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CLIMATE CHANGE

CALIFORNIA

Climate change analysis increasingly is becoming an essential component of project reviews under the California Environmental Quality Act, according to the authors of this article. The California Global Warming Solutions Act (A.B. 32) set a statewide goal to reduce greenhouse gas emissions to 1990 levels by 2020. The state legislature then passed S.B. 97 in 2007, requiring the Office of Planning in Research to promulgate CEQA guidelines by July 2009 for the mitigation of greenhouse gas emissions and their effects. Until the new guidelines are released, however, developers and agencies must determine how to measure whether a project's impact on climate change is "significant," thus triggering the requirement for an Environmental Impact Report under CEQA. The authors discuss the merits of three different approaches to determine climate change significance under CEQA and conclude that the best method to determine significance is to adopt a threshold established by reference to the state's emissions-reduction goals.

Accounting for Climate Impacts Under the California Environmental Quality Act

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Recent initiatives by California's legislature, attorney general, and courts have transformed climate change analysis into an essential component of project review under the California Environmental Quality Act (CEQA).

In 2006, the California Global Warming Solutions Act (A.B. 32) set a statewide goal of reducing greenhouse gas emissions to 1990 levels by 2020, building on Gov. Arnold Schwarzenegger's (R) 2005 Executive Order S-3-05, which established an emissions goal of 80 percent below 1990 levels by 2050.

In 2007, the legislature expressly incorporated climate change impacts into CEQA review by passing S.B.

97, which requires the governor's Office of Planning and Research to promulgate guidelines by July 2009 for the mitigation under CEQA of greenhouse gas emissions and their effects. S.B. 97 requires the California Resources Agency to certify and adopt those guidelines by Jan. 1, 2010.

These developments mirror a trend in state and federal judicial decisions toward increasingly strict scrutiny of agencies' climate change analyses under CEQA and its federal counterpart, the National Environmental Policy Act (NEPA). Until the Office of Planning and Research releases its CEQA guidelines in July 2009, however, developers and agencies must grapple with the difficult question of how to measure whether any given project's climate change impact is "significant" so as to require an Environmental Impact Report under CEQA.

This determination is made difficult by the absence of statewide numerical significance thresholds, and the fact that any given project will account for, at most, a very small percentage of global greenhouse gas emissions.

On Oct. 24, 2008, the California Air Resources Board (CARB) shed some faint light on this question when it released a preliminary draft proposal for establishing greenhouse gas emission thresholds.¹

The purpose of this document was to assist the Office of Planning and Research in formulating the CEQA significance guidelines required under S.B. 97. The tentative guidelines suggest a numerical significance threshold of 7,000 metric tons per year of carbon dioxide equivalents for operating emissions from industrial projects (excluding transportation-related emissions), and an unspecified threshold for emissions from residential and commercial projects. Ultimately, the draft proposal likely will be a disappointment to those who had hoped for a reasoned assessment of significance with regard to greenhouse gas emissions, because the 7,000 metric ton cutoff is not linked to any objective environmental impact.

In adopting the draft proposal, the California Air Resources Board followed one of three general approaches for determining climate change significance under CEQA set forth in a January White Paper released by the California Air Pollution Control Officers' Association (CAPCOA).² While the White Paper did not advocate any particular approach to determining significance, it discussed the advantages and disadvantages of (1) a threshold of zero, under which any project with greenhouse gas emissions above zero would be presumed significant, so as to require an Environmental Impact Report; (2) no threshold, under which significance would be evaluated on a case-by-case basis for each project; and (3) non-zero thresholds, under which some defined level of greenhouse gas emissions above

zero would trigger a presumption of significance and the obligation to prepare an Environmental Impact Report.

Although CARB's adoption of a non-zero threshold for industrial projects' operating emissions is more administrable than the other two options set forth in the White Paper, and poses less risk of inconsistent determinations, its 7,000 metric ton threshold is subject to challenge as arbitrary and not supported by substantial evidence.

A more reasoned threshold might be rooted in the emissions reduction level that climate change scientists suggest is necessary to avoid a significant risk of catastrophic climate effects: a reduction of 80 percent by 2050. This benchmark is reflected in the goal adopted for California in Executive Order S-3-05, which calls for an 80 percent reduction in emissions by mid-century, compared with 1990 levels.

Global Climate Change

Global climate change refers to changes in the temperature of the earth's climate over time, whether caused by human activities or natural factors. In general, the earth's climate is influenced by incoming energy from the sun, as well as by reflection, absorption, and emission of energy within the earth's atmosphere and at the earth's surface.³ Greenhouse gases such as carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), water vapor, and ozone affect the Earth's climate by increasing atmospheric absorption of outgoing radiation.⁴ This effect combines with that of aerosols—microscopic airborne particles that absorb and reflect incoming solar radiation—to change the balance of incoming and outgoing energy in the Earth's atmosphere.⁵

In recent years, the pace of global climate change has been accelerating, the atmosphere has been heating up, and atmospheric greenhouse gas concentrations have increased. According to a recent U.N. report, "average global temperature has increased by around 0.7 [degrees Celsius, or 1.3 degrees Fahrenheit] since the advent of the industrial era,"⁶ and "average global mean temperature is rising 0.2C every decade."⁷ Eleven of the 12 years between 1995 and 2006 (excluding 1996) were among the warmest years on record since 1850.⁸ A recent report by the U.N. Intergovernmental Panel on Climate Change (IPCC) states that "[c]urrent concentrations of atmospheric CO₂ and CH₄ far exceed preindustrial values found in polar ice core records of atmospheric composition dating back 650,000 years."⁹

³ Intergovernmental Panel on Climate Change, Fourth Assessment Report, Working Group I, Technical Summary [hereinafter IPCC Technical Summary] at 21, available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-ts.pdf>. The Technical Summary explains that the document has been "[a]ccepted by Working Group I of the [IPCC] but not approved in detail." *Id.* at 19.

⁴ *Id.* at 21.

⁵ *Id.*

⁶ United Nations Human Development Report 2007/2008, Fighting Climate Change: Human Solidarity in a Divided World [hereinafter U.N. Report] at 26, available at http://hdr.undp.org/en/media/HDR_20072008_EN_Complete.pdf.

⁷ U.N. Report at 26.

⁸ IPCC Technical Summary at 36.

⁹ IPCC Technical Summary at 24.

¹ CARB, Preliminary Draft Staff Proposal: Recommended Approaches for Setting Interim Significance Thresholds for Greenhouse Gases Under the California Environmental Quality Act, Oct. 24, 2008 [hereinafter CARB Draft Proposal], available at <http://www.arb.ca.gov/cc/localgov/ceqa/meetings/102708/prelimdraftproposal102408.pdf>.

² California Air Pollution Control Officers' Association White Paper, CEQA & Climate Change: Evaluating and Addressing Greenhouse Gas Emissions from Projects Subject to the California Environmental Quality Act, January 2008 [hereinafter CAPCOA White Paper], available at <http://www.capcoa.org/ceqa/CAPCOA%20White%20Paper%20-%20CEQA%20and%20Climate%20Change.pdf>.

report continues, “[t]he total radiative forcing [i.e. alteration of the balance of incoming and outgoing energy in the Earth-atmosphere system] of the Earth’s climate due to increases in the concentrations of [certain greenhouse gases] . . . are unprecedented in more than 10,000 years.”¹⁰ Although “[a]tmospheric CO₂ concentration increased by only 20 ppm [parts per million] over the 8000 years prior to industrialization . . . since 1750, the CO₂ concentration has risen by nearly 100 ppm.”¹¹

This warming of the earth’s climate has already produced noticeable changes in, among other things, rainfall patterns, ecological zones, and ocean temperatures.¹² A growing scientific consensus holds that human activity likely is the cause of this trend. According to IPCC’s most recent report, “[i]t is *very likely* that anthropogenic greenhouse gas increases caused most of the observed increase in global average temperatures since the mid-20th century.”¹³ The United Nations has warned that, absent a substantial decrease in worldwide greenhouse gas emissions, the earth will face significant risk of destructive climatic changes, including a several-meter rise in sea levels, transformation of rain forests into savannah, reduced agricultural productivity and water supplies, and extreme weather events such as floods and hurricanes.¹⁴

The U.N. report identifies a worldwide temperature increase of 2C (3.6F) as a “potential tipping point for long-run catastrophic outcomes.”¹⁵ This conclusion also is supported by the IPCC’s most recent assessment report.¹⁶ According to the U.N. report, surpassing this level would cause “[c]omplex carbon on biodiversity feedback effects linked to the warming of the oceans, the loss of rainforests and melting ice sheets [that] would accelerate the pace of climate change.”¹⁷ A change of over 3 degrees Celsius, the report states, would entail a high risk of extinction for 20 percent to 30 percent of species.¹⁸ Although it is not possible to predict specific events resulting from climate change, the report warns that “following current trends concentrations of greenhouse gases could commit the world to climate change at levels far above the 2 [degrees Celsius] threshold.”¹⁹

To avoid a more than 50 percent chance of exceeding the threshold 2 degree Celsius increase, climate change scientists advise that the atmospheric concentration of carbon dioxide should be stabilized at about 450 ppm.²⁰

¹⁰ IPCC Technical Summary at 24.

¹¹ IPCC Technical Summary at 25.

¹² U.N. Report at 26.

¹³ See, e.g., IPCC Technical Summary at 60. See also *id.* at 24 (“Multiple lines of evidence confirm that the post-industrial rise in [carbon dioxide and methane] does not stem from natural mechanisms . . .”); *Id.* at 27 (concluding that it is “very likely that the observed long-term changes in [methane] are due to anthropogenic activity”); and *Id.* at 81, 86.

¹⁴ U.N. Report at 27–30.

¹⁵ *Id.* at 46.

¹⁶ IPCC Fourth Assessment Report, Working Group II, Summary for Policymakers, 16 at Fig. 2 (chart showing global impacts at various temperature increases), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-spm.pdf>.

¹⁷ U.N. Report at 27.

¹⁸ *Id.* at 30.

¹⁹ *Id.* at 34.

²⁰ *Id.* at 46. See also IPCC Fourth Assessment Report, Working Group III, Summary for Policymakers at 17, available

This would require a worldwide decrease of global greenhouse gas emissions of approximately 50 percent by mid-century.²¹ For wealthy countries such as the United States, the United Nations recommends that carbon dioxide emissions peak between 2012 and 2015, with a 30 percent decrease in emissions by 2020 and an 80 percent decrease by 2050.²² For developing countries, the United Nations recommends allowing emissions to rise until 2020—peaking at about 80 percent above current levels—and then reducing emissions 20 percent against 1990 levels by 2050.²³

CEQA Significance Analysis

Against this dramatic picture consider California: the world’s 15th largest emitter of greenhouse gas emissions.²⁴ The recent spotlight on climate change has focused attention on CEQA, which requires disclosure and mitigation of the environmental impacts of proposed activities undertaken, financed, or approved by the government.²⁵ Since its adoption in 1970, CEQA has forced consideration and mitigation of a range of environmental effects. Until recently, however, greenhouse gas emissions typically were not considered in documents prepared under CEQA.

One of the most significant steps in the CEQA process is the determination by the lead agency (*i.e.*, the agency with primary responsibility for carrying out and approving the project) of whether a project will have a “significant impact” on the environment, so as to require preparation of an Environmental Impact Report. A report must be prepared if “substantial evidence” shows “that any aspect of [a] project, either individually or cumulatively, may cause a significant effect on the environment.”²⁶ The standard for determining whether an Environmental Impact Report is needed is whether there is “a fair argument that a project may have a significant effect on the environment.”²⁷ If no substantial evidence indicates a significant effect, the lead agency

at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg3/ar4-wg3-spm.pdf>.

²¹ U.N. Report at 48.

²² *Id.*

²³ *Id.*

²⁴ See, e.g., CARB, Climate Change Proposed Scoping Plan, a Framework for Change, October 2008 at 11, available at <http://www.arb.ca.gov/cc/scopingplan/document/psp.pdf>.

²⁵ CAL. PUB. RES. CODE. §§ 21000–21177; CEQA Guidelines, 14 C.C.R. § 15002(a). CEQA applies to projects directly undertaken by the government, wholly or partially financed by a government agency, and/or private projects requiring government approval. CEQA Guidelines, 14 C.C.R. § 15002(b). “Projects” subject to CEQA broadly are defined to include actions “that ha[ve] a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” CEQA Guidelines, 14 C.C.R. § 15378(a). These include, but are not limited to, public works construction, adoption, and amendment of local general plans and elements of such plans pursuant to government code section 65100 et seq., private action subsidized by public agency grants, contracts, subsidies, and/or loans, and private action requiring public agency issuance of a lease, permit, license, and/or certificate. CEQA Guidelines, 14 C.C.R. § 15378(a).

²⁶ CEQA Guidelines, 14 C.C.R. §§ 15063(b), 15064.

²⁷ CEQA Guidelines, 14 C.C.R. § 15064(f)(1).

must prepare a negative declaration.²⁸ Alternatively, the agency may determine which of the proposed project's effects already have been adequately considered in a previous Environmental Impact Report or negative declaration, and which effects still must be accounted for in a new Environmental Impact Report.²⁹

In the Environmental Impact Report itself, the agency must identify and discuss all significant direct and indirect effects and provide mitigation measures and alternatives to reduce or avoid the effect.³⁰ As to each significant effect, the agency must make a finding that (1) changes have been included in the project to eliminate or lessen substantially the effects; (2) changes needed to mitigate the effects are within another agency's responsibility and jurisdiction; or (3) specific economic, legal, social, technological, or other considerations make the mitigation measures or project alternatives infeasible.³¹ If the third type of finding is made, the agency must adopt a "statement of overriding considerations," describing the specific reasons it believes approval is warranted despite the irremediable adverse environmental effects.³²

In the context of greenhouse gas emissions, it is far from clear how to determine what is "significant," so as to require preparation of an Environmental Impact Report, given that any given project contributes only a very small amount to the global problem.

The CEQA guidelines shed some light on this issue, but not much. Specifically, they teach that agencies must consider both a project's direct physical changes (i.e., dust, noise, smog) and its reasonably foreseeable indirect physical environmental changes.³³ Standards for determining significance may be derived from various sources, such as ordinances, plans, and regulations adopted by the lead agency,³⁴ and formally adopted significance thresholds.³⁵ Agencies may not rely solely on ordinances, plans, or regulations, however, if other substantial evidence indicates a possible significant effect.³⁶ Rather, CEQA's "fair argument" standard requires preparation of an Environmental Impact Report *whenever* a fair argument may be made that a significant impact may result, regardless of whether the proposed action complies with applicable legal provisions.³⁷ Ultimately, if an agency "after thorough investigation . . . finds that a particular impact is too

speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact."³⁸

To facilitate significance determinations, the CEQA guidelines encourage agencies to establish and publish thresholds of significance—i.e., "identifiable quantitative, qualitative, or performance level[s] of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant."³⁹ Such thresholds must be "supported by substantial evidence."⁴⁰ "Substantial evidence," under CEQA, includes "fact, a reasonable assumption predicated on fact, or an expert opinion supported by fact."⁴¹ The CEQA guidelines define "substantial evidence" as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion even though other conclusions might also be reached."⁴² Even where a threshold exists and is met, an agency cannot apply the threshold so as to disregard other substantial evidence that a project's environmental effects may be significant.⁴³

Of particular relevance in analyzing greenhouse gas emissions, the CEQA guidelines require consideration of "whether the effects of [a proposed] project are cumulatively considerable."⁴⁴ "'Cumulatively considerable' means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects."⁴⁵ A project's "cumulative impact" is "the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects."⁴⁶ The guidelines, however, permit an agency to determine that "a project's contribution to a significant cumulative impact will be rendered less than cumulatively considerable and thus is not significant."⁴⁷ The fact that the cumulative effects of *existing* projects are significant is not itself substantial evidence that any proposed project's incremental effects are cumulatively considerable.⁴⁸

Two California court of appeal decisions have particular relevance to the issue of how to make significance determinations with respect to greenhouse gas emissions. These cases reject the notion that whether an impact cumulatively is considerable depends on its incremental size in relation to an existing problem. Instead, they hold, the question is whether the incremental effect is considerable considered *in tandem* with existing impacts.

In *Kings County Farm Bureau v. City of Hanford*, the California court of appeal overturned an agency's conclusion in its Environmental Impact Report that a pro-

²⁸ CEQA Guidelines, 14 C.C.R. §§ 15063(b)(2), 15064(f)(3). A negative declaration is a written statement by the lead agency briefly describing the reasons that a proposed project will not have a significant effect on the environment and therefore does not require the preparation of an Environmental Impact Report. CEQA Guidelines, 14 C.C.R. § 15371. If a possible significant impact can be avoided or substantially mitigated to insignificance by changing the project, then the agency may prepare a mitigated negative declaration. CEQA Guidelines, 14 C.C.R. § 15070.

²⁹ CEQA Guidelines, 14 C.C.R. § 15063(b)(1)(C).

³⁰ CEQA Guidelines, 14 C.C.R. §§ 15123, 15126.2.

³¹ CEQA Guidelines, 14 C.C.R. § 15091.

³² CEQA Guidelines, 14 C.C.R. §§ 15064, 15093.

³³ CEQA Guidelines, 14 C.C.R. § 15064(d).

³⁴ See, e.g., *Mira Mar Mobile Community v. City of Ocean-side*, 119 Cal. App. 4th 477, 493–94 (Cal. Ct. App. 2004).

³⁵ CEQA Guidelines, 14 C.C.R. § 15064.7.

³⁶ *Communities for a Better Environment v. California Resources Agency*, 103 Cal. App. 4th 98, 112–13 (Cal. Ct. App. 2002).

³⁷ *Id.* at 113.

³⁸ CEQA Guidelines, 14 C.C.R. § 15145.

³⁹ CEQA Guidelines, 14 C.C.R. § 15064.7(a).

⁴⁰ CEQA Guidelines, 14 C.C.R. § 15064.7(b).

⁴¹ CAL PUB. RES. CODE § 21080(e)(i).

⁴² CEQA Guidelines, 14 C.C.R. § 15384(a).

⁴³ *Mejia v. City of Los Angeles*, 130 Cal. App. 4th 322, 342 (Cal. Ct. App. 2005).

⁴⁴ CEQA Guidelines, 14 C.C.R. § 15064(h)(1).

⁴⁵ CEQA Guidelines, 14 C.C.R. §§ 15065(a)(3), 15130(a).

⁴⁶ CEQA Guidelines, 14 C.C.R. § 15355(b).

⁴⁷ CEQA Guidelines, 14 C.C.R. § 15064(h)(2).

⁴⁸ CEQA Guidelines, 14 C.C.R. § 15064(h)(4).

posed co-generation plant's cumulative contribution to ozone levels was insignificant because it "would contribute less than one percent of area emissions."⁴⁹ The court said that "[i]n simple terms, the EIR reasons the air is already bad, so even though emissions from the project will make it worse, the impact is insignificant."⁵⁰ "The relevant question to be addressed in the EIR is not the relative amount of precursors emitted by the project when compared with preexisting emissions," the court concluded, "but whether any additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in this air basin."⁵¹

The court took the same approach in *Communities for a Better Environment v. California Resources Agency*.⁵² In that case, environmental groups challenged several CEQA guidelines as inconsistent with the statute. One such guideline, former 14 C.C.R. § 15064(i)(4), stated, "[a] lead agency may determine that the incremental impacts of a project are not cumulatively considerable when they are so small that they make only a de minimis contribution to a significant cumulative impact caused by other projects that would exist in the absence of the proposed project."⁵³ The court held that this definition of "cumulatively considerable" conflicted with CEQA section 21083 and Guidelines 14 C.C.R. § 15355, under which "the need for an EIR turns on the impacts of both the project under review and the relevant past, present and future projects."⁵⁴ "[T]he relevant question," the court said, "is not how the effect of the project at issue compares to the preexisting cumulative effect, but whether 'any additional amount' of effect should be considered significant in the context of the existing cumulative effect."⁵⁵ "[T]he greater the existing environmental problems are," the court stated, "the lower the threshold should be for treating a project's contribution to cumulative impacts as significant."⁵⁶ However, the court stopped short of requiring any additional amount of emissions in a nonattainment zone to be considered significant. It stated, "the 'one additional molecule rule' is not the law."⁵⁷

Communities also addressed a separate issue important to greenhouse gas emissions evaluations: the extent to which an agency may rely on a project's compliance with a separate statute to find an effect not significant. That issue was raised by former CEQA Guideline 14 C.C.R. § 15064(h), which provided in part that "a change in the environment is not a significant effect if the change complies with a standard" embodied in a separate statute or ordinance adopted for the purpose of environmental protection.⁵⁸ The trial court had concluded that this guideline contravened CEQA's "fair argument" standard by requiring agencies to deem effects not significant based on compliance with non-CEQA provisions even when a fair argument existed to

the contrary.⁵⁹ The California court of appeal agreed, reasoning that the guideline improperly "relieve[d] the agency of a duty it would have under the fair argument approach to look at evidence beyond the regulatory standard, or in contravention of the standard, in deciding whether an EIR must be prepared."⁶⁰ "Under the fair argument approach," the court stated, "any substantial evidence supporting a fair argument that a project may have a significant environmental effect would trigger the preparation of an EIR."⁶¹ In other words, compliance with a separate statute alone is not enough, the agency must still remain open to the possibility that the project might have a significant environmental impact for other reasons.

Together, *Kings County* and *Communities* establish that agencies may not simply deem emissions from a project not significant because they are a percentage of existing emissions, they must analyze the cumulative effect of even small emissions increases in light of the severity of existing pollution problems. Nor may agencies simply rely on non-CEQA standards to find greenhouse gas emissions not significant, if other evidence indicates otherwise.

Case Law and Legislative Action

Since 2005, California's legislature and attorney general have pushed to require consideration of greenhouse gas emissions in CEQA documents. The attorney general's efforts have included sending numerous comment letters objecting to draft Environmental Impact Reports on the basis that they insufficiently analyze the environmental effects of emissions for city and county general plans and other projects.

In these letters, the attorney general has criticized Environmental Impact Reports that refuse to analyze climate change impacts on the basis that it would be "speculative" given the absence of specific numerical thresholds for significance under CEQA. For example, a June 19, 2007, letter objecting to the draft Environmental Impact Report for the Coyote Valley Specific Plan stated, "[w]hile the City is correct that there are currently no regulatory thresholds for significance relating to global warming impacts, this does not relieve a lead agency of its statutory obligation under CEQA to determine whether or not a project's impacts are significant."⁶²

While the attorney general did not propose any methodology for determining significance, the letter opined that "by any objective standard, 500,000 metric tons per year [the approximate emissions from the proposed plan] would appear to be a considerable contribution."⁶³ This was so notwithstanding that the Environmental Impact Report identified the 507,000 tons of emissions as "roughly 0.001 percent of California's total 2004 emissions."⁶⁴

⁴⁹ 221 Cal. App. 3d 692, 718–21 (Cal. Ct. App. 1990)

⁵⁰ 221 Cal. App. 3d at 718.

⁵¹ *Id.*

⁵² 103 Cal. App. 4th 98 (Cal. Ct. App. 2002).

⁵³ *Id.* at 117.

⁵⁴ *Id.* at 119.

⁵⁵ *Id.* at 120.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 111–12.

⁵⁹ *Id.* at 111–12.

⁶⁰ *Id.* at 113.

⁶¹ *Id.*

⁶² See June 19, 2007, letter to Jared Hart and Darryl Boyd, available at http://ag.ca.gov/globalwarming/pdf/comments_Coyote_Valley.pdf#xml=http://search.doj.ca.gov:8004/AGSearch/isysquery/51f340a9-1f67-440f-b60b-094cf4b7f05a/1/hilite/.

⁶³ *Id.* at 7.

⁶⁴ *Id.* at 4.

Keeping pace with these efforts, Schwarzenegger June 1, 2005, issued Executive Order S-3-05, which set goals for reducing greenhouse gas emissions in California to 2000 levels by 2010, to 1990 levels by 2020, and to 80 percent below 1990 levels by 2050. The 2050 goal reflects the benchmark set forth in the United Nations' 2007–2008 Human Development Report for avoiding a high risk of dangerous climate change.⁶⁵ In the order, Schwarzenegger identified specific dangers posed by greenhouse gas emissions, including “diminished water supply” alternations in “micro-climates within the state,” proliferation of diseases, and changes in “crop quantity and yield.”⁶⁶

The legislature adopted S-3-05's 2020 goal in 2006 by passing A.B. 32 (Chapter 488, Statutes 2006), the California Global Warming Solutions Act. The law requires CARB to, among other things: (1) adopt regulations by Jan. 1, 2008, to require the reporting and verification of greenhouse gas emissions; (2) determine by Jan. 1, 2008, what the emissions level for California was in 1990 and adopt that level as the limit for statewide greenhouse gas emissions in 2020; (3) adopt a “scoping plan” to implement A.B. 32's goals; and (4) by Jan. 1, 2011, adopt greenhouse gas emission limits and reduction measures to achieve the maximum technologically feasible and cost-effective reductions in emissions “in furtherance of achieving” the statewide 2020 limit and become operative beginning Jan. 1, 2012.

Although A.B. 32's passage led many to anticipate that climate change analysis would soon be required in CEQA documents, the legislation did not address treatment of greenhouse gas emissions under CEQA or propose any method of conducting significance determinations for greenhouse gas emissions.

The next year, the legislature answered the question of whether CEQA required analysis of climate change impacts by passing S.B. 97 (Chapter 185, Statutes 2007). The bill requires the Office of Planning and Research to prepare and submit to CARB, by July 1, 2009, guidelines for the feasible mitigation of greenhouse gas emissions or their effects.

The bill also provided an exemption until Jan. 1, 2010, for certain state-financed infrastructure projects from CEQA lawsuits challenging the adequacy of Environmental Impact Reports' discussions of greenhouse gas emissions.

In keeping with this rising tide of climate change legislation, federal and California courts have increasingly required lead agencies to justify their determinations that greenhouse gas emissions from proposed projects are not significant for CEQA and NEPA purposes. This marks a significant departure from courts' previous, more deferential attitude.

One example of this early deference is *City of Los Angeles v. National Highway Traffic Safety Administration*,⁶⁷ in which the U.S. Court of Appeals for the District of Columbia affirmed the National Highway Traffic Safety Administration's (NHTSA) determination that no Environmental Impact Statement (EIS) was required under NEPA for revised Corporate Average Fuel

Economy standards because the maximum possible hypothetical increase in greenhouse gas emissions from the proposed rule would be less than one percent.⁶⁸ The court appeared to consider this small percentage sufficient to support the agency's finding of non-significance.⁶⁹

The tide is now turning. Recently, the U.S. Court of Appeals for the Ninth Circuit held in *Center for Biological Diversity v. National Highway Traffic Safety Administration*⁷⁰ that it is not sufficient for an agency merely to assert that a small percentage difference in greenhouse emissions is not significant, even though the proposed action would decrease existing emissions.

At issue was NHTSA's determination that no Environmental Impact Statement was required for its adoption of revised Corporate Average Fuel Economy (CAFE) standards, which would yield a 0.2 percent decrease in greenhouse gas emissions, instead of more stringent standards that would produce a larger emissions decrease. NHTSA argued that its conclusion that a 0.2 percent decrease in carbon dioxide emissions will not have a significant impact upon the environment is self-evidently reasonable and that the impact of the revised CAFE standard on global warming is too speculative to warrant NEPA analysis.⁷¹ The court rejected those arguments, holding that “it is hardly ‘self evident’ that a 0.2 percent decrease in carbon emissions (as opposed to a greater decrease) is not significant.”⁷²

In holding that the petitioners had raised a substantial question as to whether the revised standards might have a significant effect, the court relied on the IPCC Third Assessment Report's findings of “positive feedback mechanisms” in the atmosphere” and thresholds of climate change that, if crossed, would produce dramatic environmental impacts.⁷³

Despite the difficulty of quantifying the effect of greenhouse gas emissions, the court required NHTSA to justify its conclusion of non-significance, holding that NHTSA's finding of no significant impact was arbitrary and capricious because the agency “has not explained why its rule will not have a significant effect.”⁷⁴

California courts have followed a similar trend. In *Environmental Council of Sacramento v. California Department of Transportation (Caltran)*,⁷⁵ the court re-

⁶⁸ *City of Los Angeles v. Nat'l Highway Traffic Safety Administration*, 912 F.3d 478 (D.C. Cir. 1990). *Id.* at 482 (Ginsberg, Ruth B., concurring), 486 (Ginsberg, D.H., Opinion for the Court), *overruled on other grounds, Florida Audubon Society v. Bentsen*, 94 F.3d 658, 669 (D.C. Cir. 1996).

⁶⁹ *City of Los Angeles v. Nat'l Highway Traffic Safety Administration*, 912 F.3d 478, 487–88 (D.C. Cir. 1990).

⁷⁰ 538 F.3d 1172 (9th Cir. 2008) (denying petition for rehearing with suggestion for rehearing en banc, vacating and withdrawing opinion at 508 F.3d 508 (9th Cir. 2007), and publishing new opinion).

⁷¹ *Id.* at 1221.

⁷² *Id.* at 1223.

⁷³ *Id.* at 1221–22.

⁷⁴ *Id.* at 1223–24. Although the court distinguished *City of Los Angeles* because the petitioner in that case “fail[ed] even to allege that [the less than one percent increase in emissions] would produce any marginal effect” on global warming, the court also agreed with the dissent in *City of Los Angeles* that the agency should have provided “some articulated criteria . . . in terms of contribution to global warming that is grounded in the record and available scientific evidence.” *Id.* at 1224–25.

⁷⁵ Sacramento County Case No. 07C500967, Ruling After Hearing, Nov. 12, 2007.

⁶⁵ See U.N. Human Development Report 2007/2008, Summary at 15, available at http://hdr.undp.org/en/media/HDR_20072008_Summary_English.pdf.

⁶⁶ Executive Order S-3-05, available at <http://gov.ca.gov/executive-order/1861/>.

⁶⁷ 912 F.2d 478 (D.C. Cir. 1990).

jected Caltran's position, reasoning that "[w]hile CEQA does not require an agency to foresee the unforeseeable, [it] does require an agency to use its best efforts to find out and disclose all that it reasonably can," and that "[o]nly after thorough investigation may an agency find that a particular impact is too speculative for evaluation and terminate its discussion of the impact."⁷⁶

On Aug. 6, another California trial court followed suit in *Center for Biological Diversity v. City of Desert Hot Springs*,⁷⁷ holding that an Environmental Impact Report for a proposed residential and commercial development project in Desert Hot Springs, Calif. was insufficient because it failed to make a "meaningful attempt" to analyze the project's effects on global warming.

The trial court, like the court in *Environmental Council of Sacramento*, rejected the city's argument that the absence of statewide CEQA significance thresholds or guidelines for greenhouse gas emissions exonerated the agency of the duty to analyze such emissions in CEQA documents: the court quoted the Ninth Circuit's statement in *Center for Biological Diversity* that "the cumulative impact of greenhouse gases is 'precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.'"⁷⁸

The court emphasized that even though it could be true that projects' effects on global warming are too speculative in the absence of guidance from the California Air Resources Board or the federal Environmental Protection Agency, the agency could not simply assert this speculation without first making some attempt to determine whether the project would have a significant effect on climate change.

Lack of CEQA Standards

Despite this growing judicial and legislative insistence that agencies analyze climate change impacts under CEQA, no statewide thresholds currently exist to guide lead agencies in those determinations. Under S.B. 97, the Office of Planning and Research guidelines will not be promulgated until July 2009.

To help fill this void, the California Air Pollution Control Officers' Association released a White Paper in January 2008 outlining three broad approaches that lead agencies could take in making significance determinations: (1) no numeric significance threshold for greenhouse gas emissions, whereby significance would be determined on a case-by-case basis and/or through the use of presumptions; (2) a threshold of zero, under which any project that would release greenhouse gases would require an Environmental Impact Report; and (3) a non-zero threshold that also could include a tiered approach, under which projects could be presumed not significant if they complied with certain numerical thresholds, fell within specified "green" categories, and/or complied with A.B. 32- and S-3-05-compliant general plans.⁷⁹ Although the document did not advocate any one of these three approaches, it provided detailed discussions of each.

⁷⁶ *Id.* at 11.

⁷⁷ Riverside County Case No. RIC 464585, Ruling on Petition for Writ of Mandate, Aug. 6, 2008.

⁷⁸ *Id.* at 2. The quoted language comes from the Ninth Circuit's 2007 opinion in *Center for Biological Diversity*, which the Ninth Circuit substantially reaffirmed in its August opinion.

⁷⁹ CAPCOA White Paper, *supra* note 2.

On June 19, 2008, the Office of Planning and Research issued a technical advisory to give some further guidance.⁸⁰ Though this document also provided no thresholds, the technical advisory advised lead agencies to "undertake a project-by-project analysis, consistent with available guidance and current CEQA practice."⁸¹ Echoing the decisions in *Environmental Council of Sacramento* and *Desert Hot Springs*, the advisory warned that "[l]ead agencies should not dismiss a proposed project's direct and/or indirect climate change impacts without careful consideration, supported by substantial evidence."⁸² But no explanation was provided of what might constitute such "substantial evidence" of a project's significant effect on climate change.

Air Resources Board's Preliminary Draft

On Oct. 24, 2008, the California Air Resources Board released its preliminary draft staff proposal, which set forth its recommended approaches for setting interim significance thresholds for greenhouse gas emissions under CEQA.

Although these merely are draft guidelines to assist the Office of Planning and Research in preparing the guidelines mandated by S.B. 97, the draft proposal gives a first glimpse of what those statewide guidelines might ultimately resemble. The document states that CARB will release its final recommendations in early 2009.

The draft proposal gives recommended guidelines for assessing the significance of greenhouse gas emissions created by industrial projects, on the one hand, and residential and commercial projects on the other.

For industrial projects, the proposal suggests that a project be presumed not to have a significant impact on climate change if it (1) falls within an existing statutory or categorical exemption under CEQA and its guidelines; and (2) meets interim CARB performance standards for construction and transportation-related emissions, and emits less than 7,000 metric tons of greenhouse gases per year from non-transportation related sources.⁸³

The 7,000 metric ton threshold for non-transportation related industrial emissions was derived, CARB explains, from a study showing that 93 percent of total industrial boiler input capacity corresponds to boilers that have emissions of 4,660 metric tons per year. CARB took that 4,660 metric ton emissions level and incorporated estimated additional emissions from process losses, purchased electricity, and water use and wastewater treatment to arrive at an estimated total emissions level of 7,000 metric tons per year for the typical industrial boiler.

For residential and commercial projects, CARB proposed another tiered approach whereby a project will

⁸⁰ Governor's Office of Planning and Research, CEQA, and Climate Change: Addressing Climate Change Through California Environmental Quality Act (CEQA) Review, June 19, 2008 [hereinafter Technical Advisory], available at <http://www.climatechange.ca.gov/publications/agencies/OPR-1000-2008-018.PDF>.

⁸¹ *Id.* at 6.

⁸² *Id.*

⁸³ These include combustion-related components, process losses, purchased electricity, and water usage and wastewater discharge. See CARB Draft Proposal, *supra* note 1, at 7.

be presumed not significant if it: (1) is exempt under existing statutory or categorical exemptions; (2) complies with a CEQA-approved plan addressing greenhouse gas emissions that meets certain additional criteria;⁸⁴ and (3) meets CARB minimum performance standards for construction-related emissions and operations and emits, with performance standards or equivalent mitigation, no more than an unspecified threshold of metric tons of carbon dioxide per year.

Air Pollution Control Officers' White Paper

The California Air Resources Board's approach adopts a form of the non-zero threshold approach described in the California Air Pollution Control Officers' Association White Paper. Although this approach poses less administrative difficulties than either the no threshold or the zero-threshold options outlined in the White Paper, CARB's 7,000 metric ton of emissions threshold for industrial sources appears to be unconnected to any investigation of actual impact on the environment.

This section will review the approaches in the air pollution control officers' White Paper rejected by CARB, evaluate the merits of CARB's approach, and propose a different basis for establishing numerical threshold-setting based on the greenhouse gas reductions embodied in Executive Order S-3-05 and suggested in the White Paper: thresholds geared towards reducing statewide emissions to 1990 levels by 2020 and 80 percent below 1990 levels by 2050.

No-Threshold Approach

Under the White Paper's "no-threshold" approach, lead agencies would not apply any numerical threshold in determining significance with respect to climate change. Instead, the lead agencies could use presumptions of significance or non-significance, or not use presumptions and instead could analyze each proposed project afresh based on numerical or non-numerical criteria.

The White Paper acknowledges, however, that absent some type of presumption there would be a significant risk of inconsistent determinations with respect to projects with similar emissions levels, making climate change significance determinations subject to challenge on the basis of arbitrariness.⁸⁵

CARB's preliminary draft proposal advisably did not adopt this no-threshold approach, which would be extremely difficult to implement. Most obviously, unlike in the arena of non-greenhouse gas air pollutants, there appear to be no non-quantitative factors that weigh on the significance determination for greenhouse gas emissions, such as noxious odors, and/or whether the project will be built near a hospital, school, or other

sensitive site.⁸⁶ The harmful effects from greenhouse gases come from their quantitative buildup in the atmosphere.

Although the use of presumptions would ease the difficulty of determining significance in the absence of qualitative factors, that approach poses its own problems. Under a "significance presumption" regime, each proposed project would be presumed to have a significant effect on the environment unless project proponents could demonstrate that a particular project's emissions are *not* significant and would not entail a cumulatively considerable impact on the environment.

This likely would be very difficult to do in any given case. Although the California court of appeal has stated that the "one additional molecule rule" is not the standard for making CEQA significance determinations,⁸⁷ it is difficult to argue against the conclusion that, in the realm of climate change, there is at least a "fair argument" that the incremental effects of *any* amount of additional greenhouse gas emissions cumulatively are considerable in light of the magnitude of the existing problem.

Ultimately, a significance presumption likely would require preparation of Environmental Impact Reports for virtually every proposed project with emissions above zero. While such an approach might sound reasonable, especially in light of the significant emissions cuts called for by A.B. 32 and S-3-05, in practice such a rule could dilute the effectiveness of CEQA significance determinations by prompting agencies to prepare large numbers of statements of overriding considerations to avoid blocking projects that could not mitigate emissions to a zero level.

For projects with small emissions levels, there almost always would be some "economic, legal, social, technological or other" benefit that could be considered to override a small prospective amount of greenhouse gas emissions. As such policy determinations "lie[] at the core of the lead agency's discretionary responsibility under CEQA,"⁸⁸ they would be difficult to challenge. If declarations of overriding considerations became the norm for small emissions projects, CEQA's efficacy as a tool for mitigating climate change impacts would be diminished.⁸⁹

⁸⁶ Compare, e.g., Bay Area Air Quality Management District CEQA guidelines: Assessing the Air Quality Impacts of Projects and Plans, December 1999, available at http://www.baaqmd.gov/pln/ceqa/ceqa_guide.pdf, at 12-25 (describing BAAQMD significance thresholds, including some guidelines that depend on whether emissions of given pollutants would cause a violation of local ambient air quality standards, and additional guidelines that relate to odors and exposure of sensitive receptors to toxic air contaminants); with County of San Diego Guidelines for Determining Significance and Report Format and Content Requirements, March 19, 2007, at 11-14, available at <http://www.co.san-diego.ca.us/dplu/docs/AQ-Report-Format.pdf>.

⁸⁷ *Communities for a Better Environment v. California Resources Agency*, 103 Cal. App. 4th 98, 120 (Cal. Ct. App. 2002).

⁸⁸ *City of Marina v. Board of Trustees of the Cal. State Univ.*, 39 Cal. 4th 341, 368 (Cal. Ct. App. 2006).

⁸⁹ Also, to the extent such an approach causes agencies to adopt statements of overriding considerations for projects with very small greenhouse gas emissions levels, it could lead to *de facto* adoption of a "ratio" theory of the type rejected in *Kings County Farm Bureau v. City of Hanford*, under which agencies arrive at non-significance determinations when added emis-

⁸⁴ Specifically, the project would have to (1) meet a community level emissions target consistent with statewide emission limits in A.B. 32 and, where the plan will apply beyond 2020, Executive Order S-3-05; (2) be consistent with a transportation-related emissions reduction target adopted by ARB pursuant to S.B. 375; (3) include an emissions inventory and mechanisms to regularly monitor and evaluate emissions; (4) include specific, enforceable emissions requirements; (5) incorporate mechanisms that allow the plan to be revised to meet targets; and (6) have a certified final CEQA document under guideline section 15152(f).

⁸⁵ CAPCOA White Paper, *supra* note 2, at 25.

Even more serious problems are posed by a presumption of non-significance. Under a non-significance presumption, projects would be presumed *not* to be significant unless project opponents could present sufficient evidence to demonstrate otherwise.

This approach almost certainly would violate CEQA's "fair argument" standard, to the extent agencies refused to find an effect significant in the face of equivocal evidence. "Under th[e] 'fair argument' standard, an EIR must be prepared even if other substantial evidence shows no significant environmental effect."⁹⁰ Thus, to the extent a "fair argument" exists for significance, that argument must prevail even if an equally strong argument exists to the contrary.

At the very least, to comply with the fair argument standard, any presumption of non-significance would have to be very easy to rebut, with any substantial evidence of significance being conclusive on the need to prepare an Environmental Impact Report.

Another problem with an insignificance presumption is that it conflicts with the rule of CEQA guideline 14 C.C.R. § 15145, *Desert Hot Springs*, and *Environmental Council of Sacramento* that agencies may not simply refuse to make significance determinations based on declarations of speculation without first conducting a thorough investigation.

As the White Paper acknowledges, "a presumption of insignificance could be based on the perspective that it would be speculative to attempt to identify the significance of greenhouse gas emissions from a project relative to climate change on a global scale."⁹¹ But if the decisions in *Desert Hot Springs*, *Environmental Council, Center for Biological Diversity*, and CEQA guideline 14 C.C.R. § 15145, mean anything, it is that agencies may not simply conclude (or presume) that no Environmental Impact Report is warranted because climate change impacts are "speculative"—they must at least conduct a thorough investigation first.

Finally, a non-significance presumption approach also is at odds with the factors used to determine the "intensity" component of significance determinations under NEPA, under which cases can serve as persuasive authority for interpreting CEQA.⁹²

Almost all factors used to evaluate the intensity of an environmental impact under NEPA weigh on the side of significance where climate change impacts are concerned.

Under NEPA, intensity is evaluated by considering the degree to which: (1) a proposed action will affect public health or safety; (2) the effects on the environment are likely to be highly controversial; (3) the possible effects on the human environment are highly uncertain or pose unique or unknown risks; (4) the action may establish a precedent for future actions with significant effects, or represent a decision in principle about a future consideration; (5) the action is related to other actions with individually insignificant but cumulatively significant impacts; and (6) the action may ad-

sions of pollutants would constitute only a small percentage of existing emissions. 221 Cal. App. 3d 692 (Cal. Ct. App. 1990).

⁹⁰ *Communities for a Better Environment v. California Resources Agency*, 103 Cal. App. 4th 98, 106–107 (Cal. Ct. App. 2002).

⁹¹ CAPCOA White Paper, *supra* note 2, at 25.

⁹² *Bowman v. City of Berkeley*, 122 Cal. App. 4th 572, 591 (Cal. Ct. App. 2004).

versely affect an endangered or threatened species or its habitat.⁹³ The uncertainty, controversy, and "related to other actions" factors, at least, are likely to be met in cases involving CEQA analysis of greenhouse gas emissions.

Ultimately, the absence of any thresholds for CEQA climate change significance determinations is unlikely to be a workable solution.

The use of presumptions without any numerical threshold would, as a practical matter, entail either significance determinations in virtually all cases or a presumption of non-significance that could conflict with CEQA's "fair argument" standard.

As the Office of Planning and Research stated in its June 19 technical advisory, "the global nature of climate change warrants investigation of a statewide threshold of significance for [greenhouse gas] emissions" rather than "local or regional definitions" unmoored to any uniform cutoff.⁹⁴

Zero-Threshold Approach

The second approach outlined in the California Air Pollution Control Officers' Association White Paper—also not adopted in the CARB draft guidelines—is a zero-threshold regime. Under this approach, an Environmental Impact Report would be required for any project that would cause *any* increase in greenhouse gas emissions greater than zero.

This approach is problematic for the same reasons as the presumption of significance discussed above: the possibility that projects routinely would be approved through declarations of overriding considerations, due to the difficulty of mitigating emissions to a below-zero level.

There also are practical problems with the zero threshold: because the significance threshold would be zero, as the California Air Pollution Control Officers' Association paper explains, almost no project would be able to comply with CEQA's requirement of mitigation to a less-than-significant level other than through offsetting emission reduction credits—credits that may not be available in sufficient quantities to permit offsetting for all projects, and that tend to vary in quality.⁹⁵

Nor is the problem likely to be solved by categorical exemptions. Although CEQA permits such exceptions, they may not be available under CEQA for small-scale projects that emit greenhouse gases. CEQA guideline 14 C.C.R. § 15300.2(b) provides that "[a]ll exemptions for these classes [of projects from CEQA] are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant."

CEQA guideline 14 C.C.R. § 13500.2(c) further undermines the availability of a categorical exemption where climate change is involved: "a categorical exemption

⁹³ *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172, 1220 (9th Cir. 2008).

⁹⁴ Technical Advisory, *supra* note 80, at 4.

⁹⁵ CAPCOA White Paper, *supra* note 2, at 28. The White Paper explains that high quality emission reduction credits are those "generated by actions or projects that have clearly demonstrated emission reductions that are real, permanent, verifiable, enforceable, and not otherwise required by law or regulation." *Id.* Lower-quality credits result "[w]hen the pre- or post-project emissions are not well quantified or cannot be independently confirmed" or "if the reductions are temporary in nature." *Id.*

[from CEQA] shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.”

Non-Zero Threshold Approach

The third option posed by the White Paper—a form of which CARB Adopted in the Draft Proposal—is a non-zero threshold, whereby greenhouse gas emissions are considered not significant if they fall below some “de minimis” level, and/or fit within a preset framework for determining significance.

One form of this approach is a tiered analysis, under which a project would be presumed not to be significant if it meets any of various criteria, such as consistency with an A.B. 32-compliant regional or general plan or compliance with preset mitigation standards. These criteria could be tied to A.B. 32 and S-3-05, such as by establishing a significance threshold for projects that comply with a general plan or regional plan that meets those goals.⁹⁶ Such a tiering method would permit agencies to use “multiple methodologies to demonstrate [greenhouse gas] significance” to “facilitate the determination of significance for a broad range of projects/plans that would otherwise be difficult to address with a single non-compound methodology.”⁹⁷

A non-zero threshold regime is much more administrable than either a zero-threshold or a no-threshold regime and does not pose the potential for declarations of overriding considerations overwhelming CEQA review raised by a zero threshold.

CARB adopted a form of this non-zero threshold approach in its draft proposal, by suggesting that there be different significance standards for commercial/residential and industrial projects, taking into account compliance with CEQA-approved plans and CARB performance guidelines.

One advantage to a non-zero threshold is that it decreases the likelihood that agencies will dismiss green-

house gas emissions as “speculative” after conducting inconclusive investigations. CEQA guideline 14 C.C.R. § 15145 permits an agency to “terminate discussion of [an] impact” based on a determination that the “impact is too speculative for evaluation,” so long as the agency first conducts a thorough inquiry.

However, investigations are not likely to yield certain results in the area of climate change, and without thresholds many agencies likely will conclude after investigation that no Environmental Impact Report is warranted.

Such an approach, if widespread, would undermine the purpose of CEQA climate change review. The Sacramento Development Services Department, for example, recently declined to determine significance for the city’s proposed 2030 general plan, stating that “the significance of . . . impacts on climate change cannot be determined because: there are no published State thresholds, targets or methodologies for making the determination,” and “it is not known how much of the emissions from new development are truly ‘new’ or would be transferred from somewhere else.”⁹⁸

Numerical thresholds would head off such equivocation. But several potential pitfalls exist in determining non-zero thresholds. One is that any threshold must be supported by substantial evidence.⁹⁹ Although “the mere existence of significant cumulative impacts caused by other projects alone” is not substantial evidence that an individual project’s incremental effects are cumulatively considerable,¹⁰⁰ an Environmental Impact Report must be prepared where a project’s incremental effects “are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.”¹⁰¹ Second, under *Communities*, determinations of non-significance simply may not rely on a project’s compliance with requirements embodied in a separate statute or ordinance, if there is other evidence showing a fair argument the other way. Third, consideration of cumulative impacts must be made not by comparing the additional incremental impact against the magnitude of existing emissions, but by considering existing and additional impacts as a whole.

“[T]he relevant question . . . is not how the effect of the project at issue compares to the preexisting cumulative effect, but whether any additional amount of effect should be considered significant in the context of the cumulative effect.”¹⁰² Any non-zero threshold approach, whether based on a tiered method or not, must satisfy these requirements.

The California Air Resources Board draft proposal’s 7,000 metric ton emissions limit for industrial sources runs afoul of the first and third of these principles. First, it does not appear to be linked to any actual assessment of the impact of greenhouse gas emissions on the environment, and thus arguably is not based on substantial

⁹⁶ See CAPCOA White Paper, *supra* note 2, at 41.

⁹⁷ CAPCOA White Paper at 37. Under the proposed tiered approach set forth in the White Paper, the agency would first determine whether the proposed project or plan is consistent with a regional plan (RP) or general plan (GP) that provides for emissions reduction to 1990 levels by 2020, as required under A.B. 32. Alternatively, the agency would determine whether the project falls within a number of “exempt” categories set forth in S.B. 97, such as projects funded under the November 2006 Proposition 1B (the Highway Safety, Traffic Reduction, Air Quality and Port Security Bond Act) and 1C (the Disaster Preparedness and Flood Prevention Bond Act). If neither of these criteria were met, the agency would determine whether the proposed plan or project is included in something called a “green list,” which would be a list of “projects that are deemed a positive contribution to California efforts to reduce GHG [greenhouse gas] emissions.” *Id.* at 39. Fourth, if none of the foregoing criteria is met, an agency would determine whether a project is consistent with an appropriate general plan’s greenhouse gas emissions reduction plan, that has itself been subjected to CEQA review. Finally, if none of the foregoing standards is satisfied, the White Paper explains that agencies could use a tiered methodology to analyze and mitigate greenhouse gas emissions. This methodology would set forth mitigation strategies and emissions thresholds specific to particular types of projects, such as commercial, industrial, and residential. The White Paper outlines several options for thresholds, such as requiring projects to mitigate their greenhouse gas emissions to below zero levels, or to some non-zero level deemed not significant.

⁹⁸ See letter from attorney general’s office re: Draft EIR for Sacramento 2030 General Plan, Aug. 29, 2008, available at http://ag.ca.gov/globalwarming/pdf/comments_Sacramento_GP.pdf#xml=http://search.doj.ca.gov:8004/AGSearch/isysquery/07df0cca-b0f1-49bc-b006-afc834320706/1/hilite/.

⁹⁹ CEQA Guidelines, 14 C.C.R. § 15064.7(b).

¹⁰⁰ CEQA Guidelines, 14 C.C.R. § 15064(h)(4).

¹⁰¹ CEQA Guidelines, 14 C.C.R. §§ 15065(a)(3), 15130(a).

¹⁰² *Communities for a Better Environment v. California Resources Agency*, 103 Cal. App. 4th 98, 120 (Cal. Ct. App. 2002).

evidence that the environmental impacts of projects in excess of the threshold create a cumulatively considerable incremental contribution to a cumulative effect, whereas those below the threshold do not.

To reach the 7,000 metric ton cutoff for industrial projects, CARB explains in the draft proposal that it simply estimated the total yearly greenhouse gas emissions from a typical industrial boiler, and adopted that amount as the significance threshold. It reasoned that: (1) combustion emissions are the primary source of greenhouse gas emissions from industrial sources, with industrial boilers being a “top contributor to industrial combustion emissions”; (2) boilers that emit at least 4,660 metric tons per year represent 93 percent of total industrial boiler input capacity; and (3) a typical boiler with 4,660 metric tons per year of emissions would have total emissions of approximately 7,000 metric tons per year.¹⁰³ Nothing in the draft proposal indicates it is based on an actual investigation into the environmental effects of particular amounts of greenhouse gas emissions.

The CARB draft proposal’s method also arguably runs afoul of *Kings County’s* and *Communities’* rule against basing significance determinations on a comparison of incremental additions to the magnitude of existing emissions.

Setting the significance level at 7,000 metric tons would sweep in approximately 90 percent of greenhouse gas emissions from new industrial projects statewide.¹⁰⁴ The draft proposal states, “ARB staff’s objective [was] to develop a threshold of significance that will result in the vast majority” (approximately 90 percent statewide) of emissions “from new industrial projects being subject to CEQA’s requirement to impose feasible mitigation.” ARB staff believes this can be accomplished with a threshold that allows small projects to be considered insignificant.¹⁰⁵ However, this approach is roughly equivalent to deeming a project not significant because it will comprise only 1 percent of existing emissions—the precise method rejected by the *Kings County* court (indeed, it is less defensible to the extent it permits a greater “de minimis” cushion).

Contrary to *Kings County* and *Communities*, it measures significance by reference to the percentage of existing emissions to which a given project corresponds, instead of measuring cumulative impacts as a whole. It also fails to take account of the possibility that a proliferation of small projects could have a more substantial impact than a limited number of larger projects subject to the significance threshold.

Conclusion

But what threshold could avoid these problems? In the end, there are only two non-arbitrary choices for a numerical greenhouse gas emissions threshold: (1) a zero threshold, on the view that all greenhouse gas emissions are significant in the context of global climate change; or (2) some threshold established by reference to the amount of greenhouse gas reductions necessary to meet the goals embodied in A.B. 32 and S-3-05.

Setting thresholds based on A.B. 32 and S-3-05 is the preferable option, from both a legal and a practical standpoint. Practically, such thresholds would forestall the potential for overuse of statements of overriding considerations posed by a zero threshold by giving businesses a defined level below which to mitigate emissions.

Legally, thresholds linked to A.B. 32 and S-3-05 likely would withstand judicial scrutiny under *Kings County’s* and *Communities’* requirement that cumulative environmental effects be analyzed in totality, by reference to the gravity of the existing situation. Also, because the long-term goals embodied in A.B. 32 and S-3-05 are not arbitrary—they reflect the level of emissions reductions scientists recommend to avoid a dangerous risk of climate change—they likely will be held to meet the substantial evidence standard of CEQA guideline 15064.7.

Finally, such thresholds would be forward-looking: Rather than basing a significance cutoff on a targeted percentage of existing industrial emissions, as does the draft proposal, such an approach would examine the total emissions reductions needed to meet the A.B. 32 and S-3-05 goals.

Even the draft proposal appears to endorse this approach: it states, “[s]taff is proposing the use of a quantitative significance threshold at least until such time that performance standards, such as A.B. 32 regulatory requirements, are in place to ensure mitigation of significant impacts of GHG emissions from projects in the industrial sector.”¹⁰⁶

The question is how thresholds based on A.B. 32 and S-3-05 could be formulated. The California Air Pollution Control Officers’ Association White Paper provides several possibilities, including requiring emission reductions targeted to particular economic sectors and/or geographic regions or uniformly across all sectors, and/or “decision tree” approaches whereby projects could be deemed not significant if they fell within certain exempt categories within S.B. 97 and/or complied with an A.B. 32- and S-3-05-compliant general plan.¹⁰⁷ However, it is unclear where the impetus for such thresholds would come from. Although A.B. 32 tasks CARB with drafting rules and regulations to achieve maximum technologically feasible and cost-effective greenhouse gas emission reductions, that mandate expressly is not linked to S-3-05’s 2050 goal. One thing is certain, however: creating statewide thresholds linked to A.B. 32 and S-3-05 would require much time and study, and such thresholds likely could not be formulated by the time the Office of Planning and Research releases its draft guidelines in July 2009.

For the time being, it remains to be seen whether the California Air Resources Board’s proposal can withstand challenge, and whether the Office of Planning and Research will incorporate it into the July 2009 guidelines.

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¹⁰³ CARB Draft proposal, *supra* note 1, at 10.

¹⁰⁴ CARB Draft Proposal, *supra* note 1, at 9.

¹⁰⁵ CARB Draft Proposal, *supra* note 1, at 9.

¹⁰⁶ CARB Draft Proposal, *supra* note 1, at 9.

¹⁰⁷ CAPCOA White Paper, *supra* note 2, at 31–55.

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