

## COURT RULES CEQA REVIEW REQUIRED FOR NEW BAY AREA AIR DISTRICT RULES

In an important case for development in the Bay Area generally, and in-fill development in particular, the Alameda Superior Court ruled this week that the Bay Area Air Quality Management District's new CEQA rules were themselves a CEQA "project" requiring environmental impact review. The ruling is important because the District's rules had effectively created "EIR only" zones in much of the urban Bay Area, which disincentivizes in-fill development. The new rules had a reasonably foreseeable impact of pushing development away from in-fill areas. The District itself touted its intent that its new thresholds have an impact on land use development patterns throughout the Bay Area, but refused to consider the potential adverse impacts. Under the court's ruling, the District has to evaluate the potential impacts as required by CEQA, before adopting new rules and policies.

The District adopted new CEQA thresholds in June 2010, including rules for evaluating the greenhouse gas emissions of new projects, and rules relating to the impacts of existing toxic air contaminants (such as diesel emissions) on proposed projects. Many planning agencies and experts commented during the process that the rules would drive away in-fill developments. In *California Building Industry Association v. Bay Area Air Quality Management District*, Alameda Superior Court Case No. RG10548693, homebuilders challenged the rules on several grounds, including the impact of discouraging in-fill development and otherwise impacting land use development patterns. In brief, CBIA argued that the District's new thresholds are a "project" requiring CEQA review. CBIA also argued that the rules were inconsistent with CEQA because they required proposed projects to mitigate for existing environmental conditions, such as toxic air contaminants from surrounding sources unrelated to the project, despite a line of cases holding that CEQA review is limited to the impacts of the project on the environment, not the impact of the environment on the project.

The court ruled this week only on the CEQA "project" issue, ruling that "this is a CEQA project," and granting CBIA's petition for writ of mandate. The court specifically declined to rule on the question of whether the District's toxic air contaminant rules were a reverse application of CEQA, stating at oral argument that the Court anticipated that that issue, as well as other claims of error, would be addressed on remand to the District. The court had earlier in the proceedings dismissed a separate claim by the homebuilders that the District thresholds are invalid underground regulations. The District argued strenuously that the thresholds are not regulatory, but are merely optional. The court accepted the District's contentions stating that the rules "are not binding on anyone."

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How does this ruling impact Bay Area projects and public agencies? The court has directed CBIA to prepare a statement of decision for its consideration, and the court will ultimately issue a judgment and writ based on that decision. These court documents will obviously be important to consider in evaluating the effects of the case. Until the writ is issued, as applicants and agencies consider greenhouse gas emissions and TAC issues, it is important to remember that under CEQA, lead agencies generally have discretion to determine the appropriate threshold to be applied in a particular case and should therefore determine, based on substantial evidence, what air quality and greenhouse gas thresholds should be used in a CEQA analysis. Such discretion was specifically confirmed recently in the Court of Appeal decision in *Citizens for Responsible and Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 127 Cal.Rptr.3d 435 (petition for review denied), which upheld a lead agency's discretion to select the appropriate threshold for evaluating a project's greenhouse gas emissions, provided the threshold decision is supported by substantial evidence. In that case, the agency evaluated the significance of the project impacts based on the percentage reduction in emissions needed to show compliance with the greenhouse gas emission reduction goals set forth in AB 32.

*Andrew Sabey argued the case before the court, and was supported on the briefs by Michael Zischke and Christian Cebrian.*

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