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April 6, 2012

On March 5, an Alameda County Superior Court judge ordered the Bay Area Air Quality Management District (BAAQMD) to set aside, depublish and stop the circulation of its controversial thresholds of significance for greenhouse gas (GHG) emissions and certain toxic air contaminants (“Thresholds”). The CEQA Thresholds were intended to be used by BAAQMD and other local agencies in the San Francisco Bay Area to determine whether a local land use project would have significant air quality impacts under the California Environmental Quality Act (CEQA). The Court invalidated the Thresholds because BAAQMD failed to perform a CEQA analysis of the impacts of the Thresholds on the physical environment prior to their adoption.

Background

In June 2010, BAAQMD adopted [Resolution No. 2010-06](#) including numeric air quality thresholds for analyses by lead agencies under CEQA. While the BAAQMD Thresholds are not binding on other Bay Area agencies, they are widely used by cities and counties in evaluating projects for CEQA purposes, and BAAQMD’s stated policy is that lead agencies should apply the Thresholds when conducting CEQA review. The Thresholds were part of a larger document entitled “BAAQMD CEQA Air Quality Guidelines,” which had not been updated in nearly a decade.

The Thresholds’ adoption marked the first time that a California air district set numeric “thresholds of significance” for evaluating environmental effects of GHG emissions from proposed projects under CEQA. If a project’s emissions exceeded the Thresholds, it would result in a finding of a significant impact necessitating preparation of an environmental impact report (EIR) and adoption of mitigation measures. For more information see [“BAAQMD District GHG Thresholds of Significance Will Have Wide Impact” \(9/17/09\)](#) and [“BAAQMD Update on CEQA Thresholds” \(1/8/10\)](#). The BAAQMD Thresholds were of further note because they introduced a new requirement for projects proposed within 1,000 feet of existing pollution sources, including most freeways, major roads and transportation corridors in the region. Such projects were asked to perform a community risk assessment to determine the potential health impacts on new project residents from existing, background pollution. Traditionally, CEQA examines a project’s impacts on the surrounding environment rather than the environment’s impact on a project and its residents.

During the Thresholds' approval process, several cities, as well as development, transit and affordable housing advocates, criticized the Thresholds as being too easily exceeded and causing infill "smart growth" development to become less feasible due to the additional cost and burden of preparing full-scale EIRs and related regulatory compliance. Opponents asserted that the numeric standards were so low and restrictive that even transit villages planned adjacent to BART lines would be unable to avoid a significant impact finding for GHG emissions. These parties also argued that the Thresholds were inconsistent with laws like SB 375 which are designed to promote infill growth and include CEQA streamlining and exemptions for qualifying transit oriented development.

The Lawsuit

Following the Thresholds' approval in 2010, the California Building Industry Association (CBIA) sued, claiming, among other grounds, that BAAQMD did not analyze the Thresholds as a "project" under CEQA and failed to study the impacts of the Thresholds on future development patterns. (*CBIA v. BAAQMD*, Alameda County Superior Court, Case No. RG10-548693.)

In a written ruling issued on March 5, 2012, Judge Frank Roesch agreed with the CBIA and ordered BAAQMD to withdraw the Thresholds entirely until BAAQMD studies the potential environmental impact of the Thresholds, including their potential effect on future development in the region. Roesch found that BAAQMD's approval of the Thresholds was a project under CEQA and required environmental review. Roesch found that there was a fair argument that implementation of the Thresholds "may cause a reasonably foreseeable indirect change in the environment" and might discourage urban infill development while encouraging suburban development.

Next Steps

Judge Roesch ordered BAAQMD to set aside its 2010 resolution adopting the Thresholds and to take no further action to disseminate the Thresholds as an approved set of air quality thresholds until and unless BAAQMD "fully complies with its obligations under CEQA." He rejected BAAQMD's request to leave the Thresholds in place pending CEQA compliance.

Specifically, the writ of mandate issued by the court directs that the 2010 resolution be set aside within 90 days and that within 30 days, BAAQMD "cease dissemination and publication of the Thresholds and their implementing CEQA Air Quality Guidelines and calculators." Further, the writ directed that BAAQMD "shall not take any further actions that rely on or treat the Thresholds as generally applicable requirements or recommendations." BAAQMD is contesting the writ to the extent it requires de-publication of their full CEQA Air Quality Guidelines, as opposed to the Thresholds only on the basis that the writ goes beyond what was contained in the court's written decision and judgment. A hearing on that issue is set for April 17.

Invalidation of the Thresholds in their entirety presents uncertainty for current project applicants and local agencies regarding proper evaluation of air quality impacts (including from GHG emissions) in CEQA documents. Clearly, invalidation of the Thresholds means that reliance on them is not currently required. (BAAQMD's previous Thresholds were adopted in 1999.) The impact on local agencies that have already adopted or endorsed the Thresholds is unclear and may depend upon the extent to which the agency undertook its own CEQA analysis prior to adopting the Thresholds or incorporating them into their planning documents, such as a general plan or climate action plan.

CEQA encourages local agencies to adopt thresholds of significance to evaluate environmental impacts so long as those thresholds are supported by substantial evidence and adopted through a public review process. (Public Resources Code § 21082; 14 Cal. Code Regs. §§ 15064.7, 15064.4 (addressing GHG impacts); see also *Citizens for Responsible and Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327 [upholding city's threshold for GHG emissions based on compliance with goals set out in AB 32]). Clearly, a local agency could adopt the BAAQMD Thresholds or other thresholds so long as that determination is supported by substantial evidence.

The requirements for project applicants to perform a community risk assessment if their project is located within 1,000 feet of existing pollution sources such as major transportation corridors is unclear. Judge Roesch's ruling did not specifically address the issue and such a requirement is on hold while BAAQMD undergoes the administrative and public processes of drafting and circulating a CEQA evaluation of the invalidated Thresholds.

The validity of the Thresholds' 1,000-foot community risk assessment zone is further in doubt given two recent CEQA decisions that rejected an assertion that a project must evaluate impacts of the surrounding environment on project residents. (See *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455; *South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604. The California Supreme Court recently denied petitions to review and/or depublish the *Ballona* decision.)

The decision in this case indicates that courts may not allow a regulatory agency to bypass CEQA analysis even when the agency contends that adoption of a new environmental rule, policy or guideline will result in environmental benefits. Courts are increasingly scrutinizing such regulations and finding that their adoption can constitute a "project" under CEQA with the potential to negatively impact the environment, and consequently require compliance with CEQA.

It is not yet known how BAAQMD will address the Court's ruling, including whether it intends to prepare an environmental impact report, or if it will appeal the ruling. BAAQMD is required to report back to Judge Roesch within 90 days regarding compliance with his ruling. We will provide further information on BAAQMD's response and any further proceedings related to the BAAQMD Guidelines and Thresholds when it becomes available.