

**Office of  
The City Attorney  
City of San Diego**

**MEMORANDUM  
MS 59**

**(619) 533-5800**

**DATE:** July 1, 2016

**TO:** Honorable Mayor and City Council

**FROM:** City Attorney

**SUBJECT:** Environmental Review for the Proposed Single-Use Carryout Bag Reduction Ordinance

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**BACKGROUND**

This memorandum provides the applicable legal framework under the California Environmental Quality Act (CEQA) for the environmental review of the City of San Diego's (City) proposed Single-Use Carryout Bag Reduction Ordinance (Ordinance). Our Office discusses our prior advice to City staff applying that framework to the Ordinance in a separate confidential memorandum. Generally speaking, the Ordinance restricts the provision of plastic and paper single-use carryout bags at regulated stores, and promotes the use of reusable bags within the City. A further description of the Ordinance may be found in Section 2.6 of the Draft EIR and in Report to Council No. 16-044. Our Office anticipates that the full City Council, acting as lead agency under CEQA, will consider the Ordinance on or around July 19, 2016.

**ENVIRONMENTAL REVIEW UNDER CEQA**

The Ordinance is a "project" subject to CEQA because it is an activity directly undertaken by a public agency "which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." Cal. Pub. Res. Code § 21065; *see* Cal. Code Regs., title 14 § 15378.

Projects may be exempt from environmental review under CEQA if they fall within a statutory or categorical exemption. Cal. Code Regs., title 14 § 15061. The CEQA Guidelines list classes of projects that normally have no significant effect on the environment and are categorically exempt. Cal. Pub. Res. Code § 21084. Implied in the determination that a categorical exemption

applies is the finding that the project has no significant effect on the environment.<sup>1</sup> *Davidon Homes v. City of San Jose*, 54 Cal. App. 4th 106, 115 (1997). Whether a categorical exemption may apply depends “upon the unique facts and circumstances presented.” *Save the Plastic Bag Coalition v. County of Marin*, 218 Cal. App. 4th 209, 224-25 (2013).

A lead agency’s finding that a proposed project falls within a categorical exemption is subject to the substantial evidence standard of judicial review, meaning “substantial evidence” must support the agency’s determination that an exemption applies. *Save Our Big Trees v. City of Santa Cruz*, 241 Cal. App. 4th 694, 711 (2015). “Substantial evidence” is enough relevant information and reasonable inferences from the information that a fair argument can be made to support a conclusion, even if other conclusions could also be reached. Cal. Code Regs., title 14 § 15384(a). Substantial evidence includes “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” Cal. Code Regs., title 14 § 15384(b).

If the lead agency meets its initial burden by showing the exemption is supported by substantial evidence, the burden shifts to the challenging party to show there is a “fair argument” that one or more exceptions to the exemption apply.<sup>2</sup> *Hines v. California Coastal Comm’n*, 186 Cal. App. 4th 830, 856 (2010) (recognizing a split of authority on whether the fair argument standard applies to categorical exemptions, but upholding the use of the exemption because no fair argument had been made). The main exceptions to categorical exemptions are for projects in a sensitive environment, for significant cumulative impacts, and unusual circumstances.<sup>3</sup> Cal. Code Regs., title 14 § 15300.2.

If a project is not exempt, the lead agency must determine whether the project may have a significant effect on the environment. *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 83 (1974). If there is no substantial evidence that the project may have a significant effect on the environment, the lead agency prepares a negative declaration. Cal. Code Regs., title 14 §§ 15070(a), 15072–15073. If, however, the project may have a significant effect, the agency must prepare an Environmental Impact Report (EIR). Cal. Pub. Res. Code § 21151(a). If challenged, conclusions in EIRs are subject to the more deferential “substantial evidence” standard of review, meaning that they will be upheld if supported by substantial evidence, even if there is competing evidence on the other side. *Banning Ranch Conservancy v. City of Newport Beach*, 211 Cal. App. 4th 1209, 1230 (2012).

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<sup>1</sup> A “significant effect on the environment” is a substantial or potentially substantial adverse change in the environment. Cal. Pub. Res. Code § 21068.

<sup>2</sup> The fair argument standard is less deferential to the agency’s decision because it requires a court to determine whether there is substantial evidence in the record on which a fair argument can be made that the project may have significant environmental effects. *See Voices for Rural Living v. El Dorado Irrigation District*, 209 Cal. App. 4th 1096, 1108 (2012).

<sup>3</sup> A specific two-prong standard of review applies to the unusual circumstances exception. First, an agency’s determination that a project does not present unusual circumstances is subject to the substantial evidence review. *Berkeley Hillside Preservation v City of Berkeley*, 60 Cal. 4th 1086, 1115 (2015). Second, if the agency determines that unusual circumstances exist, then whether those circumstances will cause a significant environmental effect (and thus remove the project from the exemption) is determined under the fair argument standard. *Id.* at 1116.

Additionally, recirculation is required prior to certification when significant new information is added to the EIR. Cal. Code Regs., title 14 § 15088.5(a). The term “information” can include both changes in the project or environmental setting, as well as additional data or other information. *Id.* An example of significant new information requiring recirculation includes a new significant environmental impact that would result from the project. *Id.*

### **CEQA AND SINGLE-USE CARRYOUT BAG REDUCTION ORDINANCES**

California jurisdictions with single-use carryout bag reduction ordinances (referred to hereinafter as “plastic bag bans”) have conducted various forms of environmental review under CEQA, including preparation of negative declarations and EIRs, and the use of categorical exemptions. The City of Manhattan Beach, Marin County, and the City and County of San Francisco did not prepare EIRs for their plastic bag bans. As discussed below, each faced CEQA challenges from Save the Plastic Bag Coalition (Coalition). As these ordinances may increase paper bag use, the challenges have focused upon the adequacy of the environmental review considering potential impacts due to the manufacture, transportation, and disposal of paper bags.

In *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal. 4th 155 (2011), the California Supreme Court recognized that, with the adoption of a plastic bag ban, “some increase in the use of paper bags is foreseeable, and the production and disposal of paper products is generally associated with a variety of negative environmental impacts.” *Id.* at 175. However, the court upheld the negative declaration in finding there was no significant impact on cumulative greenhouse gas (GHG) emissions based on the particular circumstances of the Manhattan Beach ordinance, including the relatively small size of Manhattan Beach at less than 40,000 residents, and the relatively small impact of the ordinance, which affected only 220 stores. *Id.* at 173. The court noted that the analysis would be different for a larger jurisdiction.<sup>4</sup> *Id.*

In *Save the Plastic Bag Coalition v. County of Marin*, the court held that categorical exemptions under CEQA Guidelines sections 15307 and 15308 may apply to regulatory actions enacting a plastic bag ban. *County of Marin, supra*, at 228. However, the court stated, “We do not suggest there is a blanket exemption from CEQA for plastic bag bans. A categorical exemption *may* apply to plastic bag bans depending on the unique facts and circumstances presented.” *Id.* at 224-25. Further, the Marin ordinance only applied to 40 stores, which the court seemed to rely upon in determining that the exemption was appropriately utilized. *Id.*

Lastly, in *Save the Plastic Bag Coalition v. City and County of San Francisco*, 222 Cal. App. 4th 863 (2013), the court held San Francisco’s ordinance expansion<sup>5</sup> appropriately relied on categorical exemptions under CEQA Guidelines sections 15307 and 15308. *Id.* at 876-77. Although the Coalition argued that unusual circumstances precluded use of the exemptions (i.e., a large number of commuters and tourists would not switch to reusable bags, and paper bags are

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<sup>4</sup> While the analysis would be different, that does not necessarily mean that a larger jurisdiction could not appropriately utilize a CEQA exemption for a similar ordinance. *Id.* at 173-74.

<sup>5</sup> The litigation addressed the expansion of San Francisco’s plastic bag ban prohibition from groceries and pharmacies (adopted in 2007 and akin to the Ordinance) to all retailers and food establishments in the jurisdiction.

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more adverse to the environment than plastic bags), the court rejected these arguments based on evidence in the record supporting a conclusion that the ordinance would not, in fact, cause consumers to switch to paper bags because of the 10-cent charge on paper bags and a public outreach program to encourage reusable bags. *Id.* at 881. Thus, the court's decision was fact-specific and relied on the documentation San Francisco prepared prior to adoption of the ordinance that supported use of the exemptions and responded to the Coalition's arguments. The court also noted that if the record does not support the use of the exemption, a lead agency cannot circumvent CEQA by simply characterizing a proposed project as environmentally friendly and therefore exempt under sections 15307 and 15308. *Id.* at 877.

Although the foregoing cases are instructive, the City is required to separately evaluate the Ordinance under CEQA to ensure the particular facts and circumstances presented by the project are addressed. Our analysis of a recent case related to GHG analyses under CEQA, Report 2016-2, dated February 4, 2016, is attached. Our Office discusses our prior advice to City staff applying the applicable legal framework under CEQA to the Ordinance in a separate confidential memorandum.

### CONCLUSION

This memorandum provides the applicable legal framework for the environmental review of the Ordinance, in order to fully inform and assist the Councilmembers as they consider the project. Our Office is available to address any further legal questions that the City Council may have related to this matter.

JAN I. GOLDSMITH, City Attorney

By /s/ Amanda L. Guy  
Amanda L. Guy  
Deputy City Attorney

ALG:js  
MS-2016-19

Attachment

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February 4, 2016

## REPORT TO HONORABLE MAYOR AND CITY COUNCILMEMBERS

REVIEW OF THE 2015 CALIFORNIA SUPREME COURT DECISION *CENTER FOR BIOLOGICAL DIVERSITY v. CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE* AS IT PERTAINS TO GREENHOUSE GAS EMISSIONS ANALYSIS PURSUANT TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

### INTRODUCTION

On January 26, 2016, Council Member David Alvarez requested an update on a recent case decision concerning the appropriate analysis of greenhouse gas (GHG) impacts pursuant to the California Environmental Quality Act (CEQA). This Report first provides an overview of relevant State of California GHG reduction requirements, then summarizes the decision in *Center for Biological Diversity v. California Department of Fish and Wildlife* and notes possible options for lead agencies evaluating the cumulative significance of a land use project's GHG emissions.

### ANALYSIS

#### I. REVIEW OF STATE OF CALIFORNIA GHG REDUCTION LAWS, PROGRAMS, AND POLICIES RELEVANT TO *CENTER FOR BIOLOGICAL DIVERSITY v. CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE* DECISION<sup>1</sup>

##### A. Global Warming Solutions Act of 2006 (AB 32) and Scoping Plans

In 2006, the State of California enacted the Global Warming Solutions Act of 2006, Assembly Bill 32 (AB 32) and set a goal of reducing GHG emissions to 1990 levels by 2020. Cal. Health & Safety Code §§ 38500- 38599. AB 32 also clearly recognized that GHG reductions would need to continue past 2020, and the California Air Resources Board (CARB) was directed to recommend reduction measures beyond 2020. Cal. Health & Safety Code § 38551(c).

Additionally, AB 32 required CARB to prepare a scoping plan that described the approach California would take to achieve the "maximum technologically feasible and cost-effective" GHG emissions reductions to achieve the goal of reducing emissions to 1990 levels by 2020, and to update that plan at least once every five years. Cal. Health & Safety Code

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<sup>1</sup> There are numerous international, federal and state measures regarding GHG reduction, the summary of which is beyond the scope of this Report.

§ 38561(a), (h). CARB approved the Climate Change Scoping Plan (Scoping Plan) in 2008. The Scoping Plan determined that reducing statewide GHG emissions to the 1990 levels would require a reduction of about 30 percent from the business-as-usual emissions projected for 2020, or about 15 percent from the 2008 levels.<sup>2</sup> Climate Change Scoping Plan, Executive Summary, at ES-1. In May, 2014, CARB adopted the First Update to the Climate Change Scoping Plan (First Update). The First Update noted that California is on track to meet the 2020 limit, and is “well positioned to maintain and continue reductions beyond 2020 as required by AB 32.” Air Resources Board, First Update to the Climate Change Scoping Plan (May 2014), Executive Summary at ES2. However, the First Update also noted the need to establish a mid-term statewide reduction target to ensure a continuum of reductions, not just the achievement of goals for 2020 or 2050. *Id.* at ES6.

### **B. Executive Orders<sup>3</sup>**

Executive Order No. S-3-05, signed June 1, 2005, established GHG reduction targets of 1990 levels by 2020 and 80 percent reduction below the 1990 levels by 2050. AB 32 codified the 1990 reduction levels. Cal. Health & Safety Code § 38550.<sup>4</sup>

Executive Order No. B-30-15, signed April 29, 2015, set a new interim GHG reduction target of 40 percent below 1990 levels by 2030 to ensure that California meets its targets of reducing GHG emissions to 80 percent below 1990 levels by 2050. The Executive Order also directed CARB to update the Scoping Plan to express the 2030 target in terms of metric tons of carbon dioxide equivalent (MT CO<sub>2</sub>e).<sup>5</sup>

### **C. California Environmental Quality Act**

The CEQA Guidelines,<sup>6</sup> promulgated by the Office of Planning and Research (OPR) pursuant to California Public Resources Code section 21083, must contain objectives and criteria for the evaluation of projects and the preparation of environmental documents, and must specifically contain criteria for public agencies to follow in determining whether a project may have a significant effect on the environment. Cal. Pub. Res. Code § 21083(a), (b). In 2007, CEQA was amended to specifically require that the Guidelines be periodically updated for the mitigation of GHG or the effects of GHG, incorporating data or criteria established by CARB pursuant to AB 32. Cal. Pub. Res. Code § 21083.05.

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<sup>2</sup> The 2020 “business-as-usual” emissions projection assumed no conservation or regulatory efforts other than those requirements in place at the time of CARB’s forecast. Air Resources Board, Climate Change Scoping Plan (Dec. 2008), App. F, at F-3.

<sup>3</sup> Nationwide, Executive Orders may be used for various issues, such as creating boards or commissions, or addressing management of regulatory reform or environmental impact. National Governors Association, Governors’ Power and Authority, <http://www.nga.org/cms/home/management-resources/governors-powers-and-authority.html>. The Governor has implied powers to issue Executive Orders. *Id.*; The Council of State Governments, The Book of the States 2014, Table 4.5; 63 Op. Cal. Att’y Gen. 583 (1980).

<sup>4</sup> Whether an EIR should include an analysis of consistency with the GHG reduction goals in Executive Order S-3-05 is pending before the California Supreme Court. *Cleveland National Forest Foundation v. San Diego Association of Governments*, 184 Cal. Rptr. 3d 725 (2015).

<sup>5</sup> Pending Senate Bill 32 would codify the requirement for CARB to create a statewide GHG emissions limit that is equivalent to 40 percent below the 1990 limits by 2030. Senate Bill 32 (2015-2016 Reg. Session).

<sup>6</sup> Cal. Code Regs., title 14 §§ 15000 to 15387.

In 2010, CEQA Guidelines section 15064.4 was adopted, which provides that the “lead agency should make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project.” CEQA Guidelines § 15064.4(a). For each project, a lead agency has the discretion to determine whether (1) to use a model or methodology to quantify the GHG from the project, and which method or methodology to use, provided the decision is supported by substantial evidence, or (2) to rely on a qualitative analysis or performance based standards. CEQA Guidelines § 15064.4(a)(1), (2).

The factors to be considered in determining the significance of a project’s emissions are: (1) the extent to which the project may increase or reduce GHG compared to the existing environmental setting; (2) whether the emissions exceed a significance threshold that the lead agency has determined applies to the project;<sup>7</sup> and (3) the extent to which the project complies with regulations or requirements adopted to implement a publicly adopted statewide, regional, or local plan for the reduction or mitigation of GHG. CEQA Guidelines § 15064.4(b)(1)-(3). If there is substantial evidence that the possible effects of the project are still cumulatively considerable, an EIR is required. CEQA Guidelines § 15064.4(b)(3). In addition, CEQA Guidelines section 15183.5 provides that lead agencies may analyze and mitigate the significant effects of GHG emissions at a programmatic level, and that later projects may tier from that programmatic analysis. CEQA Guidelines § 15183.5(a).<sup>8</sup>

## II. *CENTER FOR BIOLOGICAL DIVERSITY v. CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE*

On November 30, 2015, the California Supreme Court decided the case of *Center for Biological Diversity v. California Department of Fish and Wildlife*, 62 Cal. 4th 204 (2015), concerning the approvals of the Newhall Ranch Project, a large land development project in northwest Los Angeles County.<sup>9</sup> While the decision addressed several issues, this Report only discusses the ruling as it relates to the Court’s determination that the Department of Fish and Wildlife, the lead agency that certified the Environmental Impact Report (EIR) and approved the project, abused its discretion by determining that the project’s GHG impacts would have no significant impact, because this conclusion was not supported by a “reasoned explanation based on substantial evidence.”<sup>10, 11</sup> *Id.* at 213.

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<sup>7</sup> The City currently uses the 900 MT CO<sub>2</sub>e as a screening threshold for determining whether GHG analysis is required.

<sup>8</sup> “Tiering” refers to the “coverage of general matters in broader EIRs . . . with subsequent narrower EIRs or ultimately site-specific EIRs incorporating by reference the general discussions and concentrating solely on the issues specific to the EIR subsequently prepared.” CEQA Guidelines § 15385.

<sup>9</sup> A petition for a rehearing has been filed and the Court has extended the time for granting or denying the rehearing to February 26, 2016.

<sup>10</sup> “Substantial evidence” can be summarized as enough relevant information and reasonable inferences from the information that a fair argument can be made to support a conclusion, even if other conclusions could also be reached. CEQA Guidelines § 15384(a). Substantial evidence includes facts, reasonable assumptions based on facts, and expert opinion supported by facts. CEQA Guidelines § 15384(b).

<sup>11</sup> Noncompliance with either the information disclosure provisions or the substantive requirements of CEQA constitutes prejudicial abuse of discretion. Cal. Pub. Res. Code § 21005. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. Cal. Pub. Res. Code § 21168.5.

The method of analysis used in the EIR was to consider “whether the proposed Project’s emissions . . . would impede the State of California’s compliance with the statutory emissions reduction mandate established by AB 32.” 62 Cal. 4th at 218. The conclusion in the EIR was that the project would not impede AB 32’s reduction mandate because the project’s projected emissions were 31 percent less than the business-as-usual projections, which exceeded CARB’s determination that a 29 percent reduction from business-as-usual was necessary statewide to meet the AB 32 goals.<sup>12</sup>

The EIR was determined to be deficient because there was no substantial evidence that the *project’s* GHG emissions reduction of 31 percent in comparison to the statewide reduction to business-as-usual GHG emissions was consistent with AB 32’s *statewide* goal of a 29 percent reduction from business-as-usual. *Id.* at 227. The Court noted that the Scoping Plan did not contain any project level reduction that should be required from individual projects, and the Newhall Ranch Project record did not contain any evidence to support a conclusion that the percentage reduction for a project is the same as that necessary for the entire state population and economy. *Id.* at 224. In fact, the Court agreed with plaintiffs that it may be the case that new buildings and infrastructure may need to be much more GHG efficient than existing development in order for the 29 percent reductions to be achieved statewide. *Id.* at 226. This is because it is easier for new development to incorporate new building standards, energy efficiency, and renewable energy than it is for older structures and systems to be retrofit. *Id.* at 226.

Further, the Court found that even if the state-wide and economy-wide percentage reductions in the Scoping Plan could be shown to be appropriate significance measures for individual projects, the EIR was still inadequate because it assumes, without showing the basis for the assumption, that the statewide density measures used in the Scoping Plan were the same at those in the Newhall Ranch Project area. *Id.* at 226-27.

The Court concluded that, based on the record, the EIR failed to provide substantial evidence to support its use of the Scoping Plan’s statewide 29 percent reduction from business-as-usual as an appropriate standard for a specific land use development.

### III. CURRENT OPTIONS

The Court attempted to provide some guidance for public agencies faced with evaluating the cumulative significance of a proposed land use project’s GHG emissions, although it noted that it could not guarantee that any of the approaches would satisfy CEQA’s demands for any particular project. Some possible options noted by the Court were:<sup>13</sup> (1) utilize the Scoping Plan’s business-as-usual reduction goals, but provide substantial evidence to bridge the gap between the statewide goal and the project’s reductions; (2) assess AB 32’s goal by looking to compliance with specific regulatory programs designed to reduce GHG emissions from particular activities, to the extent the impacts are governed by the regulations; and (3) use existing numerical thresholds of significance for GHG emissions, and if the project exceeds such thresholds, then adopt feasible mitigation or project alternatives to reduce the effect to

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<sup>12</sup> The plaintiffs also challenged the use of AB 32’s reduction goals as a significance threshold, however, the Court upheld its use. 62 Cal. 4th at 222.

<sup>13</sup> These generally track the GHG impact factors in CEQA Guidelines section 15064.4(b), discussed in Section I.C., above.

insignificance, or to the extent impacts remain significant, approve the project with a statement of overriding considerations. *Id.* at 228-29; Cal. Pub. Res. Code § 21081. Regarding option number (2), compliance with specific regulatory programs, the Court noted the Scoping Plan does not propose statewide regulation of land use planning, because land use planning is a local matter. 62 Cal. 4th at 229. For that reason, local governments bear the primary burden of evaluating a land use project's impact on GHG emissions. 62 Cal. 4th at 230. Here, too, the Court attempted to provide guidance. The Court noted GHG emission reduction plans for specific geographic areas such as general plans or climate action plans could be used in the evaluation of later project-specific CEQA analysis. 62 Cal. 4th at 230; CEQA Guidelines § 15183.5. Moreover, the GHG emissions relating to transportation may be able to be streamlined, if the project meets the sustainable communities strategy, as defined in CEQA Guidelines section 15183.3(f)(6). 62 Cal. 4th at 230; Cal. Pub. Res. Code § 21155; CEQA Guidelines § 15183.5(c).

In December 2015, the City Council adopted the 2015 Climate Action Plan (CAP). The CAP specifically provided that with future implementing actions, it is anticipated that the CAP will serve as a qualified GHG reduction plan for purposes of tiering under CEQA Guidelines section 15183.5. City staff is currently working to develop a checklist for future projects that would determine whether a project is consistent with the CAP. If a project is consistent with the CAP, it may be eligible to use the cumulative GHG analysis in the CAP and CAP certified Final Environmental Impact Report. In the meantime, while that is being developed, projects should analyze GHG emissions impacts in accordance with one of the three ways identified above.

### CONCLUSION

The *Center for Biological Diversity v. California Department of Fish and Wildlife* case invalidated the GHG analysis for the Newhall Ranch Project because the Department of Fish and Game's conclusion that the GHG emission impacts had no significant impact was not supported by substantial evidence. In order to prepare defensible environmental documents, this Office is working with City staff to review the City's GHG analysis methods to ensure they are consistent with the principles in the *Center for Biological Diversity v. California Department of Fish and Wildlife* case.

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By /s/ Shannon M. Thomas  
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