State NEPAs and GHG Impacts

Most states have adopted their own versions of NEPA that have used to evaluate potential environmental impacts such as air and water pollution, congestion, and noise. In the wake of the United States Supreme Court decision in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) environmental organizations and states are beginning to turn to NEPA or state environmental quality laws to force developers to reduce the GHG impacts of their projects as well as to ensure that the developments meet sustainability requirements.

Massachusetts

In April 2007, the Massachusetts Executive Office of Energy and Environmental Affairs ("EOEEA") issued a Greenhouse Gas Emissions Policy to be implemented under the Massachusetts Environmental Policy Act ("MEPA").[1] Under MEPA, projects conducted by either a state agency or a private developer utilizing state funds or requiring state approvals must undergo environmental review if they exceed certain thresholds (e.g., alteration of more than 25 acres of land or the creation of more than 300 new parking spaces). Unlike NEPA, MEPA has a substantive component that requires agencies to make a finding "that all feasible measures have been taken to avoid or minimize" environmental impacts.

The first step in the process is the filing of an Environmental Notification Form ("ENF") that describes the project, its potential impacts, and any required state approvals. If potential environmental impacts are identified, the project proponent must then submit as an Environmental Impact Report ("EIR") which is similar to the NEPA EIS. For projects with lesser environmental consequences, the Secretary of Environmental Affairs determines whether an EIR is necessary based on an initial threshold assessment.

Under the new GHG Policy, an EIR must quantify the GHG emissions generated by the project and identify measures to avoid, minimize or mitigate the emissions. A project will be subject to the GHG Policy when an EIR is required and the project falls into one of the following categories:

- The Commonwealth or state agency is a project proponent;
- The Commonwealth or state agency is providing financial assistance to a private project proponent;
- The project is privately funded, but requires an air permit from the Massachusetts Department of Environmental Protection; or
- The project is privately funded but will generate: (i) 3,000 or more new vehicle trips per day for office projects; (ii) 6,000 or more vehicle trips per day for mixed use projects that are 25 percent office space; or (iii) 10,000 vehicle trips per day for other projects.

The Policy will be implemented in phases. Effective immediately, scoping documents for EIRs must identify and describe sources of project-related GHG emissions, and propose measures to avoid, minimize, or mitigate such emissions. Project proponents will not be expected to quantify GHG emissions until the state has developed a GHG protocol.

The Policy applies to the six GHGs covered by the Kyoto Protocol (CO2, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and, sulphur hexafluoride). Applicants must also consider both "direct" emissions" such as emissions from boilers and "indirect" emissions such as emissions from vehicles driven by employees and plants supplying electricity to the proposed project.

Although the Policy does not mandate the type of measures that must be used to avoid, minimize, or mitigate GHG emissions, EOEEA has developed a guidance document that provides examples of the type of emission reduction techniques that project proponents will be required to implement. These include:

- Energy efficiency improvements;
- Site orientation and building layout to maximize use of natural light, heating, cooling;
- use of low-impact development techniques such as reducing the use of asphalt and increasing the amount of shade provided by building elements or landscaping (e.g., green roofs);
- Transportation demand management (e.g., locating near mass transit, access to shuttle or bus services, ridesharing programs, bicycle and pedestrian accommodations; zip car spaces, etc.);
- On-site renewable energy and combined heat and power generation;
- use of clean and alternative fuels; and
- On-site reuse and recycling of construction and demolition materials and occupant waste materials.

Harvard University entered into the nation's first legally-enforceable GHG restrictions for a major real estate project in connection with the university's 20-year master plan for a new campus in Boston's Allston neighborhood. The project will increase the size of the Allston campus from 140 acres to approximately 215 acres.

Under a Draft Record of Decision issued under the state MEPA, the state DEP granted a waiver of a full environmental impact review for construction of a Science Complex consisting of a four-building, 589,000-square-foot project. The proposed waiver was based on the project's minimal environmental impact, ample available infrastructure, commitments for future environmental reviews of other aspects of the project, and other specified conditions One of the conditions is that the Science Complex will have to achieve 50 percent reduction in GHG emissions compared with national standards set by the American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc. ("ASHRAE").

Under a second MEPA document, Harvard agreed to establish a Special Review Procedure that would be used in lieu of the traditional two-step environmental review process. A Special Review Procedure is frequently used to provide environmental review for complex development that will be implemented over several years. The Special Review Procedure for this project requires Harvard to provide Interim Updates every three years and mandates project-specific filings to go through an extensive public comment process. Harvard also agreed to provide

resources to facilitate technical review of documents by a citizens' advisory group.

A third scoping document also delineates "sustainable development principles" that Harvard must implement. These practices include stormwater and wastewater standards, and high-level transportation requirements as Harvard develops its Allston Campus Master Plan.

California

The California Environmental Quality Act ("CEQA") requires state and local agencies to determine if a project that requires discretionary approval may have significant environmental effects and to impose feasible mitigation measures. In general, the project proponent must prepare an EIR and may prepare a Mitigated Negative Declaration to reduce or mitigate a project's potentially significant effects. CEQA has procedural requirements that are similar to NEPA but also contains substantive provisions that prohibit agencies from authorizing actions with significant, unmitigated environmental impacts. These substantive provisions have allowed plaintiffs to argue that state and local agencies must require developers to measure and mitigate climate change impacts from new developments, and to require the agencies to assess climate change in their reviews.

Following passage of the California Global Warming Solutions Act of 2006, public agencies have began receiving comments on draft EIRs demanding that the project's contribution to climate change be assessed by estimating the project's GHG emissions. Earlier this year, the state Attorney General filed a lawsuit against the County of San Bernardino's General Plan alleging that county's general plan failed to analyze climate change issues.

California's adoption of statewide emission-reduction targets in 2006 supplied the basis for the State of California's claims in *State of California v. San Bernardino County*., San Bernardino recently settled the lawsuit and agreed to amend its General Plan. Under the terms of the settlement, the General Plan must establish a policy to reduce GHG emissions "reasonably attributable to discretionary land use decisions" and internal operations, and require adoption of a "Greenhouse Gas Emissions Reductions Plan." The Plan must set a baseline inventory of current sources of GHGs within San Bernardino, establish an inventory of the 1990 GHG emissions from those same sources and project new GHG emissions in San Bernardino in 2020 from its discretionary land use decisions and governmental operations. The Plan must then target reductions of those projected emissions.

A key to the San Bernardino settlement will be the identification of feasible mitigation measures that can be used to minimize GHG emissions. At this point in time, feasible measures appear to include high-density development to reduce vehicle trips, promoting carpooling, alternative fuel vehicles, public transportation, transportation impact fees; energy efficient design for buildings and appliances, use of solar panels, water reuse systems, and on-site renewable energy production.

As a result of the settlement, it appears that developers and project proponents will have to address GHG emissions in their CEQA documents. Indeed, air districts and other public agencies are now considering requiring project proponents to estimate their projects' GHG emissions and

discuss their contribution to potential global warming effects. It would appear the future projects will have to be designed to reduce direct and indirect GHG emissions. In addition, to pass CEQA muster, project proponents will have to provide a clear analysis in the CEQA documents showing how those designs or measures will reduce GHG emissions so that public agencies can determine that climate change impacts have been properly evaluated.

A number of lawsuits have been filed under CEQA challenging the adequacy of climate change analysis prepared for private developments. The plaintiffs have challenged an EIR for a 2,700 unit residential/commercial development in *Center for Biological Diversity vs. City of Desert Hot Springs,* an EIR for a 1500 residential development in Banning (*Center for Biological Diversity vs. City of Banning*), have challenged a permit for commercial composting facility in *Center for Biological Diversity vs. San Bernardino County* and a permit for a 520,000-square-foot, big-box retail development with a 24-hour Wal-Mart Super center and generate close to 40,000 daily vehicle trips in *Center for Biological Diversity v. City of Perris.*

In another case, NRDC v. Reclamation Board, environmental groups are seeking to require a permitting agency to consider whether potential climate change impacts affect the viability of a development project. Plaintiffs allege that the Reclamation Board must consider how rising sea levels will exacerbate the environmental impacts of a 4,900 acre mixed-use development in Sacramento's San Joaquin Bay Delta, a system of lowland islands created by myriad levees and natural and man-made sloughs.

The California Public Utilities Commission proposed that all new housing developments and commercial buildings would have to produce all of their power needs so that should achieve "zero net energy" by 2020. The energy would be produced from solar panels, windmills or small generators. The commission also proposed that California electric utilities create a statewide energy efficiency plan rather than pursuing their own separate programs.

The California Energy Commission is recommending legislation that would mandate regional growth plans for areas with more than 100,000 residents to identify housing needs, development patterns and areas that should remain off-limits. Some utilities and municipal utility districts are working with local governments to site power stations more efficiently and communicate with developers early on in the planning stage to implement non-transportation efficiency measures.

Kings County, Washington

King County in the State of Washington issued an Executive Order requiring County agencies to consider climate change impacts as part of their project review under Washington's State Environmental Policy Act ("SEPA"). The Executive Order took effect on September 1, 2007.

The Executive Order applies to any project that requires a SEPA checklist and utilizes the United States Supreme Court decision in Massachusetts v. EPA, as a basis for its authority. It also cites previous Executive Orders under which County departments were directed to "employ increasingly aggressive strategies" and "innovative environmental management," including "coordinated strategies to mitigate and adapt to global warming.
Some key issues raised by the Executive Order is

- Climate Impacts-Is information required for "upstream impacts" (for example, from particular building materials), "mid-stream impacts" (impacts generated by the construction of the project itself) or "downstream impacts" (increased vehicle trips associated with development).
- Vesting issues-.Because the regulatory requirements under this policy will be developed over a 16 month period, it is unclear when vesting will be available under the new Executive Order.
- Reliability of information. Without a clear indication of what information the County is seeking, it will be extremely difficult for project proponents to know what data to collect and submit in connection with their SEPA checklists.
- Regulatory focus- Will the focus be on mitigation such as through cap and trade or through direct reduction of GHG emissions.
- Transportation Planning Compliance with State SIP- To comply with the SIP transportation planning obligations, current county policy is to require road improvements and improved traffic signals to reduce impacts. However, if mitigation becomes the preferred mechanism, projects may have to reduce overall vehicle trips and facilitate greater use of public transportation.

[1] See Massachusetts Executive Office of Energy and Environmental Affairs Greenhouse Gas Emissions Policy (April 23, 2007). MEPA is codified at Mass. Gen. Laws, ch. 30, § 61, et seq.