout the county.

I. Early Efforts Shaped California's Approach

A. The Clean Air Act and Mobile Sources

A true cornerstone of the state's greenhouse gas-reduction strategy, Assembly Bill 1493 (Chapter 200, Statutes 2002) (AB 1493) was the first law in the nation to address greenhouse gas emissions from automobile exhaust.³ At the time the legislation was adopted, greenhouse gas emissions were not regulated as criteria pollutants under the federal Clean Air Act.⁴ Specifi-

² Cal. Pub. Res. Code Sections 21100-21177.

³ Greenhouse gases from motor vehicles include carbon dioxide, hydrofluorocarbons, methane, and nitrous oxide.

⁴ The Supreme Court since then has held in *Massachusetts et al. v. Environmental Protection Agency et al.*, 549 U.S. 49, 63 ERC 2057 (2007) that the Environmental Protection Agency has the statutory authority under Section 202(a)(1) of the Clean Air Act (42 U.S.C. § 7521(a)(1)) to regulate greenhouse gas emissions from new motor vehicles and can avoid regulating greenhouse gases only if the agency determines greenhouse gas emissions do not contribute to climate change or provides some other reasonable explanation why it cannot or will not exercise its discretion to determine whether to regulate greenhouse gas emissions. *Massachusetts v. Environmental Protection Agency* 549 U.S. 497, 528-533. After the 2007 decision, former EPA Administrator Stephen L. Johnson published an Advance Notice of Proposed Rulemaking (ANPR) in the *Federal Register* July 30, 2008. (73 Fed. Reg. 44,354) (available on the Web at <http://www.epa.gov/climatechange/emissions/downloads/ANPRPreamble.pdf>) The ANPR did not make an endangerment finding but detailed the difficulties with using the Clean Air Act to regulate greenhouse gases. Thereafter, the comment period extended until Nov. 28, 2008,

cally, AB 1493 required the California Air Resources Board to implement regulations that would achieve the maximum cost-effective reduction of greenhouse gas emissions from motor vehicles.⁵ In 2004, CARB approved regulations that would have required specified reductions in tailpipe emissions from model-year 2009 cars and light-duty trucks.⁶ A CARB report estimated that when compared to use of conventional fuels, implementation of these "Pavley standards" (named for the author of the law) would reduce statewide greenhouse gas emissions by 87,700 carbon dioxide equivalent tons per day in 2020 and 155,200 carbon dioxide equivalent tons per day in 2030, translating into an 18 percent overall reduction in greenhouse gas emissions in 2020 and a 27 percent overall reduction in 2030.⁷ Such reductions, along with an anticipated second phase of regulations, would have constituted the most significant individual strategy to meet California's greenhouse gas emission-reduction targets, discussed below.⁸ With such a huge estimated environmental benefit, AB 1493 led to at least 13 other states subsequently adopting these Pavley standards.⁹

The regulations soon were stalled, however, when several automobile dealerships and manufacturers filed suit seeking to enjoin the regulations primarily on the grounds of preemption in December 2004, which precipitated a long legal and political morass.¹⁰ In December 2007, the district court hearing the case granted summary adjudication and declared that if the EPA granted a waiver of Section 209(b) of the Clean Air Act (42 U.S.C. § 7543(b))¹¹ allowing California to adopt the regulations, enforcement of the regulations by California would not be prevented by the doctrine of preemption.¹² Earlier in 2007, California filed a lawsuit against

at which point new regulations were not proposed pending the transition to new EPA leadership under the Obama administration. Evidencing a change in policy, the new EPA administrator, Lisa Jackson, signed a finding that greenhouse gases in the atmosphere endanger the public health and welfare on April 17, 2009. EPA released a prepublication copy of the proposed endangerment finding, which will be published in the *Federal Register*. See the pre-publication copy available at <http://www.epa.gov/climatechange/endangerment/downloads/GHGEndangermentProposal.pdf>. The proposed endangerment finding now enters the public comment period, which is the next step in the process EPA must undertake before issuing final findings and legislation.

⁵ Cal. Health & Safety Code Section 43018.5(a).

⁶ Cal. Code Regs. Title 13, Section 1962.

⁷ CARB, *Climate Change Emission Control Regulations* (Dec. 10, 2004), page 3, available at http://www.arb.ca.gov/cc/factsheets/cc_newfs.pdf.

⁸ CARB, *Proposed Scoping Plan* (October 2008), Figure 2 Recommended Greenhouse Gas Reduction Measures, page 17, available at <http://www.arb.ca.gov/cc/scopingplan/document/psp.pdf>.

⁹ *Id.* at 39.

¹⁰ See *Central Valley Chrysler Jeep, Inc. v. Witherspoon* (E.D. Cal., No. 04-6663, filed Dec. 7, 2004).

¹¹ Section 209(b) allows the EPA administrator to waive the prohibition against state standards governing the control of emissions from new motor vehicles where the administrator determines the state standards in the aggregate will be at least as protective of public health and welfare as the applicable federal standards. 42 U.S.C. § 7543(b).

¹² *Central Valley Chrysler Jeep Inc. v. Goldstone*, 529 F. Supp. 2d 1151, 66 ERC 1826 (E.D. Cal. 2007).

EPA¹³ seeking to compel the agency to act on a waiver request made by the state in 2005.¹⁴ On Dec. 19, 2007, EPA denied California's waiver request, citing the global nature of the problem of climate change and the need for a national solution.¹⁵ California along with 17 other states challenged the waiver denial in the U.S. Court of Appeals for the Ninth Circuit Jan. 2, 2008.¹⁶

As litigation remains in the courts, the new EPA administrator is expected to grant the waiver necessary for CARB to implement the Pavley standards. On Jan. 21, 2009, CARB Chairperson Mary Nichols asked newly appointed EPA administrator Lisa Jackson to reconsider the denial of the waiver.¹⁷ On Jan. 26, 2009, President Obama issued a memorandum requesting Administrator Jackson to assess whether the EPA's decision to deny the waiver was appropriate in light of the Clean Air Act and initiate appropriate action based on the assessment.¹⁸ On Feb. 6, 2009, Administrator Jackson signed a *Federal Register* notice initiating EPA's process to reconsider the waiver.¹⁹

B. Executive Orders

Despite the litigation and political chaos following the Pavley bill, both California Gov. Arnold Schwarzenegger and the Legislature have reaffirmed their commitment to addressing greenhouse gas reductions and have pursued several innovative approaches in doing so.

Most notably, Gov. Schwarzenegger June 1, 2005, issued Executive Order S-03-05 establishing aggressive emission-reduction goals: by 2010, greenhouse gas emissions must be reduced to 2000 levels; by 2020, greenhouse gas emissions must be reduced to 1990 levels; and by 2050, greenhouse gas emissions must be reduced to 80 percent below 1990 levels.²⁰

The order also established the state's Climate Action Team, consisting of the chair of the Air Resources Board; chair of the Energy Commission; president of the Public Utilities Commission; secretary of the Busi-

¹³ *State of California and California Air Resources Board v. Environmental Protection Agency*, Complaint for Declaratory and Injunctive Relief (D.D.C., No 1:07-CV-02024, 11/8/07). A total of 14 states intervened in the lawsuit.

¹⁴ 72 FR 21260 (4/30/07). Available at <http://www.epa.gov/fedrgstr/EPA-AIR/2007/April/Day-30/a8168.htm>.

¹⁵ See Dec. 19, 2007, letter to Gov. Arnold Schwarzenegger from EPA Administrator Stephen L. Johnson, available at <http://www.epa.gov/otaq/climate/20071219-slj.pdf>.

¹⁶ *State of California v. United States Environmental Protection Agency* (9th Cir., Jan. 2, 2008) available at http://ag.ca.gov/cms_attachments/press/pdfs/n1514_epapetition-1.pdf.

¹⁷ CARB Press Release, *California Air Resources Board asks EPA to reconsider denial of waiver to reduce greenhouse gas emissions from cars* (Jan. 21, 2009), available at <http://www.arb.ca.gov/newsrel/nr012109b.htm>.

¹⁸ President Barack Obama, *Memorandum for the Administrator of the Environmental Protection Agency* (Jan. 26, 2009), available at http://www.whitehouse.gov/the_press_office/Presidential_Memorandum_EPA_Waiver/.

¹⁹ *California State Motor Vehicle Pollution Control Standards; Greenhouse Gas Regulations; Reconsideration of Previous Denial of a Waiver of Preemption* 74 FR 7040 (2/12/09), available at <http://www.epa.gov/fedrgstr/EPA-AIR/2009/February/Day-12/a2913.htm>.

²⁰ Gov. Schwarzenegger, *Executive Order S-3-05* (June 1, 2005), available at <http://www.dot.ca.gov/hq/energy/ExecOrderS-3-05.htm>.

ness, Transportation, and Housing Agency; secretary of the Department of Food and Agriculture; and secretary of the Resources Agency.²¹ The Climate Action Team will be coordinated and managed by the Secretary of the California Environmental Protection Agency.²² The Climate Action Team was charged with reporting on progress toward meeting the statewide greenhouse gas targets; reporting on the impacts of global warming on California (including impacts on agriculture, the coastline, forestry, public health, and the water supply); and preparing a report on adaptation and mitigation plans to combat these impacts.²³

C. Recent Legislation Addressing Climate Change

These past executive and legislative efforts set the stage for California's most recent legislation, which targets greenhouse gas emissions from all sectors, including land-use patterns. The following discussion presents some of the key legal and political issues raised by these recent legislative efforts and associated caselaw, including: (1) AB 32's science-based model to achieve statewide greenhouse gas emission reductions by creating sector-specific greenhouse gas-reduction targets; (2) SB 375's land-use based model aimed to reduce transportation-related greenhouse gas emissions by improving the efficiency of regional land-development patterns; (3) SB 97's development of guidelines that will require analysis of proposed activities' impacts on climate change under CEQA; and (4) preliminary decisions in the trial courts on the need for and adequacy of greenhouse gas analysis under CEQA prior to the finalization of regulations implementing AB 32, SB 375, and SB 97.

II. AB 32: Sector-Specific, Science-Based

California's Global Warming Solutions Act of 2006,²⁴ commonly known as AB 32, established the first comprehensive greenhouse gas regulatory program in the United States by regulating greenhouse gas²⁵ emissions from most industries in the state. AB 32 requires the reduction of statewide greenhouse gas emissions to 1990 levels by 2020.²⁶ Notably, AB 32 does not contain detailed control measures. Similar to the manner in which the Clean Air Act sets national standards and EPA subsequently creates regulations to implement those standards, AB 32 creates statewide greenhouse gas limits and then requires those limits to be met via sector-specific greenhouse gas emission reduction measures to be developed and regulated by CARB.

A. Components of AB 32

Emissions Inventory

The first step under AB 32 required CARB to evaluate the best available economic, scientific, and technological information on greenhouse gas emissions to deter-

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Cal. Health & Safety Code Sections 38500-38599.

²⁵ AB 32 defines "greenhouse gases" to include carbon dioxide, hydrofluorocarbons, methane, nitrous oxide, perfluorocarbons, and sulfur hexafluoride. CA. Health & Safety Code Section 38505(g).

²⁶ Cal. Health & Safety Code Section 38550.

mine the statewide greenhouse gas levels in 1990 and approve a statewide greenhouse gas limit equivalent to that level to be achieved by 2020.²⁷ CARB staff recommended an amount of 427 million metric tonnes of carbon dioxide equivalent (MMTCO₂E) as the total statewide 1990 greenhouse gas emissions level and 2020 greenhouse gas emissions limit, which was approved by the CARB Board Dec. 6, 2007.²⁸ Accordingly, to meet the 2020 goal, the state will have to lower emissions by 169 MMTCO₂E from 596 MMTCO₂E projected for the state in 2020 if the state continues to conduct “business-as-usual.”²⁹ The greenhouse gas emissions limit for 2020 requires an approximately 30 percent reduction from the business-as-usual projections.

Reporting Requirements

AB 32 also includes mandatory reporting requirements for significant greenhouse gas sources.³⁰ Pursuant to AB 32, CARB approved reporting regulations Dec. 6, 2007,³¹ that took effect Jan. 1, 2009.³² CARB posted a Greenhouse Gas Reporting Tool on Feb. 25, 2009, to assist those required to report greenhouse gas emissions under the new regulations.³³ Compliance reporting requirements include establishing a greenhouse gas inventory management program, documenting greenhouse gas calculation methods, collecting and recording data, submitting a greenhouse gas emissions data report, and initiating third-party verification that is optional in 2009 and mandatory in 2010.³⁴

Early Action Measures

CARB also was required to publish a list of discrete early action measures to achieve the maximum technologically feasible and cost-effective reductions in greenhouse gas emissions.³⁵ Measures adopted June 21, 2007, included increased methane capture from landfills, a low-carbon fuel standard, and the reduction of refrigerant losses from motor vehicle air-conditioning

system maintenance.³⁶ In October 2007, CARB staff recommended the expansion of the early action list to 44 measures.³⁷ The CARB Board found that nine measures met AB 32’s definition of discrete early action measures that can be implemented prior to the measures adopted as part of the Scoping Plan (discussed below). These nine measures include the original three measures plus an additional six measures in the commercial and transportation sectors.³⁸ CARB must adopt regulations to implement the early action measures by Jan. 1, 2010.³⁹

Scoping Plan

CARB also was required to adopt a scoping plan for achieving the maximum technologically feasible and cost-effective reductions in greenhouse gas emissions to meet AB 32’s greenhouse gas-reduction goals.⁴⁰ In June 2008, CARB released a draft plan indicating how sector-specific greenhouse gas emission reductions will be made from significant sources (Draft Scoping Plan) and released an updated plan in October 2008 (Scoping Plan). Input on the development of the Scoping Plan came from (1) formal advisory committees created by AB 32 that include an Environmental Justice Advisory Committee, an Economic and Technology Advancement Advisory Committee, and a Market Advisory Committee; (2) meetings with various stakeholders, such as business and industrial groups, members of the public, and nonprofit organizations; and (3) written comments on the Draft Scoping Plan.⁴¹ CARB approved the Scoping Plan Dec. 11, 2008.⁴²

Consistent with AB 32’s directive that CARB evaluate the costs and benefits of greenhouse gas-reduction measures,⁴³ the Scoping Plan explains that in preparing the Scoping Plan, CARB evaluated the effect of the greenhouse gas emission-reduction measures on the economy⁴⁴ and plans to consider the cost-effectiveness of the proposed measures, or the cost per unit of reduced greenhouse gas emissions, when adopting the Scoping Plan measures in the future.⁴⁵ Other criteria considered in developing the Scoping Plan included energy diversification; impacts on specific sectors, like disproportionately impacted communities and small businesses; and public health improvements.⁴⁶

²⁷ *Id.*

²⁸ CARB, *Resolution 07-55* (Dec. 6, 2007) available at http://www.arb.ca.gov/cc/inventory/1990level/arb_res07-55_1990_ghg_level.pdf.

²⁹ CARB, *Proposed Scoping Plan* (October 2008), p. 12, available at <http://www.arb.ca.gov/cc/scopingplan/document/psp.pdf>.

³⁰ Cal. Health & Safety Code Section 38530. The reporting requirement follows Senate Bill 1771 (Chapter 1018, Statutes of 2000), which established the California Climate Action Registry to allow cities, companies, and government agencies to voluntarily record their greenhouse gas emissions in anticipation of a possible program that would allow them to be credited for early reductions.

³¹ CARB, *Resolution 07-54* (Dec. 6, 2007), available at <http://www.arb.ca.gov/regact/2007/ghg2007/res0754.pdf>. Resolution 07-54 approved reporting regulations adopted at Cal. Code Regs. Title 17, Sections 95100- 95133.

³² CARB, *Rulemaking to Consider Adoption of a Regulation for the Mandatory Reporting of Greenhouse Gas Emissions*, (Dec. 2, 2008) available at <http://www.arb.ca.gov/regact/2007/ghg2007/ghg2007.htm>.

³³ CARB, *Online Greenhouse Gas Reporting Tool: Training Site*, available at <http://ghgreporttraining.arb.ca.gov/eats/carb%5Ftraining/>.

³⁴ CARB, *Instructional Guidance for Mandatory GHG Emissions Reporting* (December 2008), available at http://www.arb.ca.gov/cc/reporting/ghg-rep/ghg-rep-guid/00_06_GenProvs.pdf.

³⁵ Cal. Health & Safety Code Section 38560.5(a).

³⁶ CARB Press Release, *California Moves Swiftly to Further Address Climate Change Emissions; Early Action Items Approved Today* (June 21, 2007), available at <http://www.arb.ca.gov/newsrel/nr062107.htm>.

³⁷ CARB, *Expanded List of Early Action Measures to Reduce Greenhouse Gas Emissions in California Recommended for Board Consideration* (October 2007), p. 19, available at http://www.arb.ca.gov/cc/ccea/meetings/ea_final_report.pdf.

³⁸ *Id.*

³⁹ Cal. Health & Safety Code Section 38560.5(b).

⁴⁰ Cal. Health & Safety Code Section 38561.

⁴¹ CARB, *Proposed Scoping Plan* (October 2008), p. 1, available at <http://www.arb.ca.gov/cc/scopingplan/document/psp.pdf>.

⁴² CARB Press Release, *ARB Says Yes to Climate Action Plan* (Dec. 11, 2008) available at <http://www.arb.ca.gov/newsrel/nr121108.htm>.

⁴³ See Cal. Health & Safety Code Sections 38505, 38560, 38561(d), 38562.

⁴⁴ CARB, *Proposed Scoping Plan* (October 2008), p. 73, available at <http://www.arb.ca.gov/cc/scopingplan/document/psp.pdf>.

⁴⁵ *Id.* at 84.

⁴⁶ *Id.* at ES-7.

The foundation of the Scoping Plan is the imposition of greenhouse gas emissions caps on most sectors of the California economy, so-called “capped sectors.”⁴⁷ Within the capped sectors, reductions will be achieved through direct emission reduction measures (e.g., improved building efficiency standards and vehicle efficiency measures) as well as potential monetary and nonmonetary incentives resulting from a cap-and-trade program.⁴⁸ Greenhouse gas emission reductions are roughly proportional to the emissions from those sectors. For example, the transportation sector is estimated to be responsible for roughly 38 percent of greenhouse gas emissions. Accordingly, the Scoping Plan calls on the transportation sector to contribute nearly 36 percent of the plan’s overall emission reductions.⁴⁹ The largest sources of greenhouse gas reductions from capped sectors include the following:

- light-duty vehicle greenhouse gas standards, including the implementation of the Pavley standards and the development of a second phase of Pavley light-duty vehicle standards;

- energy efficiency measures for appliances and buildings;

- reductions from a statewide renewable energy level of 33 percent, relying on the adoption of a low-carbon fuel standard and stricter tailpipe emissions standards;

- regional transportation-related greenhouse gas-reduction targets:

- deployment of the California Solar Initiative, California’s commitment to construct one million solar roofs;

- construction of a statewide high-speed rail;

- reduction of emissions from trucks and ships docked in California ports; and

- industrial measures, including measures for energy efficiency and refineries.⁵⁰

Other “uncapped” sectors are to be regulated by specific measures recommended by CARB.⁵¹ While the Scoping Plan measures allow some flexibility in achieving greenhouse gas-reduction goals, some measures will require businesses and industries to upgrade current technologies to achieve emission-reduction goals. For example, the Scoping Plan explains that investment in methane digesters for dairy operations may be necessary to achieve reductions in the agriculture sector.⁵² CARB released a Scoping Plan Measures Implementation Timeline Jan. 29, 2009 that specifies the implementation date and agency responsible for each measure listed in the Scoping Plan.⁵³

Consistent with AB 32’s option to adopt regulations for establishing a system of market-based declining an-

nual aggregate emissions limits,⁵⁴ the Scoping Plan also relies on a cap-and-trade program to reduce greenhouse gas emissions. The cap-and-trade program will be phased in first by capping electricity generation and large industrial facilities that emit more than 25,000 metric tonnes carbon dioxide equivalent (MTCO₂E) per year in 2012, and then capping additional industrial facilities emissions as well as all commercial and residential emissions and transportation emissions in 2015.⁵⁵

B. Economic Impacts of Scoping Plan

In addition to the economic analysis provided in the Scoping Plan, CARB released supplements to the Draft Scoping Plan Sept. 17, 2008, that included an additional economic analysis. The Scoping Plan provides that implementation of AB 32 will have an overall positive effect on the economy by creating jobs and saving individual households more money than if California continued to conduct business-as-usual.⁵⁶

The Legislative Analyst’s Office (LAO), a nonpartisan fiscal and policy advisor, reviewed and reported on the economic impacts of the Scoping Plan in response to a request made by Assembly Member Roger Niello. The LAO concluded that (1) the Scoping Plan’s overall emission reductions and purported net economic benefit are highly reliant on one measure, the Pavley mobile source fuel-efficiency regulations; (2) the Scoping Plan’s evaluation of the costs and savings of some recommended measures is inconsistent and incomplete (i.e. the Scoping Plan varies in whether it attributes costs and savings of measures to business-as-usual that alters the overall costs and savings of the plan); (3) modeling results show a slight net economic benefit to the Scoping Plan, but CARB failed to demonstrate analytical support of its findings; (4) economic analysis played a limited role in development of the Scoping Plan and appears to have been conducted after measures already had been recommended; and (5) despite its prediction of eventual net economic benefit, the Scoping Plan fails to lay out an investment pathway that would describe, year-by-year, the investments required to implement measures and the timing of the economic return on those investments necessary to reach greenhouse gas emissions levels goals in 2020.⁵⁷ The LAO letter also explained that the use of market mechanisms in cap-and-trade programs can be complex and involve policy choices that will require oversight and policy direction from the Legislature, particularly because there is little experience with the use of the market mechanisms to control greenhouse gas emissions.⁵⁸

C. AB 32 Provides for Flexibility and Innovation

Over the next three years, CARB will engage in the rulemaking phase to implement the AB 32 programs. In 2009, CARB will be drafting language to implement the Scoping Plan and conducting a series of public workshops. By Jan. 1, 2010, the early action measures will

⁴⁷ *Id.* at 15.

⁴⁸ *Id.*; Cal. Health & Safety Code Section 38561(d).

⁴⁹ See letter to Assembly Member Niello (Nov. 17, 2008), p. 8, available at http://www.lao.ca.gov/2008/rsrc/ab32/AB32_scoping_plan_112108.pdf.

⁵⁰ CARB, *Proposed Scoping Plan* (October 2008), p. 17, available at <http://www.arb.ca.gov/cc/scopingplan/document/psp.pdf>.

⁵¹ *Id.* at 15.

⁵² *Id.* at 66-67.

⁵³ CARB, *Scoping Plan Measures Implementation Timeline* (Jan. 29, 2009) available at http://www.arb.ca.gov/cc/scopingplan/meetings/012909/sp_measures_implementation_timeline_012909.pdf.

⁵⁴ Cal. Health & Safety Code Section 35870(a).

⁵⁵ CARB, *Proposed Scoping Plan* (October 2008), p. 31, available at <http://www.arb.ca.gov/cc/scopingplan/document/psp.pdf>.

⁵⁶ *Id.* at ES-8.

⁵⁷ See letter to Assembly Member Niello (Nov. 17, 2008), available at http://www.lao.ca.gov/2008/rsrc/ab32/AB32_scoping_plan_112108.pdf.

⁵⁸ *Id.* at 23.

take effect.⁵⁹ By Jan. 1, 2011, CARB must adopt regulations establishing greenhouse gas limits and emission reduction measures in furtherance of achieving statewide greenhouse gas emissions limits.⁶⁰ And by Jan. 1, 2012, the greenhouse gas regulations and market mechanisms adopted by CARB will take effect.⁶¹

While the Scoping Plan has garnered some criticism in its economic analysis and allocation of greenhouse gas-reduction targets between varying sectors, AB 32 has followed the example of the Clean Air Act and provided a comprehensive, science-based model targeting greenhouse gas reductions from a variety of sectors but allowing each sector flexibility to determine the best way to achieve greenhouse gas reductions. AB 32 also encourages innovation from consumers and energy producers, particularly through the establishment of the cap-and-trade program, which creates an opportunity for firms to seek out cost-effective, technologically innovative emission-reduction strategies.

III. SB 375: Changing Land-Use Patterns

SB 375, signed by Gov. Schwarzenegger Sept. 30, 2008,⁶² is designed to limit greenhouse gas emissions from cars and light trucks by improving the efficiency of regional land-development patterns. Breaking new ground nationally, SB 375 concludes that even with better mileage standards for light trucks and cars and improved lower carbon fuels, “it will be necessary to achieve significant additional greenhouse gas reductions from changed land-use patterns and improved transportation.”⁶³

A. Historical Perspectives

California has experimented with regional planning reforms in response to major issues throughout the past century, as reformers have worked to create stronger a planning framework at the regional level. Reform in the 1990s, undertaken to respond to growth pressures of the 1980s and 1990s, delegated authority to the regional or county level of governance and called for a greater link between regional planning areas and land-use policy. In 2000, Assembly Speaker Robert Hertzberg created the Speaker’s Commission on Regionalism, which aimed to “foster regional collaboration among communities and local governments.”⁶⁴ The commission’s report advocated a long-term realignment of state policies and programs in a number of areas to support regional coordination, but the program stalled because of the state’s electricity crisis and an economic downturn that diverted attention and produced a budget shortfall. SB 375 is another attempt to improve and elevate regional planning. In contrast to previous reform

attempts, SB 375 introduces a potentially significant financial hook.

B. Adoption of SB 375

SB 375 was introduced in February 2007 by Sen. Darrell Steinberg⁶⁵ to achieve greenhouse gas reductions within the land-use sector in furtherance of AB 32’s goals by linking land-use patterns and transportation. Steinberg explained that “[c]urrent planning models used for transportation decisions and air quality planning must be improved to assess policy choices. This includes encouraging more compact development patterns, expanding transit service, creating walkable communities, and providing incentives. . . . [T]ransportation and CEQA incentives are needed for greater housing choices, shorter commutes, reduced climate emissions, less air pollution, less fossil fuel consumption, and greater conservation of farmlands and habitat.”⁶⁶

In proposing a new model of regional planning, SB 375 garnered attention from various organizations, including the California League of Cities (LOC), an association of California city officials, and the California Building Industry Association (CBIA), a statewide trade organization representing architects, engineers, home builders, and other industry professionals. These organizations, among others, engaged in numerous negotiations with Steinberg in amending the bill. Specifically, LOC sought to ensure SB 375 would protect local land-use authority, result in realistic emission-reduction targets, and eliminate vagueness in SB 375’s language that could lead to potential litigation.⁶⁷ LOC’s official position on the bill fluctuated from opposition to eventual support.⁶⁸ Similarly, CBIA’s view of SB 375 has oscillated. During SB 375 negotiations, CBIA recommended an alternative to SB 375 similar to the Sacramento Area Council of Governments’ “Sacramento Region Blueprint,”⁶⁹ which links transportation projects to air-quality considerations and land-development forecasts. This led to CalTrans’ establishment of the California Regional Blueprint Planning Program, a voluntary, discretionary grant program to fund regional transportation and land-use plans designed by metropolitan planning organizations working in cooperation with regional councils of governments. Although SB 375

⁵⁹ The original version of SB 375 was introduced by Sen. Steinberg (Feb. 21, 2007), available at http://leginfo.ca.gov/pub/07-08/bill/sen/sb_0351-0400/sb_375_bill_20070221_introduced.pdf.

⁶⁰ Senate Committee on Environmental Quality, Bill Analysis (April 20, 2007), available at http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0351-0400/sb_375_cfa_20070420_163218_sen_comm.html.

⁶¹ LOC, *League Takes Positions on SB 375* (July 7, 2007), available at http://www.cacities.org/index.jsp?displaytype=11&story=26793&zone=loc§ion=issues&sub_sec=issues_housing&tert=issues_housing_cominfo (search for SB 375).

⁶² LOC, *League Officially Takes an Oppose Position on SB 375: Cities Should Act Now to Defeat the Measure* (Aug. 10, 2007), available at <http://www.cacities.org/index.jsp?displaytype=11&story=26832&zone=loc>; LOC, *Governor Signs SB 375* (Oct. 6, 2008), available at <http://www.cacities.org/index.jsp?displaytype=11&story=27459&zone=loc>.

⁶³ LOC, *League Board Meets in San Diego; Strategic Priorities, Eminent Domain, SB 375, and Other Issues Discussed* (Feb. 15, 2008), available at <http://www.cacities.org/index.jsp?displaytype=11&story=27109&zone=loc>.

⁵⁹ Cal. Health & Safety Code Section 38560.5(b).

⁶⁰ Cal. Health & Safety Code Section 38562(a).

⁶¹ *Id.*

⁶² Governor’s Press Release, *Governor Schwarzenegger Signs Sweeping Legislation to Reduce Greenhouse Gas Emissions Through Land Use* (Sept. 30, 2008) available at <http://gov.ca.gov/press-release/10697>.

⁶³ See SB 375, Section 1(c) [uncodified], available at http://leginfo.ca.gov/pub/07-08/bill/sen/sb_0351-0400/sb_375_bill_20080930_chaptered.pdf.

⁶⁴ Speaker’s Commission on Regionalism, *Assembly Speaker Hertzberg Creates Commission on Regionalism* (Nov. 16, 2000), available at <http://www.regionalism.org/news/item.php?id=3>.

diverges from the regional blueprint model, as discussed below, CBIA supported the bill when it was adopted⁷⁰ but now plans to seek amendments to SB 375.⁷¹

At the time SB 375 was adopted, a broad range of organizations, including affordable housing advocates, environmentalists, home builders, and local governments, had come together to support the bill.⁷² Most believe that SB 375 was supported in the hope it would provide some clarity on how AB 32's greenhouse gas-reduction limits would be achieved in the land-use and transportation planning sectors.⁷³ As uncertainty about the implementation of SB 375 emerges, support for it has faltered.⁷⁴

C. Elements of SB 375

To promote regional land-use patterns that would limit greenhouse gas emissions, SB 375 links transportation funding to regional plans that will effectuate greenhouse gas emission-reduction targets and streamlines environmental review under CEQA for certain transit-oriented projects.

Sustainable Communities Strategy

Metropolitan Planning Organizations (MPOs)⁷⁵ are directed to develop a "sustainable communities strategy" within regional transportation plans that consider a number of factors related to existing transportation networks and patterns and provide a strategy to achieve CARB-approved greenhouse gas emission-reduction targets.⁷⁶ In making the sustainable communities strategy element a mandatory component of regional transportation plans, SB 375 diverges from the Regional Blueprint Planning Program mentioned above because the blueprints remained separate documents designed to inform rather than be incorporated into regional transportation plans.

The greenhouse gas emission-reduction targets will be designated according to the following process: (1) CARB was required to appoint a Regional Targets Advisory Committee (RTAC) to recommend factors to be considered and methodologies to be used for setting

greenhouse gas-reduction targets by Jan. 31, 2009;⁷⁷ (2) RTAC will make recommendations to CARB on the greenhouse gas-reduction targets by Sept. 30, 2009;⁷⁸ (3) CARB will provide each affected region with a draft greenhouse gas-reduction target to review by June 30, 2010;⁷⁹ and (4) CARB will provide each affected region with the approved greenhouse gas-reduction target by Sept. 30, 2010.⁸⁰ On Jan. 23, 2009, CARB took the first step in the process and appointed the members of RTAC.⁸¹

Where a sustainable communities strategy does not achieve the greenhouse gas emission-reduction target set by CARB, the MPO must develop an alternative planning strategy that identifies the impediments to achieving greenhouse gas-reduction targets and includes a number of measures (e.g., additional transportation measures or policies, alternative development patterns, or new infrastructure) that would achieve the regional target.⁸²

When developing a sustainable communities strategy or alternative planning strategy, if any, MPOs must adopt a public participation plan that includes: (1) efforts to include a broad range of stakeholders in the planning process; (2) consultation with congestion management agencies, transportation agencies, and transportation commissions; (3) workshops to provide the public with information about the planning process; (4) preparation and circulation of a draft plan; (5) at least three public hearings on the draft plan; and (6) a process for enabling members of the public to receive information, notices, and updates.⁸³ After an MPO approves a sustainable communities strategy, CARB is required to accept or reject an MPO's determination that such a plan would achieve greenhouse gas-reduction targets.⁸⁴

These new regional plans only may be approved after environmental review under CEQA.⁸⁵ However, SB 375 does not create funding to pay for regional plans or accompanying CEQA review, presenting MPOs with a daunting economic, legal, and political task. Additionally, while SB 375 provides that "[n]othing in this section shall require a city's or county's land use policies and regulations, including its general plan, to be consistent with the regional transportation plan or an alternative planning strategy,"⁸⁶ some believe local agencies will feel political pressure for general plan consistency to obtain federal transportation funding, as discussed below.

Based upon the process delineated above, sustainable communities elements adopted pursuant to SB 375 will not be applicable for several years. Among the steps required to implement a sustainable communities strategy, CARB first must endorse greenhouse gas-reduction targets after consultation with RTACs and affected regions, MPOs must prepare a sustainable

⁷⁰ CBIA Press Release, *CBIA Participates in SB 375 Signing Ceremony* (Oct. 2, 2008), available at <http://www.cbia.org/go/cbia/newsroom/press-releases/cbia-participates-in-sb-375-signing-ceremony/>.

⁷¹ See CBIA, *Major Builders Council Reforms Remain High Industry Priority*, available at <http://www.cbia.org/go/cbia/government-affairs/2008-bill-summaries/?keywords=sb%20375>.

⁷² See SB 375 sponsors listed in Senate Transportation & Housing Committee, *Bill Analysis* (Sept. 3, 2008), available at http://leginfo.ca.gov/pub/07-08/bill/sen/sb_0351-0400/sb_375_cfa_20080903_100317_sen_comm.html.

⁷³ LOC, *Governor Signs SB 375* (Oct. 6, 2008), available at <http://www.cacities.org/index.jsp?displaytype=11&story=27459&zzone=loc>.

⁷⁴ For example, while CBIA supported SB 375 when it was adopted, CBIA now is working to have it amended. See CBIA, *Major Builders Council Reforms Remain High Industry Priority*, available at <http://www.cbia.org/go/cbia/government-affairs/2008-bill-summaries/?keywords=sb%20375>.

⁷⁵ Metropolitan planning organizations are federally mandated regional organizations responsible for comprehensive transportation planning and programming within urbanized areas of the United States. 23 U.S.C. § 134.

⁷⁶ Cal. Gov't. Code Section 65080(b)(2).

⁷⁷ Cal. Gov't. Code Section 65080(b)(2)(A)(i).

⁷⁸ *Id.*

⁷⁹ Cal. Gov't. Code Section 65080(b)(2)(A)(ii).

⁸⁰ Cal. Gov't. Code Section 65080(b)(2)(A).

⁸¹ CARB, *Regional Targets Advisory Committee Board Appointed Members* (Jan. 23, 2009), available at <http://www.arb.ca.gov/cc/sb375/rtac/memberlistfinal.pdf>

⁸² Cal. Gov't. Code Section 65080(b)(2)(H).

⁸³ Cal. Gov't. Code Section 65080(b)(2)(E).

⁸⁴ Cal. Gov't. Code Section 65080(b)(2)(I)(ii).

⁸⁵ Cal. Pub. Res. Code Section 21065.

⁸⁶ Cal. Gov't. Code Section 65080(b)(2)(E).

communities strategy or an alternative planning strategy after completing the stages of public participation, plans must be approved in accordance with CEQA, and local agencies likely will have to revise their planning documents for consistency with the adopted MPO plan in accordance with CEQA.⁸⁷

Implications for Transportation Funding

Transportation funding implications of SB 375 stem from both the requirements that (1) regional transportation plans must conform with regional air quality attainment plans to receive federal transportation funding under Section 176 of the Clean Air Act (42 U.S.C. Section 7506) and (2) SB 375 requires regional transit plans to be consistent with the CARB-endorsed sustainable communities strategy.⁸⁸ Accordingly, for federal transportation funds to be allocated, regional transportation plans now must be consistent with the sustainable communities strategy. Because of this link between transportation funding and sustainable communities strategies, SB 375 creates several transportation funding implications. Cities and counties within MPOs may lose federal transportation dollars as they struggle to meet the new regional planning requirements of SB 375. Some of California's most rural counties not located within MPOs and therefore not bound by regional transportation plans may gain transportation dollars. Finally, federal transportation dollars might be diverted to other states altogether where regional transportation planning processes are less complicated.

New CEQA Exemptions and Streamlining Provisions

Additionally, SB 375 creates exemptions and streamlining processes for transit-oriented projects under CEQA, the state's environmental review act further described later in this article. The CEQA amendments reduce or eliminate certain components of environmental review that already will be conducted as part of the SB 375 planning process.

1. New Provisions for Transit Priority Projects. SB 375 amends CEQA for qualifying "transit priority projects" (TPP). Under SB 375, a TPP : (1) contains at least 50 percent residential uses based upon total building square footage and, if the project contains between 26 percent and 50 percent nonresidential uses, a floor area ratio of not less than 0.75; (2) provides a minimum net density of at least 20 dwelling units per acre; and (3) is located within one-half mile of a major transit stop or high-quality transit corridor included in a regional transportation plan.⁸⁹ There are three potential processes for TPPs:

- **Exemption.** Total exemption from any CEQA review for a subset of TPPs that comply with a long list of criteria provided at Public Resources Code Section 21155.1(a).⁹⁰ Few projects are likely to qualify for a total exemption because of the numerous qualifying criteria.

- **Streamlined Environmental Review.** A TPP that incorporates all feasible measures to mitigate potential impacts, identified standards of performance, or criteria from prior applicable environmental impact reports

may qualify for the following streamlined environmental review:⁹¹

- **Sustainable Communities Environmental Assessment.** SB 375 created a new type of environmental review document and process, known as a "sustainable communities environmental assessment" (SCEA), under which qualifying TPPs may proceed.⁹² TPPs proceeding under a SCEA need not analyze: (1) impacts that could foster economic or population growth, (2) impacts from cars and light-duty truck trips on global warming or the regional transportation network, or (3) a reduced residential density alternative project to the TPP that would reduce vehicular trips (referred to in this article as "Growth-Inducing and Vehicular Trips Impacts").⁹³ Further, once an agency determines cumulative effects already have been analyzed and mitigated as part of the SB 375 planning process, the agency may conclude a cumulative effect shall not be treated as cumulatively considerable.⁹⁴ The SCEA process is similar to a negative declaration process under CEQA because it bypasses the normal requirement for an agency response to all public comments received on a proposed project.⁹⁵ Unlike a negative declaration, however, the lead agency's decision to review and approve a project with a SCEA is reviewed under the more deferential "substantial evidence" standard rather than the "fair argument" standard.⁹⁶

- **Streamlined EIR.** TPPs also may proceed with an environmental impact report (EIR) that does not analyze growth-inducing and vehicular trips impacts, may conclude that a cumulative effect shall not be treated as cumulatively considerable where that cumulative effect has been addressed adequately and mitigated pursuant to SB 375, and need not analyze an alternative project to the TPP in a different, offsite location.⁹⁷

- **Traffic Mitigation Measures.** SB 375 also authorizes a legislative body of a local jurisdiction to adopt measures that will avoid or mitigate the traffic impacts of TPPs, such as street or road improvements, traffic control improvements, or transit passes for future residents.⁹⁸ Thereafter, a TPP does not have to comply with any additional mitigation measures for the traffic impacts of that project on highways, intersections, mass transit, or streets.⁹⁹ Because traffic impacts often are among the most controversial and technical project impacts, this provision may provide meaningful streamlining, where applicable.

2. Simpler Review for Residential, Mixed-Use Projects. SB 375 offers CEQA streamlining for residential or mixed-use residential projects¹⁰⁰ that are consistent with the building intensity, density, use designation,

⁹¹ Cal. Pub. Res. Code Section 21155.2(a).

⁹² Cal. Pub. Res. Code Section 21155.2 (b).

⁹³ Cal. Pub. Res. Code Section 21155.2(b)(1).

⁹⁴ *Id.*

⁹⁵ Cal. Pub. Res. Code Sections 21155.2(b)(2)-(4).

⁹⁶ Cal. Pub. Res. Code Section 21155.2(b)(7).

⁹⁷ Cal. Pub. Res. Code Sections 21155.2(c)(1)-(2).

⁹⁸ Cal. Pub. Res. Code Section 21155.3(a).

⁹⁹ Cal. Pub. Res. Code Section 21155.3(b).

¹⁰⁰ A residential or mixed-use residential project is defined as a project where at least 75 percent of the total building square footage of the project consists of residential use or a project that is a TPP. Cal. Pub. Res. Code Section 21159.28(d).

⁸⁷ Cal. Gov't. Code Section 65080(b)(2)(J).

⁸⁸ Cal. Gov't. Code Section 65080(b).

⁸⁹ Cal. Pub. Res. Code Section 21155(b).

⁹⁰ Cal. Pub. Res. Code Section 21155.1.

and applicable policies specified for the project area in a CARB-endorsed sustainable communities strategy or alternative planning strategy¹⁰¹ and that incorporate mitigation measures required by the prior sustainable communities strategy EIR.¹⁰² Such residential or mixed-use residential projects are not required to “reference, describe or discuss” growth-inducing or vehicular trip impacts.¹⁰³

SB 375 Changes Housing Element Law

Finally, SB 375 amends certain provisions of housing element law so regional housing planning is coordinated with regional transportation planning.¹⁰⁴ Cities and counties that exceed criteria pollutant standards under the Clean Air Act will be required to update their housing elements every eight years rather than every five years so transportation plans and housing elements will be updated on concurrent deadlines.¹⁰⁵ Notably, new sanctions apply for a legislative body’s failure to comply with SB 375’s requirements to rezone sites to accommodate necessary housing units within the city.¹⁰⁶

D. Unresolved Issues with SB 375

In addition to unresolved questions regarding transportation funding implications mentioned above, SB 375 raises questions regarding the land-use planning role of cities and counties in the future as the emphasis on regional planning and the political pressure to comply with the regional transportation plans to maintain access to federal transportation funding may impinge upon land-use decisions traditionally delegated to local agencies.

In the future, MPOs will gain influence through the transportation strategies counties and cities must adopt to obtain federal transportation funding. Additionally, while the SB 375 plans will not be adopted for several years, SB 375’s legislative findings that changed land-use patterns and improved transportation are necessary to achieve significant greenhouse gas reductions may trigger the need to discuss how a proposed project is consistent with SB 375 goals under CEQA, as discussed below.

IV. Greenhouse Gas Analysis Now Mandatory

As discussed above, while AB 32 has mandated the reduction of statewide greenhouse gas emissions to 1990 levels by the year 2020, and SB 375 aims to reduce greenhouse gases through a change in land-use patterns, regulations have not yet been adopted to implement the legislation. Nonetheless, California does not wait for the implementation of environmental regulations before the policies in legislation become applicable—CEQA provides an alternative legal framework requiring the evaluation of greenhouse gas emissions and makes the policies set forth in AB 32 and SB 375 applicable now.

¹⁰¹ Cal. Pub. Res. Code Section 21159.28(a).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Cal. Gov’t. Code Section 65584.04(i).

¹⁰⁵ Cal. Gov’t. Code Section 65588(b).

¹⁰⁶ Cal. Gov’t. Code Section 65587.

A. Introduction to CEQA

CEQA was enacted in 1970 and was patterned after the National Environmental Policy Act of 1969 (NEPA).¹⁰⁷ CEQA requires government agencies to consider the environmental consequences of their actions before approving plans and policies or committing to a course of action on a project similar to the way NEPA requires federal agencies to prepare an environmental impact statement before approving a proposal that may affect the environment.¹⁰⁸

The CEQA process begins with a preliminary review of a proposal that may affect the environment to determine whether CEQA applies to the agency action or whether the action instead is exempt.¹⁰⁹ If the agency determines the activity is a project subject to CEQA, the agency then must prepare an EIR or a negative declaration.¹¹⁰

In enacting CEQA, the Legislature explained that the CEQA process is intended to: (1) inform government decisionmakers and the public about the potential environmental effects of proposed activities; (2) identify how environmental damage can be avoided or significantly reduced; (3) prevent significant, avoidable environmental damage by requiring changes in projects, either by the adoption of alternatives or the imposition of mitigation measures; and (4) disclose to the public why a project was approved if that project would have significant environmental effects.¹¹¹ Accordingly, CEQA’s requirements make it both a procedural statute, with obligations for disclosure, public participation, and notice and review, as well as a substantive environmental review statute that requires public agencies to take measures to avoid environmental harm.

There is substantial judicial activity under CEQA, with hundreds of lawsuits filed each year. Numerous court holdings have expanded the interpretation of CEQA and its goals, both reinforcing public participation goals¹¹² and imposing new substantive requirements.¹¹³ Early jurisprudence interpreted CEQA to establish the principle that CEQA should be interpreted broadly to provide maximum environmental protection.¹¹⁴ CEQA’s procedural and substantive requirements, along with expansive judicial interpretations, have made CEQA much broader than NEPA and one of

¹⁰⁷ 42 U.S.C. §§ 4321-4370(f).

¹⁰⁸ Cal. Pub. Res. Code Section 21000 et. seq.; Cal. Code Regs. Title 14, Sections 15000-15387 (CEQA Guidelines).

¹⁰⁹ Cal. Code Regs. Title 14, Sections 15060-15061.

¹¹⁰ Cal. Pub. Res. Code Sections 21080, 21002.1.

¹¹¹ Cal. Pub. Res. Code Sections 21000, 21001.

¹¹² *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*, 47 Cal.3d 376, 405 (1988) (court held that analysis of alternatives was inadequate because the agency did not disclose the reason for rejecting alternatives “in sufficient detail to enable meaningful participation and criticism by the public”).

¹¹³ For example, CEQA case law recently has expanded the requirements for water supply analysis in *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova*, 53 Cal.Rptr.3d 821 (2007).

¹¹⁴ *Friends of Mammoth v. Board of Supervisors*, 8 Cal.3d 247, 259 (1972) (holding that the Legislature intended CEQA to be interpreted to afford the fullest possible protection to the environment within the reasonable scope of the statutory language).

the most far-reaching of the state environmental review acts patterned after NEPA.¹¹⁵

B. Guidance Required by SB 97 Being Prepared

There was a significant debate in 2007 whether legislation should be enacted to protect EIRs against legal challenges based on AB 32. After substantial debate, the Legislature adopted only a limited provision to protect certain bonded infrastructure projects against such challenges.¹¹⁶ For all other projects, the Legislature directed the Office of Planning and Research (OPR) to prepare guidelines for mitigating the effects of greenhouse gas emissions by July 1, 2009, and directed the Resources Agency to adopt these guidelines by Jan. 1, 2010.¹¹⁷

As OPR drafts CEQA guidelines for climate change analysis, several state and influential local agencies already have weighed in on climate change analysis under CEQA. While the agencies agree regarding the need to conduct greenhouse gas analysis and some of the necessary analytical components, questions remain regarding the appropriate threshold to determine whether a proposed project will have a substantial adverse effect on climate change under CEQA.

Agencies Agree on Greenhouse Gas Analysis

Setting the standard for greenhouse gas analysis, OPR first released a technical advisory, *CEQA and Climate Change: Addressing Climate Change Through California Environmental Quality Act* (OPR Technical Advisory) June 19, 2008. The OPR Technical Advisory explains how greenhouse gas and climate change impacts and mitigation measures should be addressed in EIRs. Specifically, the OPR Technical Advisory recommended a three-step approach to CEQA analysis of greenhouse gas emissions: (1) identify and quantify greenhouse gas emissions; (2) assess the significance of the project's impact on climate change; and, if the impact is found to be significant, (3) identify alternatives and/or mitigation measures that will reduce the impact below significance.¹¹⁸

Additionally, on Jan. 8, 2009, OPR released a draft of the proposed CEQA Guidelines amendments and finalized the CEQA Guidelines amendments April 13, 2009 (OPR's CEQA Amendments). OPR's CEQA Amendments Section 15064.4 provides that lead agencies should "make a good faith effort, based on available information to describe, calculate or estimate" greenhouse gas emissions and notes that an agency may identify emissions either by selecting a "model or methodology" to quantify the emissions or relying on "qualitative or other performance based standards."¹¹⁹ Further, when assessing the significance of greenhouse gas emissions, OPR's CEQA Amendments Sections 15064.4 and 15130(f) provide that lead agencies should consider the extent to which:

- a project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting;

- the project emissions exceed a threshold of significance that the lead agency determines applies to the projects;

- a project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas; and

- a project produces greenhouse gas emissions that cumulatively would be considerable.¹²⁰

Finally, OPR's CEQA Amendments Section 15126.4(c) provides that "[l]ead agencies should consider all feasible means of mitigating greenhouse gas emissions." Mitigation may include:

- measures in an existing plan or mitigation program for the reduction of emissions that are required as part of the lead agency's decision;

- reductions in emissions resulting from a project through implementation of project features, project design, or other measures;

- offsite measures, including offsets, to mitigate a project's emissions; and

- measures that sequester greenhouse gases.¹²¹

OPR transmitted the CEQA Guidelines Amendments to the Resources Agency April 13, 2009, for rulemaking and adoption by Jan. 1, 2010.¹²²

Agencies Grapple with Significance Thresholds

Notably, OPR's CEQA Amendments do not include a specific greenhouse gas significance threshold but allow lead agencies to consider significance thresholds adopted by other public agencies and the recommendations of others, provided such recommendations or thresholds are supported by substantial evidence.¹²³ A threshold of significance is defined as an "identifiable quantitative, qualitative, or performance level of a particular environmental effect, noncompliance with which means the effect normally will be determined to be significance by the agency and compliance with which means the effect normally will be determined to be less than significant."¹²⁴ Significance thresholds are important under CEQA because an agency may approve a project with an impact deemed to be significant only after incorporating all feasible measures to mitigate that impact by adopting a Statement of Overriding Considerations that provides that economic, social, or other considerations make it infeasible to mitigate the significant impacts of a project on the environment.¹²⁵ Adopting such a statement often is a politically controversial decision. Recognizing the importance of the chosen greenhouse gas significance thresholds, the introduction to OPR's CEQA Amendments provides that OPR has asked CARB's technical staff to recommend a method for setting significance thresholds. If CARB

¹¹⁵ Selmi, *The Judicial Development of the California Environmental Quality Act* (1984) 18 U.C. Davis L. Rev. 197, 198.

¹¹⁶ Cal. Pub. Res. Code Section 21097(a).

¹¹⁷ Cal. Pub. Res. Code Section 21083.05.

¹¹⁸ OPR, *CEQA and Climate Change: Addressing Climate Change Through California Environmental Quality Act* (June 19, 2008), p. 5, available at <http://www.opr.ca.gov/ceqa/pdfs/june08-ceqa.pdf>.

¹¹⁹ OPR, *CEQA Guidelines Sections Proposed to be Added or Amended* (April 13, 2009), p. 4, available at http://opr.ca.gov/ceqa/pdfs/PA_CEQA_Guidelines.pdf.

¹²⁰ *Id.* at 4, 15.

¹²¹ *Id.* at 13.

¹²² OPR, *Transmittal of the Governor's Office of Planning and Research Proposed SB 97 CEQA Guidelines Amendments to the Natural Resources Agency* (April 13, 2009), available at http://opr.ca.gov/ceqa/pdfs/Transmittal_%20Letter.pdf.

¹²³ OPR, *CEQA Guidelines Sections Proposed to be Added or Amended* (April 13, 2009), p. 5, available at http://opr.ca.gov/ceqa/pdfs/PA_CEQA_Guidelines.pdf.

¹²⁴ Cal. Code Regs. Title 14, Section 15064.7.

¹²⁵ Cal. Pub. Res. Code Section 21002.

makes recommendations supported by substantial evidence, lead agencies may take CARB's recommendations into consideration as part of their independent processes in adopting a significance threshold.¹²⁶

Pursuant to OPR's request, CARB released the *Preliminary Draft Staff Proposal: Recommended Approaches for Setting Interim Significant Thresholds for Greenhouse Gases under CEQA* (CARB's Initial Significance Recommendations) Oct. 24, 2008. For industrial projects that do not qualify under existing CEQA statutory or categorical exemptions, CARB recommends finding greenhouse gas-related impacts insignificant if they: (1) meet interim performance standards for construction- and transportation-related emissions and (2) emit no more than 7,000 MTCO₂E from nontransportation operational sources.¹²⁷ CARB recommends that commercial and residential projects that do not qualify under existing CEQA statutory or categorical exemptions are presumed to have a less-than-significant impact related to climate change if: (1) construction activities meet an interim CARB performance standard for construction-related emissions; (2) operational activities: i) meet the California Energy Commission's Tier II Energy Efficiency goal, ii) meet an interim CARB performance standard for water use, iii) meet an interim CARB performance standard for waste, and iv) meet an interim CARB performance standard for transportation; and (3) the project will emit no more than a "to be determined" limit for metric tonnes CO₂ equivalent per year.¹²⁸ Projects that do not qualify under the CARB criteria are presumed to have significant impacts and must prepare an EIR and implement all feasible mitigation measures.¹²⁹

Many wait with bated breath until CARB releases further performance standards and a specific numeric significance threshold. CARB's Initial Significance Recommendations provide that the CARB staff intends to make its final recommendations on thresholds in "early 2009," harmonize the recommendations with OPR's timeline for finalizing the CEQA Guidelines amendments for analyzing climate change under CEQA, and provide guidance to agencies in the near-term.¹³⁰

While CARB finalizes significance thresholds, other agencies have weighed in with several competing thresholds and models for significance thresholds. The California Air Pollution Control Officers Association prepared a guidance document in January 2008 titled *CEQA and Climate Change: Evaluating and Addressing Greenhouse Gas Emissions from Projects Subject to the California Environmental Quality Act*, which provided that either a zero or a 900 MTCO₂E threshold are the only "effective" greenhouse gas significance thresholds. Similar to CARB's guidance, the South Coast Air Quality Management District released guidance that creates a framework for analysis based on numeric sig-

nificance thresholds and performance standards but has not yet identified those numeric thresholds and standards.¹³¹ Finally, interim guidance from San Diego County provides that projects must demonstrate emissions will not exceed AB 32 goals by demonstrating a 33 percent reduction from business-as-usual construction and operational emissions plus a 10 percent reduction in vehicle miles traveled through the adoption of design features and mitigation measures.¹³²

Conclusions Regarding Implementation of SB 97

While OPR's CEQA Amendments provide that lead agencies may adopt their own significance thresholds (provided such thresholds are supported by substantial evidence), lead agencies are not likely to exercise their discretion to adopt thresholds different from those recommended by the state agencies, particularly CARB's forthcoming significance threshold recommendations, given the lack of expertise and resources at the local level. If local agencies do adopt different thresholds, they are likely to be more stringent. Of the models seen thus far, the San Diego guidance to reduce greenhouse gas emissions 33 percent below business-as-usual operations is consistent with AB 32's goals and also provides immediate direction for compliance, rather than attempting to identify a single numeric "x" target and unspecified performance standards as the sole basis for concluding a project has significant cumulative greenhouse gas emissions.

C. Climate Change Decisions in Trial Courts

As the state agencies continue to grapple with determining the appropriate analysis for evaluating greenhouse gas emissions under CEQA, superior courts are issuing decisions on the need for and adequacy of greenhouse gas analysis in CEQA documents. While the superior court decisions are influential only upon those cases within the same jurisdiction, the decisions offer a glimpse into different agencies' trial-and-error efforts at greenhouse gas analysis across the state, particularly in the absence of any binding appellate decisions on these issues.

CEQA Litigation Background

CEQA litigation based on climate change analysis began in 2006 when Attorney General Jerry Brown began submitting comment letters on EIRs and requested the inclusion of climate change analysis and greenhouse gas emission-reduction mitigation measures in these documents.¹³³ The attorney general and San Bernardino County reached a landmark settlement in 2007 in which the county agreed to adopt a Greenhouse Gas Emissions Reduction Plan.¹³⁴ Additional settlements

¹²⁶ OPR, *Transmittal of the Governor's Office of Planning and Research Proposed SB 97 CEQA Guidelines Amendments to the Natural Resources Agency* (April 13, 2009), p.3, available at http://opr.ca.gov/ceqa/pdfs/Transmittal_%20Letter.pdf.

¹²⁷ CARB, *Preliminary Draft Staff Proposal: Recommended Approaches for Setting Interim Significant Thresholds for Greenhouse Gases under CEQA* (Oct. 24, 2008), Attachment B, available at http://www.opr.ca.gov/ceqa/pdfs/Prelim_Draft_Staff_Proposal_10-24-08.pdf.

¹²⁸ *Id.* at Attachment B.

¹²⁹ *Id.* at Attachment A, Attachment B.

¹³⁰ *Id.* at 1.

¹³¹ SCAQMD, *Draft Guidance Document—Interim CEQA Greenhouse Gas (GHG) Significance Threshold* (October 2008), Figure 3-1, available at <http://www.aqmd.gov/ceqa/handbook/GHG/oct22mtg/GHGguidance.pdf>.

¹³² County of San Diego, *Interim Guidelines for Determining Significance and Report Format and Content Requirements* (Oct. 23, 2008), p. 13, available at <http://www.co.sandiego.ca.us/dplu/docs/bpr/cc-guidelines.pdf>.

¹³³ A list of comment letters filed by the attorney general is available at <http://ag.ca.gov/globalwarming/ceqa/comments.php>.

¹³⁴ The settlement agreement between the attorney general and San Bernardino County is available at <http://ag.ca.gov/>

have shaped greenhouse gas analysis and mitigation.¹³⁵ These activities established a basis for routine CEQA challenges premised on greenhouse gas and climate change issues. As of April 1, 2009, OPR had compiled a list of more than 930 environmental documents that have included discussion of a proposed project's climate change impacts.¹³⁶

Emerging Trends in the Courts

Now that CEQA challenges based on greenhouse gas and climate change are routine, court decisions are shaping the methods of evaluating greenhouse gas emissions at a time when legislation effectively requiring climate change analysis in CEQA documents has been adopted, but the agencies have not yet finalized guidance on exactly how to evaluate greenhouse gas emissions.

The first group of superior court cases came in 2007 and held that climate change is not required as supplemental analysis for a previously certified EIR. Supplemental analysis is required under CEQA after a lead agency has certified an EIR where substantial changes are proposed to the project itself, substantial changes occur with respect to the circumstances under which the project is being undertaken, or new information becomes available that was not known and could not have been known at the time the EIR was certified as complete.¹³⁷ In *American Canyon Community United for Responsible Growth et al v. City of American Canyon et al.*, the court held that subsequent environmental analysis of a Wal-Mart Supercenter was not required to analyze the project's greenhouse gas emissions and climate change impacts because AB 32 is not the type of "new information" requiring subsequent environmental review because it was not specific to the project.¹³⁸ Also, in *Natural Resources Defense Council et al. v. Reclamation Board of the Resources Agency of the State of California*, the court held that climate change and the impact it may have on hydrology and flooding from fill and encroachment activities related to development within the Sacramento-San Joaquin Delta is not "new information" requiring subsequent environmental review.¹³⁹ Whether this holding will be repeated in other jurisdictions still is unknown, particularly in the face of projects with greater potential climate change impacts.

As for a proposed project's initial environmental review, some courts have ruled a greenhouse gas analysis was unnecessary based either on the lack of regulatory guidance available at the time the environmental analysis was conducted or the speculative nature of a project's climate change impacts. In *Highland Springs v. City of Banning*, the court held that CEQA did not re-

quire the city to consider the greenhouse gas impacts of a project to develop 1,453 housing units with a school site and other amenities based on the lack of regulatory guidance.¹⁴⁰ In *Center for Biological Diversity v. City of Perris*, the court upheld a city's conclusion that an analysis of a proposed shopping center's impact on climate change could be terminated as speculative, relying on CEQA Guidelines Section 15145, which allows a lead agency to terminate discussion of an impact if, after thorough investigation, the agency finds the particular impact is too speculative to evaluate.¹⁴¹ In *Westfield v. City of Arcadia*, the court held that no discussion of greenhouse gas emissions was required for an EIR analyzing an 800,000 sq. ft. commercial project based on lack of regulatory guidance.¹⁴² Whether similar holdings will continue is doubtful now that OPR has released CEQA Amendments and more guidance will follow.

Other decisions have set aside EIRs for failing to analyze climate change. In *Environmental Council of Sacramento v. California Department of Transportation*, the court set aside a California Department of Transportation EIR proposing to add high-occupancy vehicle lanes to Highway 50 for failure to analyze greenhouse gas emissions. The court rejected the argument that the absence of a significance threshold made it impossible to quantify greenhouse gas emissions or determine their significance.¹⁴³ In *Center for Biological Diversity v. City of Desert Hot Springs*, the court ruled the city violated CEQA by failing to make a meaningful attempt to analyze the global warming effects of the project, which included over one million square feet of commercial space; 2,600 homes; a 400-room hotel; an amphitheater; and two golf courses.¹⁴⁴ In its rationale, the court cited the Legislature and governor's efforts to combat global warming in AB 32 and SB 97 as well as a U.S. Court of Appeals for the Ninth Circuit decision requiring cumulative climate change analysis under CEQA's analogous federal law, NEPA.¹⁴⁵

More recent cases go further and have begun to consider the adequacy of the greenhouse gas analysis conducted. In *Natural Resource Defense Council v. South Coast Air Quality Management District*, the court set aside the South Coast Air Quality Management Dis-

¹⁴⁰ Riverside County Superior Court, No. RIC460950, 1/29/08. This decision was appealed but dismissed on procedural grounds.

¹⁴¹ Riverside County Superior Court, No. RIC477632, 3/9/08. An appeal is pending in the 4th appellate district.

¹⁴² Los Angeles County Superior Court, No. BS108938, 7/23/08. No appeal is pending.

¹⁴³ Sacramento County Superior Court, No. 07CS00967, 7/29/08. No appeal is pending.

¹⁴⁴ Riverside County Superior Court, No. RIC464585, 8/6/08. No appeal is pending.

¹⁴⁵ *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 508 F. 3d 508, 550, 65 ERC 1489 (9th Cir. 2007) (the cumulative impact of greenhouse gas emissions is "precisely the kind of cumulative impact analysis that NEPA requires agencies to conduct"). Note that the *Center for Biological Diversity v. City of Desert Hot Springs* court's reliance on the *Center for Biological Diversity v. National Highway Traffic Safety Administration* NEPA decision is consistent with a trend in which California courts rely on NEPA precedents when construing CEQA provisions, especially for new issues not yet applied in CEQA cases.

cms_pdfs/press/2007-08-21_San_Bernardino_settlement_agreement.pdf.

¹³⁵ The settlement agreements reached between the attorney general and local agencies and private entities are available at <http://ag.ca.gov/globalwarming/ceqa.php>.

¹³⁶ OPR, *Environmental Assessment Documents Containing a Discussion of Climate Change* (April 9, 2009), available at http://www.opr.ca.gov/ceqa/pdfs/Environmental_Assessment_Climate_Change.pdf.

¹³⁷ CA. Pub. Res. Code Section 21166; Cal. Code Regs. Title 14, Section 15162(a)(1).

¹³⁸ Napa County Superior Court, No. 26-27462, 5/22/07. No appeal is pending.

¹³⁹ Sacramento County Superior Court, No. 06-CS 01228, 4/27/07. No appeal is pending.

trict's environmental analysis¹⁴⁶ of rulemaking actions to access pollution credits¹⁴⁷ known as the "Priority Reserve," which originally were set aside for public projects such as hospitals and police stations, and sell those credits to private developers and public utilities for construction of 11 natural gas-fired power plants as well as other potential future projects.¹⁴⁸ The court noted the rulemaking would have a certain and foreseeable effect on global warming. While the analysis discussed potential generation of carbon dioxide, the court held that it failed to fully quantify or analyze greenhouse gas effects and failed to consider how to mitigate them. In *Sierra Club v. City of Tulare*, the court held that while the General Plan Update EIR quantified greenhouse gas emissions from vehicular sources, the city also was required to estimate the project's overall emissions, including stationary and non-stationary sources.¹⁴⁹ Further, the court held that a significant and unavoidable finding was not supported by the deferred mitigation measure requiring the city to develop a greenhouse gas reduction plan in the future.

Continuing Challenges Create Uncertainty

Although questions remain what the state agencies will implement as appropriate significance findings and greenhouse gas reducing mitigation measures, litigation in the trial and appellate courts is progressing to address the adequacy of greenhouse gas analysis once conducted. Several cases are pending, including *Center for Biological Diversity v San Joaquin Valley Air Pollution Control District*, where plaintiffs have challenged the environmental analysis of a dairy project for using a 42,000 MTCO₂E threshold of significance.¹⁵⁰ The petitioners are arguing the environmental analysis fails to include factual or scientific evidence of the effectiveness of the chosen threshold in reducing greenhouse gas emissions or complying with the emission-reduction targets in AB 32 and Executive Order S-03-5.¹⁵¹

Additionally, the Attorney General's Office continues to comment on draft EIRs, with a new focus on greenhouse gas emissions from land-use patterns. Specifically, on Jan. 13, 2009, the attorney general submitted a comment letter on the city of Pleasanton's Proposed General Plan Update Draft Environmental Impact Report.¹⁵² The attorney general cited SB 375 and said Pleasanton's General Plan Update must include mea-

asures to reduce fossil fuel consumption.¹⁵³ In particular, the attorney general disputed the proposed increase in commercial, industrial, and other employee-generating land development in the city, which would exacerbate the city's current shortfall of housing in relation to employment opportunities.¹⁵⁴ However, the attorney general did not address the legal issue that would arise if the city proposed additional housing given that a previously adopted voters' initiative limits housing in the city and California law prohibits the legislative body from repealing or amending an ordinance adopted by initiative.¹⁵⁵ Comment letters such as the one filed in Pleasanton as well as pending litigation reinforce the necessity of clear and meaningful CEQA guidance on greenhouse gas and climate change analysis.

V. Future Trends in California

Spawned by several legislative efforts targeting greenhouse gas reductions in all sectors, rapidly evolving regulatory activities and trial court cases made 2008 an extremely busy year in shaping California's climate change landscape. Because California frequently is regarded as a bellwether state for environmental regulations, its efforts to combat or adapt to climate change will be watched closely and potentially replicated as other states and the federal government further address the issue. Some likely trends for 2009 include the following:

- additional trial and appellate court rulings on the legality of agency and legislative efforts to regulate and reduce greenhouse gas emissions and project proponent's success in reducing such emissions;
- conflicts between state agencies over mitigation measures, performance standards, and significance thresholds to be adopted as CEQA requirements as part of SB 97;
- increased influence for regional planning agencies through the adoption of SB 375 transportation strategies;
- litigation by cities and counties challenging SB 375's upheaval of traditional land-use roles; and
- litigation by industry challenging AB 32's greenhouse gas emission-reduction mandates.

Tracking and complying with these varied greenhouse gas efforts in the context of AB 32, SB 97, SB 375, and the accompanying caselaw will be a complicated, rapidly-evolving, and technical effort. The results of these efforts likely will shape state and national policies for years to come.

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¹⁵³ *Id.* at 1.

¹⁵⁴ *Id.* at 4-5.

¹⁵⁵ Cal. Elec. Code Section 9217.

¹⁴⁶ Note that a programmatic environmental assessment was prepared under NEPA but was reviewed by the court under the same standard as an EIR.

¹⁴⁷ Under the Clean Air Act, the local governments that make up the South Coast Air Quality Management District can allow more pollution in one place only if they reduce cancer-causing airborne particles and soot somewhere else in the same region through a system of pollution credits.

¹⁴⁸ Orange County Superior Court, No. BS 110792, 7/29/08. No appeal is pending.

¹⁴⁹ Tulare County Superior Court, No. 08-22812, 3/16/09. No appeal is pending.

¹⁵⁰ Fresno County Superior Court, filed 10/17/08.

¹⁵¹ *Id.*

¹⁵² See Jan. 13, 2009, letter to Janice Stern, available at http://ag.ca.gov/globalwarming/pdf/comments_Pleasanton_GP.pdf.