Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: May 17, 2016

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Climate Action Plan

QUESTION PRESENTED

Are the greenhouse gas (GHG) emissions reductions targets identified in the City of San Diego Climate Action Plan (CAP) legally binding?

SHORT ANSWER

The GHG emissions reductions targets in the CAP (CAP targets) are legally binding to the extent required by the California Environmental Quality Act (CEQA) mitigation measure for the 2008 City of San Diego General Plan (General Plan), which is enforceable pursuant to CEQA. That measure requires the City to "regularly monitor, update and implement the City's [Climate Action Plan] to ensure, at a minimum, compliance with all applicable federal, state, and local laws." The CAP targets are based on data available at the time the CAP was prepared to ensure compliance with applicable laws. Changes in law, a pending California Supreme Court decision, and implementation of other statewide GHG reduction programs and policies could change the targets necessary for the City to comply with statewide targets. In addition, the CAP's annual monitoring may identify additional necessary changes.

BACKGROUND

The City's General Plan was adopted in 2008. It "expresses community vision and values, and it embodies public policy for the distribution of future land use . . . ." City of San Diego General Plan at SF-2 (Mar. 2008). The General Plan is the City's constitution for all future development and the City's land use decisions must be consistent with the policies expressed in it. *Lesher Communications, Inc. v. City of Walnut Creek*, 52 Cal. 3d 531, 540 (1990); *Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 815 (2007). Prior to adoption of the General Plan, the San Diego City Council (City Council) certified the General Plan Program Environmental Impact Report (General Plan EIR) and adopted a Mitigation Monitoring and Reporting Program for the General Plan (General Plan MMRP) in accordance with CEQA. With

respect to GHG emissions, the General Plan EIR and General Plan MMRP included certain policies contained in the General Plan as mitigation measures, including Policy CE-A.13, which provides for the City to "regularly monitor, update and implement the City's Climate Protection Action Plan, to ensure, at a minimum, compliance with all applicable federal, state, and local laws." General Plan EIR at 5-32; General Plan MMRP at 49-50.

On December 15, 2015, by Resolution 310175, the City Council adopted the CAP. When the City Council adopted the CAP, the intent was to satisfy the General Plan MMRP requirement set forth in General Plan Policy CE-A.13 to update what was then the City's Climate Protection Action Plan to be in "compliance with all applicable federal, state, and local laws." CAP at 14. The CAP was also intended to meet the requirements set forth in CEQA Guidelines[1] section 15183.5, whereby a lead agency may analyze and mitigate the significant effects of GHG emissions at a programmatic level, such as in a general plan or a separate plan to reduce GHG emissions. CAP at 15. However, additional implementing actions are necessary for the CAP to satisfy the requirements set forth in CEQA Guidelines section 15183.5. CAP at 16. These additional implementing actions are expected to be considered by the City Council in the next few months.

To ensure compliance with applicable laws,[2] the City looked to the Global Warming Solutions Act of 2006, commonly known as A.B. 32. Cal. Health & Safety Code §§ 38500-38599. A.B. 32 required the California Air Resources Board (CARB) to determine 1990 levels of GHG emissions and then to establish "a statewide greenhouse gas emissions limit that is equivalent to that level, to be achieved by 2020." Cal. Health & Safety Code § 38550. A.B. 32 also provided that emissions must remain in effect unless otherwise amended or repealed and further stated that the intent was that "the statewide [GHG] emissions limit . . . continue reductions . . . beyond 2020." Cal. Health & Safety Code § 38551(a)-(b). A.B. 32 also required CARB to "prepare and approve a scoping plan . . . for achieving the maximum technologically feasible and cost-effective reductions in [GHG] emissions . . . by 2020." Cal. Health & Safety Code § 38561(a). In December 2008, CARB approved the first Climate Change Scoping Plan (2008 Scoping Plan). In the 2008 Scoping Plan, CARB "recommended a [GHG] reduction goal for local governments of 15 percent below [then current] levels by 2020 to ensure that . . . municipal and community-wide emissions match the State's reduction target." 2008 Scoping Plan at ES-5. The City also looked at Executive Order No. S-3-05, which set statewide targets to reduce GHG emissions to 1990 levels by 2020, and to reduce to 80 percent below 1990 levels by 2050. Using A.B. 32, Executive Order No. S-3-05, and the 2008 Scoping Plan as guidance, the CAP set City targets to achieve a 15 percent reduction by 2020, a 40 percent reduction by 2030, and a 50 percent reduction by 2035. CAP at 21. The CAP states that by meeting the 2020 and 2035 targets, the City will maintain its trajectory to meet its proportional share of the 2050 state target. *Id.* The CAP also "identifies a comprehensive set of goals, actions, and targets that the City can use to reduce GHG

[1] Cal. Code Regs., title 14, §§ 15000-15387.
[2] The General Plan mitigation provides for ensuring compliance with applicable federal, state, and local laws. However, there are currently no federal laws applicable to the City with respect to GHG emissions reductions. Additionally, the City has not adopted any specific laws related to GHG emissions reductions. Therefore, this memorandum only discusses applicable state laws.

emissions," and recognizes that modifications to specific actions may be necessary "as circumstances change over time." CAP at 29. The CAP also states that there are multiple ways to achieve the targets, that flexibility in implementation is necessary, and that the "City may amend the CAP when circumstances require the CAP actions to provide additional flexibility or clarity." *Id.*

ANALYSIS

Since the CAP is intended to serve as mitigation required in the General Plan EIR, the issue is whether the specific CAP targets are enforceable as mitigation under CEQA. Mitigation measures must be enforceable and once adopted, cannot be defeated by ignoring them. Cal. Pub. Res. Code § 21081.6(b); *Sierra Club v. County of San Diego*, 231 Cal. App. 4th 1152, 1167 (2014). However, a local agency has substantial discretion to determine what constitutes compliance with an adopted mitigation measure, as long as the determination is reasonable, and such determination is reasonable if it does not result in new or adverse environmental impacts. *See Stone v. Board of Supervisors*, 205 Cal. App. 3d 927, 935 (1988); 2 Stephen L. Kostka & Michael H. Zischke, Practice Under the California Environmental Quality Act § 18.15 (Cont. Ed. Bar 2d ed. 2016). If an agency fails to substantially comply with an adopted mitigation measure in a way that reduces its effectiveness, supplemental CEQA review is required to analyze the impacts of the change. *Sierra Club*, 231 Cal. App. 4th at 1174; *see also Lincoln Place Tenants Ass'n v. City of Los Angeles*, 130 Cal. App. 4th 1491, 1508 (2005). In *Sierra Club*, the County of San Diego's General Plan EIR included mitigation that required the County to adopt a climate action plan that would "'achieve comprehensive and enforceable GHG emissions reduction of 17% (totaling 23,572 MTCO2E) from County operations from 2006 by 2020 and 9% reduction (totaling 479,717 MCTO2E) in community emissions from 2006 by 2020.'" *Sierra Club*, 231 Cal. App. 4th at 1159. The court found that the County's climate action plan failed to comply with that mitigation measure because there was no evidence in the record that such reductions would be achieved. *Id.* at 1174-75.

Unlike the County of San Diego's General Plan EIR mitigation, which identified specific reduction targets, the applicable mitigation in the City's General Plan EIR and General Plan MMRP provided for the City to "regularly monitor, update and implement the City's [Climate Action Plan], to ensure, at a minimum, compliance with all applicable federal, state, and local laws." General Plan EIR at 5-32; General Plan MMRP at 49-50. In addition, the City's CAP identifies an implementation phasing schedule and an annual monitoring and reporting measure.[3] As discussed in the Background, the City used the statewide targets in A.B. 32 and Executive Order No. S-3-05 as well as guidance in the 2008 Scoping Plan to determine the appropriate CAP targets.[4]

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[3] With implementation of the annual monitoring, which includes an annual monitoring report to track success in meeting the CAP targets, as well as providing for amendment of the CAP itself if the annual monitoring report shows the City is not meeting its targets, potential deficiencies in meeting the targets would be identified and would inform decision makers on how to continue to move forward to achieve the targets. *See* CAP at 42.

[4] Neither A.B. 32, the 2008 Scoping Plan, nor Executive Order No. S-3-05 set out a mandate or method for CEQA analysis of GHG emissions for a particular local jurisdiction or project. *See Ctr. for Biological Diversity v. Cal.*

While it is generally settled that the statewide 2020 target set forth in A.B. 32 and the 2008 Scoping Plan is an acceptable criterion for determining significance under CEQA, whether the targets set forth in Executive Order No. S-3-05 are applicable remains undecided. *See Ctr. for Biological Diversity*, 62 Cal. 4th at 223 (citing *Friends of Oroville v. City of Oroville*, 219 Cal. App. 4th 832, 841 (2013); *Citizens for Responsible Equitable Envtl. Dev. V. City of Chula Vista*, 197 Cal. App. 4th 327, 335-36 (2011)). A decision on whether an environmental impact report (EIR) must include an analysis of consistency with the GHG goals reflected in Executive Order No. S-3-05 to comply with CEQA is pending before the California Supreme Court in *Cleveland National Forest Foundation v. San Diego Association of Governments*, S223603. Nevertheless, the California Supreme Court also recently stated that while the plaintiffs in the case did not claim the EIR was improper for failing to address post-2020 GHG emissions, it noted that the 2050 target identified in Executive Order No. S-3-05 may nonetheless be applicable since A.B. 32 codified the 2020 goal and did not indicate any intent to abandon the 2050 goal, but rather cited Executive Order No. S-3-05 and indicated its intent that the climate policy efforts the order initiated continue. *Ctr. for Biological Diversity*, 62 Cal. 4th at 223 n.6. In addition, CARB will continue to update its Scoping Plans and could adopt a recommendation for a percentage reduction for local governments to address post-2020 emissions. The Legislature may also act to adopt different post-2020 emissions targets. Further, the CAP's annual monitoring may identify additional changes. Due to these foreseeable changes, it is impossible to know at this time whether strict compliance with the CAP targets would be necessary to comply with applicable laws.

Therefore, to the extent the CAP targets are necessary to ensure compliance with applicable laws, the CAP targets are enforceable. While the CAP targets are enforceable as a CEQA mitigation measure, strict compliance is not necessarily required so long as the City is consistent with applicable state laws. Moreover, the City has discretion to determine what constitutes compliance with the General Plan EIR mitigation measure, as long as its determination is reasonable.

CONCLUSION

The CAP targets are legally binding to the extent required by the CEQA mitigation measure for the General Plan. That measure requires the City to "regularly monitor, update and implement the City's [Climate Action Plan] to ensure, at a minimum, compliance with all applicable federal, state, and local laws." CEQA requires that mitigation measures be enforceable. Cal. Pub. Res. Code § 21081.6(b). Changes in law, a pending California Supreme Court decision, and

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Dept. of Fish & Wildlife, 62 Cal. 4th 204, 222-23 (2015). However, CEQA requires the Natural Resources Agency to prepare, adopt, and update guidelines for mitigation of GHG impacts, and the CEQA Guidelines provide that when assessing the significance of GHG emissions, an agency should consider, among other things, "the extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of [GHG]." Cal. Pub. Res. Code § 21083.05; CEQA Guidelines § 15064.4(b)(3); *Ctr. for Biological Diversity*, 62 Cal. 4th at 222.

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cc: Andrea Tevlin, Independent Budget Analyst