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Greenhouse gas emissions under CEQA - costs and implications

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Greenhouse Gas Emissions under CEQA – Costs and Opportunities

*Peter V. Allen**

Background	37
I. What Does SB 97 Say?	38
II. Avoid The Temptation To Ignore The Issue	39
III. How To Address The Issue	39
IV. On-Site Renewable Energy Production As Mitigation Measure	42

The recent enactment of SB 97¹ has codified the California Attorney General’s argument that increased greenhouse gas emissions and their effects constitute an environmental impact that must be considered by a permitting agency under the California Environmental Quality Act (CEQA).

This new measure will make many CEQA reviews more complex, and will require more costly mitigation measures for many projects, but it also provides some potential opportunities, particularly for renewable energy developers. This Article looks at the implementation of SB 97 and some of its possible ramifications.

BACKGROUND

In 2007, California’s Attorney General Jerry Brown garnered significant media attention from a lawsuit he brought against San Bernardino County, in which he argued that the rapidly growing county’s CEQA review of its updated general plan “did not adequately analyze the effects of development on global warming,” and did not “identify feasible mitigation measures” for those effects.²

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* Of Counsel in the San Francisco office of Thelen Reid Brown Raysman & Steiner.

1. CAL. PUB. RES. CODE §§ 21083.05, 21097 (2008).

2. Press Release, California Office of the Attorney General, Brown Announces Landmark Global Warming Settlement, (Aug. 21, 2007), *available at* <http://ag.ca.gov/newsalerts/release.php?id=1453&category=global%20warming>; *see also* Tim Reiterman, *State sues San Bernardino County to nullify its blueprint for growth*, L.A. TIMES, Apr. 14, 2007, at B3.

Critics responded that Brown jumped the gun to gain publicity, and that it was unreasonable to require San Bernardino to implement mitigation measures before regulations implementing AB 32 (California's landmark global warming statute) were in place.³ Republicans in the state legislature held up the state budget and attempted to pass legislation limiting Brown's power to bring such lawsuits in the future.⁴

The case itself resulted in a settlement between San Bernardino County and the Attorney General's office, with San Bernardino agreeing to establish a greenhouse gas reduction plan which identifies sources of emissions and sets reduction targets.⁵

The political tussle's outcome was the passage of SB 97, which imposes relatively narrow limits on bringing litigation against public agencies for inadequate analysis and mitigation of global warming impacts.⁶ While not a completely unmitigated victory, the settlement with San Bernardino and the passage of SB 97 add up to a win for the Attorney General's position.

I. WHAT DOES SB 97 SAY?

SB 97 is fairly short, and consists of two parts.⁷ The first part requires the state Office of Planning and Research (OPR) to develop guidelines for the mitigation of greenhouse gas emissions and the effects of greenhouse gas emissions. OPR is to transmit its proposed guidelines to the state Resources Agency by July 1, 2009, and the Resources Agency is to certify and adopt those guidelines by January 1, 2010.

The second part bars all legal actions for failure to adequately analyze the effects of greenhouse gas emissions in an environmental document, but only for projects funded under the Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006 and the Disaster Preparedness and Flood Prevention Bond Act of 2006. This bar expires on January 1, 2010.

For projects not funded under these two bond acts it is important to understand what SB 97 means right now. But because greenhouse gas mitigation guidelines mandated by the statute do not yet exist, and probably will not exist until 2010, it might be difficult to determine what permitting agency will require.

3. See E.J. Schulze, *Brown: Consider climate change*, FRESNO BEE, Aug. 9, 2007, at B1.

4. Marie-Anne Hogarth, *Lawyers disagree over 'fig leaf' fix in state budget deal*, E. BAY BUS. TIMES, Aug. 24, 2007, available at <http://eastbay.bizjournals.com/eastbay/stories/2007/08/27/story5.html?page=1>.

5. See *State ex. re/Brown v. County of San Bernardino*, No. CIVSS 0700329 (Cal. Super. Ct. Aug. 28, 2007) (order approving settlement and dismissal), available at http://ag.ca.gov/cms_pdfs/press/2007-08-21_San_Bernardino_settlement_agreement.pdf.

6. S.B. 97, 2007-2008 Sen., Reg. Sess. (Cal. 2007) (enacted), available at http://leginfo.ca.gov/pub/07-08/bill/sen/sb_0051-0100/sb_97_bill_20070824_chaptered.pdf.

7. CAL. PUB. RES. CODE §§ 21083.05, 21097 (2008).

II. AVOID THE TEMPTATION TO IGNORE THE ISSUE

Project proponents may be tempted to argue that no mitigation measures can or should be required for a project's greenhouse gas emissions until the guidelines are in place, but in most cases this is probably a bad idea. Given AB 32, the scientific consensus around global warming, and the relatively aggressive position of the Attorney General, this approach would most likely result in increased litigation costs and project delays, and ultimately is unlikely to prevent the imposition of mitigation measures.

If a project proponent convinces a permitting agency that no greenhouse gas mitigation measures are necessary (for a project that would result in increased emissions of greenhouse gases), and the agency prepares an environmental document lacking greenhouse gas mitigation measures, it seems likely that the Attorney General or an environmental or community group would sue. This would result in litigation costs and potential project delay.

Even if the permitting agency and project proponent prevail in litigation on this issue, by the time the courts reach a decision, the new mitigation guidelines will probably be in place, with the potential to render the victory empty, or perhaps trigger another round of litigation on whether or not the mitigation measures now apply.

It would be most prudent, and most consistent with AB 32, for project proponents and lead and responsible agencies to consider the impacts of greenhouse gas emissions and to incorporate appropriate mitigation measures in their environmental documents.

III. HOW TO ADDRESS THE ISSUE

One way to understand the meaning of SB 97 is to look at the context that sparked its passage. While the San Bernardino case gathered the most attention, it was not a one-shot approach by the Attorney General. In fact, the Attorney General submitted formal comments under the CEQA process to at least thirteen local jurisdictions, encouraging them to evaluate and reduce increases in greenhouse gas emissions caused by their land use decisions.⁸

In addition to the comments, the Attorney General has discussed the terms of the San Bernardino County settlement, and set forth some mitigation measures that can be used to mitigate global warming impacts.⁹

Feasible mitigation measures identified by the Attorney General in the context of the San Bernardino case include:

8. Press Release, California Office of the Attorney General, *Brown Challenges Counties to Combat Climate Change*, (Nov. 13, 2007), *available at* <http://ag.ca.gov/newsalerts/release.php?id=1495>.

9. Press Release, California Office of the Attorney General, *supra* note 2.

- High-density developments that reduce vehicle trips and utilize public transit
- Parking spaces for high-occupancy vehicles and car-share programs
- Electric vehicle charging facilities and conveniently located alternative fueling stations.
- Limits on parking
- Transportation impact fees on developments to fund public transit service
- Regional transportation centers where various types of public transportation meet
- Energy efficient design for buildings, appliances, lighting, and office equipment
- Solar panels, water reuse systems, and on-site renewable energy production
- Methane recovery in landfills and wastewater treatment plants to generate electricity
- Carbon emissions credit purchases that fund alternative energy projects¹⁰

Not all of these mitigation measures would work for all projects, but the list provides some examples and ideas that could be adapted to fit the project at issue. Another example of mitigation measures comes from Contra Costa County, where the county certified an environmental impact report for a proposal by ConocoPhillips to expand its refinery capacity in order to increase the supply of cleaner-burning gasoline and diesel fuel. The Attorney General appealed that certification to the County Board of Supervisors, arguing that the EIR did not adequately address the greenhouse gas emissions and the associated climate change impacts of the project.¹¹ ConocoPhillips and the Attorney General reached an agreement that resolved this issue.¹²

The mitigation measures agreed to by ConocoPhillips and the Attorney General included requirements that ConocoPhillips:

- Permanently surrender the operating permit for another plant (with annual carbon dioxide emissions of 70,000 tons) by the end of 2007

10. *Id.*

11. California Attorney General, Notice of Appeal of Planning Commission Approval of ConocoPhillips Rodeo Refinery Expansion Project (File #LP052048), May 18, 2007, *available at* <http://www.pcl.org/projects/2008symposium/proceedings/Coatsworth4.pdf>.

12. Press Release, California Office of the Attorney General, *supra* note 2.

- Conduct a facility-wide energy efficiency audit using an outside consultant, in order to identify possible energy efficiency measures which may be taken at the facility
- Complete a greenhouse gas emissions audit of its California refineries by the end of 2008, including a review of the greenhouse gases emitted from those facilities, including carbon dioxide, methane, and CFC and HFC compounds. The audit will identify sources of emissions and potential emissions reduction opportunities at its California refineries
- Make a one-time payment of \$7 million to a carbon offset fund to be created by the Bay Area Air Quality Management District, to be used to fund grants for projects undertaken in the San Francisco Bay Area to achieve verifiable, quantifiable reductions in greenhouse gas emissions, with priority given to projects near the Rodeo Refinery
- Pay \$200,000 to the Audubon Society for the restoration of San Pablo Bay wetlands to offset the ConocoPhillips project's emissions of greenhouse gases by increasing the sequestration of carbon
- Pay \$2.8 million to California Wildfire ReLeaf for reforestation and conservation projects in California to be conducted in accordance with the California Climate Action Registry's Forestry Project Protocol. California Wildfire ReLeaf will be responsible for ensuring that ConocoPhillips complies with Registry requirements for certification of a reduction inventory for projects receiving these funds. This payment will offset the ConocoPhillips project's emissions of greenhouse gasses by funding planting or conservation of trees, which sequester carbon¹³

It is interesting how different the San Bernardino and ConocoPhillips settlements are, with the San Bernardino approach being more structural, while the ConocoPhillips one is more financial. These two approaches show that the Attorney General and other parties who have had to address global warming mitigation measures are not taking a one-size-fits-all approach. Nevertheless, there is at least one aspect of the San Bernardino settlement that holds the potential to provide some interesting opportunities.

13. Settlement Agreement between ConocoPhillips Company and Edmund G. Brown, Attorney General of California, September 10, 2007, available at http://ag.ca.gov/globalwarming/pdf/ConocoPhillips_Agreement.pdf. The terms requiring monetary payments had conditions and contingencies associated with them. ConocoPhillips may also apply to receive offset and/or credit status for reductions achieved through the projects and activities funded under the agreement under AB 32 or any equivalent federal law or regulation.

IV. ON-SITE RENEWABLE ENERGY PRODUCTION AS MITIGATION MEASURE

One of the mitigation measures identified by the Attorney General in the San Bernardino case included “solar panels... and on-site renewable energy production.”¹⁴ In other words, a developer whose project would otherwise contribute to global warming can mitigate that impact by incorporating solar or other forms of renewable energy production. For larger-scale projects, this approach could provide a significant opportunity for renewable energy providers to add a renewable energy component to the development.

First, developers must, from this point forward, identify greenhouse gas mitigation measures. As a result of modern building guidelines, many energy efficiency measures (which tend to be highly cost effective) will probably already be part of the project’s design, meaning that the developer will need to do something more.¹⁵

This mitigation requirement changes the equation in assessing the cost-effectiveness of installing solar panels or other renewable generation. The developer’s choice and analysis is no longer between installing solar panels or not installing them, for example, but between installing solar panels and implementing another mitigation measure. In other words, doing nothing (and incurring no additional costs) is no longer an option. The cost (and benefit) of solar panels now needs to be compared to the cost (and benefit) of other mitigation measures, which makes solar panels and other on-site renewable generation more cost effective than before.

Second, in the case of a renewable energy developer looking for a site, and facing potentially significant CEQA review costs, teaming up with a public agency or another developer may provide time and cost savings. A large part of the CEQA environmental review process (and its associated costs), such as studying existing conditions, will likely be done by the host agency or developer, rather than the renewable developer. The resulting renewable energy project will be considered as a mitigation measure, rather than a stand-alone project.

The Attorney General, AB 32, CEQA, and SB 97 are making solar panels and other distributed renewable generation more cost-effective and more attractive. There are some interesting opportunities out there for renewable energy providers who can identify and team up with agencies and developers who need to mitigate greenhouse gas impacts.

14. Press Release, California Office of the Attorney General, *supra* note 2.

15. In addition, for large projects with a significant carbon footprint that are most likely to be affected by CEQA, it is unlikely that energy efficiency measures alone will be adequate to mitigate the greenhouse gas impacts.