

# Client Alert.

June 7, 2010

## Bay Area Air District Adopts CEQA Thresholds for Greenhouse Gases

By Mitchell Randall, Miles Imwalle and Michelle Moore

After more than a year of debate, delays, and revision, on June 2, 2010, the Bay Area Air Quality Management District (“BAAQMD”) finally adopted new guidelines for analyzing air quality impacts under the California Environmental Quality Act; these are likely to significantly impact the types and patterns of development in the Bay Area—and perhaps beyond—for years to come. The BAAQMD guidelines include two particularly controversial issues: thresholds of significance for (1) the analysis of greenhouse gas (“GHG”) impacts, and (2) local community risk/hazard impacts. The setting of GHG thresholds brings welcome certainty to area agencies that have struggled with GHG thresholds for the last several years. However, the low level of the threshold will likely result in: (i) greater and more comprehensive mitigation, (ii) more development projects needing to prepare lengthy environmental impact reports, rather than a more streamlined CEQA document that would otherwise be available, (iii) further slowing during the permitting process and (iv) increased burdens on lead agencies. Ironically, the second controversial threshold relating to local community risk impacts will make it more difficult to approve projects in the densest urban areas, precisely the location where it is easiest to build projects with minimal carbon footprint.

Although the thresholds are technically advisory, due to BAAQMD’s air quality expertise, they will establish de facto standards for local agencies’ adoption of planning documents and consideration of development projects, and will have wide influence on the future of individual project approvals and land use planning in the Bay Area. Additionally, because other agencies around the state generally do not have adopted thresholds for GHG impacts, local agencies in other parts of the state may look to BAAQMD’s standards.

### PROJECT LEVEL THRESHOLDS MAY LEAD TO THE IMPOSITION OF COSTLY MITIGATION AND GREATER USE OF EIRS

BAAQMD’s first ever project-level, operational-related thresholds now set a standard for analyzing GHG emissions from development projects. The BAAQMD guidelines set two types of thresholds. First, the GHG emissions relating to a project that complies with what the document dubs a “Qualified GHG Reduction Strategy” (discussed further below) are presumed to have a less than significant impact. Second, GHG emissions that are below certain numeric thresholds are considered less than significant. At this time, no Qualified GHG Reduction Strategy exists in the Bay Area, so in the near term, projects will be judged by the numeric thresholds.

For land use development projects, which include commercial, residential, industrial, and public land use facilities, emissions generated must be less than 1,100 metric tons of carbon dioxide equivalent (“MTCO<sub>2</sub>e”) <sup>1</sup> per year or 4.6 MTCO<sub>2</sub>e per year for each resident and employee within the applicable service area. BAAQMD initially proposed only the hard cap of 1,100 MTCO<sub>2</sub>e per year, but after stakeholders pointed out that efficient, large-scale projects can be an

<sup>1</sup> Carbon dioxide equivalent, also referred to as CO<sub>2</sub>e, is a measure used to account for the fact that different GHGs have different potential to retain infrared radiation in the atmosphere and contribute to the greenhouse effect.

## Client Alert.

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important key to reducing overall emissions, the agency included the second efficiency standard. For stationary sources BAAQMD has established a bright-line threshold of 10,000 metric tons per year.

BAAQMD estimates that the following types of development projects, among others, will exceed the GHG operational threshold of 1,100 MTCO<sub>2</sub>e per year:

- 56 single-family dwelling-unit project
- 83-room hotel
- 19,000 square-foot regional shopping center
- 53,000 square-foot general office building
- 22,000 square-foot medical office building

These numbers demonstrate how very low the adopted threshold is and that a large percentage of projects will likely exceed the threshold. In general, projects that exceed these sizes will either need to demonstrate that they meet the efficiency standard (4.6 MTCO<sub>2</sub>e/service person/year) or implement all feasible mitigation measures to reduce project emissions to below 1,100 MTCO<sub>2</sub>e per year.

Having such a low GHG threshold will have three primary impacts:

- First, many small- and medium-sized projects that may otherwise be approved with a Negative Declaration or Mitigated Negative Declaration will now need a full Environmental Impact Report. This will result in an already slow and expensive environmental review process becoming even more so and additional agency resources being put to environmental review.
- Second, many more projects will be required to implement mitigation measures to reduce GHG emissions. BAAQMD's suggested mitigation measures vary for the type of project and include the addition of transit service, providing free transit passes to residents/employees, requiring building energy efficiency beyond otherwise applicable standards, installing cool roof materials/green roofs and solar panels, utilizing smart meters and programmable thermostats, sealing HVAC ducts, and providing the necessary infrastructure for outdoor irrigation reuse of 50% of the project's water. Many of these measures will require major investment and may alter the design and economic feasibility for a project. Another challenging issue is that the effectiveness of many mitigation measures, in terms of actual reduction of GHG emissions, is unknown.
- Third, project approval via a Statement of Overriding Considerations will likely become much more prevalent. Under CEQA, a project with significant and unavoidable impacts can still be approved if the agency finds that the project's overriding benefits outweigh the environmental harm. Due to the very low thresholds, it is likely that many projects will be unable to reduce impacts to a less than significant level, even after adopting all feasible mitigation. This is particularly true for projects involving traditional suburban single-family homes. While agencies can still approve such projects through overrides, all "feasible" mitigation must be included. Because there is such a wide array of potential mitigation, some of which may be quite expensive, disagreements over what is "feasible" may become a common battle during the approval process.

As an alternative to meeting the quantitative thresholds, a project that is consistent with an adopted "Qualified GHG Reduction Strategy" (or similar adopted policy, ordinance, and program) that addresses the project's GHG emissions can be presumed to have insignificant GHG emission impacts. The GHG Reduction Strategy must:

# Client Alert.

- (i) Quantify GHG emissions;
- (ii) Establish a level below which the contribution to GHG emissions would not be cumulatively considerable;
- (iii) Identify and analyze the GHG emissions from specific actions or categories occurring within the geographic area;
- (iv) Specify measures, including performance standards, that if implemented on a project-by-project basis would collectively achieve the specified emissions level;
- (v) Monitor the plan's progress; and
- (vi) Adopt the GHG Reduction Strategy in a public process after environmental review.

A GHG Reduction Strategy will essentially be a new planning document and may add a new layer to the planning process. While such plans may become prevalent in the future and may become important to shaping planning decisions, they largely do not exist today, so do not offer a short-term solution.<sup>2</sup>

While the inclusion of an efficiency standard was a positive step and will allow a "less than significant impact" finding for some large but efficient projects, some have pointed out that a uniform standard for all types of uses may be a disincentive to some mixed-use projects. For example, some necessary uses have higher per-capita GHG emissions, such as supermarkets, pharmacies, and restaurants. Thus, even though smart-growth principles favor placing such uses close to housing, a developer may choose to omit uses with higher emissions in order to meet the efficiency threshold.

## PLAN-LEVEL THRESHOLDS WILL GUIDE LOCAL AGENCIES' EVALUATION OF GHG EMISSIONS FOR PROPOSED PLANS

In addition to project-level thresholds, the BAAQMD guidelines include plan-level thresholds that will provide municipalities and local agencies with a metric to evaluate whether the uses contemplated by a general plan or other land use planning document meet the GHG emission reduction goals of AB 32. To comport with the threshold, GHG emissions resulting from a proposed plan or plan amendment either must comply with an adopted "Qualified GHG Reduction Strategy" (or similar criteria included in a General Plan) or must not exceed 6.6 MTCO<sub>2e</sub> per year for each resident and employee within the applicable service area.

If the uses contemplated by the proposed plan or plan amendment will result in GHG emissions above the threshold, the BAAQMD guidelines include an extensive list of suggested general plan/area plan policies designed to reduce GHG emissions that can be included in the proposed plan as mitigation measures. Cumulatively, these measures have the potential to change the future landscape of development in the Bay Area. They include adopting policies supporting infill development, designating a central city core for high-density and mixed-use development, providing financial incentives and density bonuses to entice development within the designated central city, reinvesting in existing neighborhoods, creating incentives to attract mixed-use projects, and providing permitting incentives for energy-efficient and solar building projects.

## LOCAL COMMUNITY RISK AND HAZARD IMPACT THRESHOLDS WILL DETER INFILL DEVELOPMENT

BAAQMD's thresholds of significance for local community risk and hazard impacts will make it substantially more difficult

<sup>2</sup> While a couple Bay Area jurisdictions have some sort of "Climate Action Plan" (see, for example, the Climate Action Plan adopted by the City of Berkeley), it is unclear whether the plans satisfy BAAQMD's guidelines.

# Client Alert.

to develop projects near freeways and other intensely used areas, acting as a disincentive to transit-oriented development and other infill projects. These thresholds apply if a project proposes siting either a new source or receptor (i.e., a place where people live, play, or convalesce) in an area where the levels of toxic air contaminants (TACs)<sup>3</sup> and PM<sub>2.5</sub> are high enough to cause an excess cancer-risk level of more than 10 in one million (or other similar increased risks). For residential or other “receptor” projects within these areas, the BAAQMD guidelines recommend an onerous investigation and screening process. First, all sources of TACs or PM<sub>2.5</sub> that would adversely affect individuals within the planned project must be identified. If certain screening criteria are exceeded based on the project’s location (e.g., projects located within 1,000 feet of a freeway), site-specific air dispersion modeling and risk assessment must be completed. If the modeling shows that thresholds of significance will be exceeded, feasible mitigation must be adopted, although in this realm, mitigation options are limited.

Through its Community Air Risk Evaluation (CARE) Program,<sup>4</sup> BAAQMD has identified certain impacted communities that have both high emissions of toxic air contaminants and a significant sensitive population. Because of the nature of these impacted communities, the BAAQMD thresholds for local community risk and hazard impacts will make development there even more difficult. Many of those commenting on the BAAQMD guidelines stated that these areas, many of which have been prioritized for development by local government, are exactly the types of areas that need to be developed to implement a more focused growth pattern and capitalize on existing public transportation improvements and other infrastructure. Some commentators suggested that the guidelines would undermine efforts to develop these areas and push development to greenfield sites in the outer suburbs.

## WHO WILL HAVE THE FINAL SAY?

BAAQMD’s adoption of the GHG thresholds of significance was not without significant opposition. Dozens of comment letters were submitted to BAAQMD, many of these by local agencies. Comment themes included objections to (i) the curtailment of the “infill exemption” under CEQA for multi-family projects, (ii) the imposition of costly planning obligations on local agencies through the GHG Reduction Strategy requirements, and (iii) the imposition of obstacles to local and regional smart-growth efforts.

It should be noted that the BAAQMD guidelines are non-binding *recommendations* and lead agencies are free to adopt alternative thresholds, so long as their analysis is supported by substantial evidence. Traditionally, local agencies have deferred to the local air quality management district when addressing local air quality issues. However, when faced with a global issue, there is no logical reason a project located in the Bay Area should follow the thresholds adopted by the BAAQMD over thresholds adopted by another agency.<sup>5</sup> Notably, in December 2009, the San Joaquin Valley Air Pollution Control District adopted a different approach, whereby a project’s GHG impact is considered less than significant if its emissions are reduced by 29% when measured against a “business as usual” baseline. While this approach has been criticized by the Attorney General and some environmental groups, it is a validly adopted alternative framework that lead

<sup>3</sup> The primary contributor to TACs is diesel particulate matter from on- and off-road mobile sources, such as trucks.

<sup>4</sup> As of November 2009 the CARE program identified the urban core areas of Concord, eastern San Francisco, western Alameda County, Redwood City/East Palo Alto, Richmond/San Pablo, and San Jose as impacted communities.

<sup>5</sup> Notably, BAAQMD’s Assistant Counsel, Alexander “Sandy” Crockett, recently wrote in an article that for this global issue where there are multiple and potentially conflicting thresholds, “it is no longer appropriate simply to apply the local air district’s thresholds as stated without further analysis.” Further, Mr. Crockett projected that with different thresholds, agencies can test multiple approaches and the best approach will ultimately “rise to the top.” A. Crockett, B. Collins-Burgard, M. Vespa, *Another Hot Year: Analyzing Greenhouse Gas Impacts under CEQA*, ENVTL LAW NEWS, Vol. 19, No. 1, Spring 2010, at 12-14.

## Client Alert.

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agencies may consider following. These significantly different approaches indicate that this issue may remain unsettled.

Further, the staff report for the BAAQMD guidelines characterized them as “interim” guidelines to be used until AB 32 and SB 375 have been fully implemented. However, it is unclear what is meant by this, since neither statute, once implemented, will necessarily result in the establishment of CEQA thresholds. Further, the Air Resources Board began the process of establishing a statewide threshold, but it abandoned that effort in early 2009.

### NO THRESHOLDS YET FOR CONSTRUCTION-RELATED GHG EMISSIONS

At least for the present, BAAQMD has established no threshold for construction-related GHG emissions, such as construction vehicle exhaust. However, lead agencies must still make a significance determination under CEQA, and BAAQMD is encouraging lead agencies to quantify and disclose GHG emissions from construction. To mitigate construction-related GHG emissions, BAAQMD is suggesting implementing performance-based best management practices, such as utilizing alternative fuel vehicles for a minimum of 15% of construction equipment; ensuring that at least 10% of building materials are from local sources, and recycling at least 50% of construction and demolition waste.

### ADOPTION OF MORE STRINGENT THRESHOLDS FOR OTHER EMISSIONS

BAAQMD also tightened its thresholds of significance for criteria air pollutants/precursor emissions and local community risk/hazard impacts. For operational-related criteria air pollutant and precursor emissions, the thresholds have generally either become more restrictive or remained approximately the same. The individual project thresholds proposed for local community risk and hazard impacts for construction, land use (source and receptor), and stationary sources have minor changes, but generally remain at the “increase of cancer risk greater than 10 in a million.” However, the proposed guidelines include a list of BAAQMD-recommended mitigation measures for reducing the exposure of sensitive receptors, compared to the absence of a list in the prior guidelines.

#### Contact:

**Mitch Randall**

(925) 295-3377

[mrandall@mofo.com](mailto:mrandall@mofo.com)

**Miles Imwalle**

(415) 268-6523

[mimwalle@mofo.com](mailto:mimwalle@mofo.com)

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