Client Alert

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They're Back? First District Court of Appeal Paves the Way for Possible Reinstatement of Controversial Air Quality Thresholds

By Chris Carr, Shaye Diveley and Miles Imwalle

California's First District Court of Appeal issued a decision on August 13 in *California Building Industry Association v. Bay Area Air Quality Management District* ("*CBIA*") (Case No. A135335 (Cal. Ct. App. 1st, August 13, 2013)), laying the groundwork for the reinstatement of controversial air quality thresholds, including for greenhouse gas emissions and toxic air contaminants.

ADOPTION OF CEQA THRESHOLDS IS NOT ITSELF A "PROJECT" REQUIRING CEQA REVIEW

In *CBIA*, the court overturned a decision by the Alameda Superior Court that invalidated the Bay Area Air Quality Management District's (BAAQMD) guidelines for assessing air quality impacts under the California Environmental Quality Act (CEQA). While BAAQMD's CEQA Guidelines (issued in June 2010 and updated in May 2011) covered several air quality issues, the thresholds of significance set for greenhouse gas emissions and toxic air contaminants were particularly problematic and difficult to implement. For example, the toxic air contaminant threshold required that residential projects conduct a burdensome health-risk assessment accounting for sources of toxic air contaminants within 1,000 feet of the project, such as freeways. Although the thresholds for greenhouse gas emissions initially were met with resistance and controversy, in practice, most infill projects have been able to meet the standards, particularly now that many cities have adopted climate action plans. More details on the controversial thresholds can be found here and more details on the Superior Court decision can be found here.

The California Building Industry Association (BIA) sued BAAQMD alleging, among other things, that BAAQMD itself had violated CEQA by not reviewing the environmental impact of the thresholds before adopting them. The trial court agreed, ordering the thresholds to be set aside and directing BAAQMD to take "no further action to disseminate" the standards until it completes CEQA review. BAAQMD appealed the decision to the Court of Appeal. At the same time, it updated its CEQA Guidelines to eliminate the thresholds, and agreed to no longer recommend that the thresholds be used as a general measure of the significance of a project's air quality impacts.

In a sweeping reversal of the trial court's decision, the Court of Appeal held that BAAQMD's adoption of the thresholds was not a "project" subject to CEQA review. The Court of Appeal based its decision on two key points. First, the CEQA Guidelines' formal procedure for the adoption of thresholds of significance does not include any provision for CEQA review. This is because, the court reasoned, the preparation of an environmental impact report would be largely duplicative of the public review process already in place for the adoption of such thresholds. Second, only activities that may cause "either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" are considered "projects" for the purposes of

CEQA review. The court determined that BIA's claim that the thresholds made it more difficult for developers to build residential projects in urban areas, and that this would result in more housing in suburban and rural areas, was "too attenuated and speculative" to be a reasonably foreseeable consequence for the purposes of triggering CEQA.

COURT UPHOLDS MERITS OF THRESHOLDS

Although the trial court did not get to BIA's arguments that the thresholds themselves were not based on substantial evidence and violated CEQA, the Court of Appeal surprisingly addressed these arguments as well. The court treated BIA's claims as a "facial challenge," requiring BIA to meet the high bar of showing that the application of the thresholds must be invalid in all or nearly all cases. Applying this standard, the court rejected BIA's argument that the thresholds improperly required an analysis of the impact of the existing environment (*i.e.,* existing toxic air emissions) on the project itself (or "new receptors," such as new residents of the project) rather than the impacts of the project on the environment. BIA argued that this type of analysis runs afoul of recent case law, including *Ballona Wetlands Land Trust v. City of Los Angeles*, 201 Cal. App. 4th 455 (2011), and is improper under CEQA. The court agreed with BAAQMD that there were scenarios, even under BIA's analysis, in which the thresholds could be used to properly assess whether and in what amount a project would add pollution to the environment. As a result, the court concluded, the thresholds were not invalid on their face. The court further concluded that BIA had failed to carry its burden of proving that there was no substantial evidence in the record to support the adoption of the toxic air contaminant single-source and cumulative thresholds.

WHAT NEXT?

Although the Court of Appeal's decision does provide the means by which BAAQMD may ultimately reinstate the GHG emissions and toxic air contaminant thresholds, any such action is still quite a ways down the road and not at all certain. The court's decision does not become "final" for more than a month, allowing time for BIA to seek review in the California Supreme Court or in a rehearing. Even if that does not happen, it will still be a couple of months at least before the legal process works its way to the point that BAAQMD will have the opportunity to revisit the issue, at which time it could reinstate the thresholds, or adopt other standards altogether.

In the meantime, project proponents are left with continuing uncertainty about how to address this decision for projects currently undergoing CEQA review. The trial court's decision did not relieve lead agencies of the duty to assess GHG emissions or toxic air contaminants and, indeed, many have continued to apply the invalidated thresholds as a measure of caution. The recent decision in *Concerned Citizens of Dublin v. City of Dublin*, 214 Cal. App. 4th 1301 (2013), may provide also some relief to lead agencies worried about the possibility that the thresholds, if reinstated by BAAQMD, would trigger the need to re-open already final EIRs. *Concerned Citizens* held that the issuance of new threshold guidelines was not new information that requires the preparation of a supplemental environmental report under CEQA.[1]

For toxic air contaminants, the court's decision did not fully reach the issue of whether such analysis is appropriate for individual projects where the application of the threshold would only address the impacts of the environment on the project itself. As a result, project proponents and lead agencies are encouraged to continue to

[1] Morrison & Foerster was counsel for the project proponent in the *City of Dublin* case

tread cautiously in this area. As for the controversial 10-in-a-million "single source" threshold, it is noteworthy that the EIR recently certified by the Metropolitan Transportation Commission and the Association of Bay Area Governments used only the 100 in a million "cumulative" threshold. That EIR was peer reviewed by BAAQMD, so may offer insight into the direction BAAQMD may take once the litigation is final. To be sure, this saga is not yet over and project proponents and lead agencies in the Bay Area should continue to monitor this important issue.

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Contact:

David Gold
(415) 268-7205
dgold@mofo.com

Chris Carr
(415) 268-7246
ccarr@mofo.com

Shaye Diveley
(415) 268-6743
sdiveley@mofo.com

Miles Imwalle
(415) 268-6523
mimwalle@mofo.com

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