

## Client Alert.

---

January 18, 2012

# CEQA Guidelines “Up in the Air:” Court Suspends BAAQMD Air Quality Rules

By David Gold, Miles Imwalle, and Sue Landsittel

The Alameda County Superior Court recently struck down the Bay Area Air Quality Management District’s (BAAQMD) controversial CEQA Guidelines (Guidelines) – including significance thresholds for greenhouse gas (GHG) emissions and toxic air contaminants – on the grounds that the Guidelines themselves must first undergo review under the California Environmental Quality Act (CEQA). Although the Court has not yet issued a written order, it is expected to set aside the Guidelines unless and until BAAQMD conducts CEQA review. This is a significant development for lead agencies and project proponents in the Bay Area, particularly as the Guidelines contained very conservative and stringent standards. While the decision may provide greater flexibility with respect to analyzing air quality impacts, the lack of clear standards and procedures creates uncertainty in the near term.

In June 2010, BAAQMD adopted new guidelines (updated in May 2011) for addressing air quality impacts. This action was taken without first conducting any CEQA review. While the Guidelines covered several air quality issues, the thresholds of significance set for GHG emissions and toxic air contaminants have caused considerable controversy and difficulty in implementation – and also triggered the lawsuit. For GHG emissions from land use development projects, the Guidelines set the threshold at a hard number of 1,100 metric tons per year (MT/yr) of CO<sub>2</sub>E or an “efficiency” metric of 4.6 MT/yr of CO<sub>2</sub>E per service population. More detail on the GHG threshold can be found in our earlier [Client Alert](#). As a general matter, only transit-oriented, infill projects with extensive green building features were below the threshold. The toxic air contaminant threshold proved to be even more problematic, as it required that projects conduct a burdensome health-risk assessment accounting for sources of toxic air contaminants within 1,000 feet of the project, such as freeways. According to the lawsuit, this effectively created swaths of “EIR Only Zones” that also coincided with many of the best transit-oriented, infill locations.

The California Building Industry Association (BIA) sued BAAQMD alleging, among other things, that BAAQMD itself had violated CEQA by not reviewing the environmental impact of the Guidelines. In particular, BIA argued that the thresholds would hinder development within 1,000 feet of major transportation corridors and push new development away from infill sites and further from the core of the Bay Area. BIA argued that such a result would be contrary to the goal and intent of other laws, such as SB 375 and AB 32, both intended to promote infill development to mitigate air quality impacts from automobile use.

The Alameda Superior Court granted BIA’s petition by finding that BAAQMD’s adoption of the Guidelines is a “CEQA project.” However, the Court only ruled from the bench, meaning that there is no written order, rendering the scope of the decision and the remedy uncertain. At the very least, we anticipate that the Court will order that BAAQMD rescind the Guidelines and comply with CEQA before adopting new Guidelines. Beyond that, it is uncertain how this saga may unfold: the parties may settle, BAAQMD may appeal, or BAAQMD may conduct CEQA and re-adopt new Guidelines, although the timing and form of new Guidelines is highly uncertain.

## Client Alert.

---

While the Court granted BIA's petition, it apparently did not go as far as BIA wanted. BIA argued that the impact of toxic air contaminants on a project is not properly subject to CEQA at all because CEQA is only concerned with the impact of a project on the environment, a notion recently affirmed by the Second District Court of Appeal. *Ballona Wetlands Land Trust v. City of Los Angeles*, \_\_ Cal.App.4th\_\_ (2011) (ruling that because CEQA does not require analysis of the impact of the environment on the project, an EIR was not required to address the future impact of sea-level rise on the proposed project). The Court did not reach that issue.

While project proponents may be pleased to see the stringent Guidelines suspended, the ruling inserts uncertainty into the CEQA process for projects currently undergoing review. Importantly, the Court's ruling does not relieve lead agencies of the duty to assess GHG emissions. For toxic air contaminants, lead agencies must consider whether to even address the issue, given the recent *Ballona* decision. Critics may have complained about BAAQMD's thresholds, but at least they provided certainty and consistency. In the meantime, lead agencies must independently determine reliable and legally defensible approaches for air quality impacts, including GHG emissions and toxic air contaminants, a task many strapped local governments may find daunting. Some may choose to continue to look to the rescinded Guidelines, although others may see an opportunity to employ alternative approaches that may be better tailored to particular projects.

***Morrison & Foerster has been on the forefront of these air quality and GHG issues and is experienced with a wide range of air quality frameworks and approaches. For questions, please contact:***

**David Gold**

415-268-7205

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

**Miles Imwalle**

(415) 268-6523

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

### **About Morrison & Foerster:**

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for eight straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at [www.mofo.com](http://www.mofo.com).

*Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.*